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## Foreign Judgments Recognition and Enforcement in Civil and Commercial Matters in Japan

Béligh ELBALTI\*

### Abstract

The purpose of this paper is to provide a detailed overview of the recognition and enforcement of foreign judgments (hereinafter referred to as “REFJ”) system in Japan. It shows that Japanese courts, under the guidance of the Supreme Court, have been generous in recognizing and enforcing foreign judgments. The recognition requirements have been interpreted in a reasonable way which strikes a good balance between conflicting interests. Therefore, it can be safely said that unless there are good reasons justifying non-recognition, foreign judgments are very likely to be recognized and enforced in Japan. One of the characteristic features of the Japanese system of REFJ is that it has remained (almost) substantially unaltered despite the occasional reforms and amendments that it has undergone during its history. This longevity of the statutory principles can be explained by the adequacy of the current regime. It can also be explained by the important role played by the courts which developed an extensive body of jurisprudential solutions giving flesh to the bare-boned legislative solutions.

### Introduction\*\*

The purpose of this paper is to provide a detailed overview of the recognition and enforcement of foreign judgments (hereinafter referred to as “REFJ”) system in

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\*\*List of abbreviations: REFJ = recognition and enforcement of foreign judgments; CEA = Civil Execution Act (Act No. 4 of 30 March 1979 as subsequently amended); CCP = Code of Civil Procedure (Act No. 109 of 26 June 1996 as subsequently amended); SCJ = Supreme Court of Japan; DC = District Court; HC = High Court; JYIL = Japanese Yearbook of International Law; JAIL = The Japanese Annual of International Law; JYPIL = Japanese Yearbook of Private International Law; YPIL = Yearbook of Private International Law; JPIL = Journal of Private International Law; Minshu = *Saikou Saibansho Minji Hanreishu* [Supreme Court Reports (civil cases)]; H.T. = *Hanrei Taimuzu* [Law Times Reports]; H.J. = *Hanrei Jiho* [Law Cases Reports]. English translation of Japanese laws is available at <http://www.japaneselawtranslation.go.jp/?re=02>.

Japan. Following an expanding modern conception, the REFJ is considered as one of the three parts of private international law (hereinafter referred to as “PIL”)<sup>1)</sup> in addition to international jurisdiction and choice of law.<sup>2)</sup>

If one would like to classify the REFJ system in Japan in one of the categories that run the gamut from most restrictive to most liberal,<sup>3)</sup> Japan would most certainly be included in the category of legal systems having a fairly liberal REFJ system. Indeed, the REFJ is not subject to the existence of a treaty,<sup>4)</sup> and Japanese courts have refused to construe the reciprocity required by Japanese law to mean formal reciprocity established by treaties.<sup>5)</sup> In addition, reciprocity, which serves objectives other than the protection of the rights of the parties, has been so much relaxed that, generally speaking,<sup>6)</sup> it no longer constitutes, and has actually never constituted, a serious hurdle to the reception of foreign judgments. Furthermore, foreign judgments would be granted *de jure* effect if they meet a certain determined number of requirements without being reviewed as to their merits. Finally, the set of requirements that foreign judgments need to satisfy are in essence focused on the guarantee of procedural fairness to litigants as well as the protection of local public policy and the legitimate interests of the state.

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- 1) Or “conflicts of laws” according to common law terminology. See, T C. Hartley, “The Modern Approach to Private International Law – International Litigation and Transactions from a Common-Law Perspective, General Course on Private International Law”, *Collected Courses*, Vol. 319, 2006, pp. 23ss.
  - 2) The traditional conception of “private international law” in Japan follows the German restrictive conception according to which the science of PIL is limited to the study of choice of law issues. Despite the shift in the PIL conception, choice of law analyses still occupy the lion’s share in the major textbooks on PIL in Japan.
  - 3) On this classification, see for example S P. Baumgartner, “How well Do U.S. Judgments Fare in Europe?”, *The George Washington International Law Review*, Vol. 40, pp. 184ss.
  - 4) The first CCP of 1890 used to require that reciprocity should be guaranteed under international treaties (Old Art. 515-2(5) CCP), but this requirement was repealed in 1926. See B Elbalti, “Reciprocity and the Recognition and Enforcement of Foreign Judgments – A lot of Bark but not much Bite”, *JPIL*, Vol.13(1), 2017 at 192; Y Okuda, “Unconstitutionality of Reciprocity Requirement for Recognition and Enforcement of Foreign Judgments in Japan”, *Frontiers of Law in China*, Vol. 13(2), 2018, pp. 160-161.
  - 5) See Tokyo DC judgment of 20 July 1960, *Kakyū Saibanshō Hanrei-shū* [Lower Court Reports] Vol 11(7), p. 1522. For an English translation, see *JAIL*, No. 8, 1964, p. 181.
  - 6) The only exception, which confirms the rule, is the reception of Chinese judgments, but this situation can be explained by the special context of cross Sino-Japanese reciprocal recognition and enforcement relationship rather than the restrictiveness of the reciprocity rule adopted in Japan (see *infra*).

One of the characteristic features of the Japanese system of REFJ is that it has remained (almost) substantially unaltered despite the occasional reforms and amendments that it has undergone during its history. This longevity of the statutory principles can be explained by the adequacy of the current regime. It can also be explained by the important role played by Japanese courts which developed, under the guidance of the Supreme Court (hereinafter referred to as “SCJ”), an extensive body of jurisprudential solutions giving flesh to the bare-boned legislative solutions (see *infra*).

This paper will proceed by firstly presenting the sources of foreign judgments law in Japan (I). Thereafter, it will detail the REFJ system in place by describing the common regime for judgments recognition and enforcement (II). The paper will then discuss the prospects of future developments (III). Finally, some concluding remarks will be made.

## **I. Sources of the REFJ in Japan**

### **1. Major National Statutes and Legislations**

As a civil law country, Japan has a codified system of law which is essentially based on statutory law. The REFJ is no exception. However, unlike certain recent codifications,<sup>7)</sup> the Japanese codification of PIL has not taken the form of a single legislative act. Rather, the rules and principles on the REFJ are found dispersed in a number of legislative acts.

Originally, the 1890 CCP, following the model of the German CCP of 1877, lacked rules on the “recognition” of foreign judgments.<sup>8)</sup> These rules were introduced in the 1926 reform. Since then, the concept of “recognition” has been separated from “enforcement”, both of which are subject to different provisions. Until 1979, rules on the recognition and enforcement were set out together in the CCP.<sup>9)</sup> After the 1979 amendment of the CCP, the rules on enforcement were moved to a separate statute. Accordingly, while the recognition of foreign judgments continued to be regulated by the CCP (old Art. 200), their enforcement

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7) See S. C. Symeonides, *Codifying Private International Law Around the World – An International Comparative Analysis* (Oxford University Press, 2014).

8) This original version of the CCP contained only provisions dealing with the enforcement of foreign judgments (Arts. 514 and 515 Old CCP of 1890).

9) Old Art. 200 CCP dealt with the “recognition” of foreign judgments, whereas Old Arts. 514 and 515 continued to deal with their enforcement.

10) On the REFJ in Japan before 1996, see M Takeshita, “The Recognition of Foreign Judgments by the Japanese Courts”, *JAIL*, No. 39, 1996, pp. 55ss; T Sawaki, “Recognition and ↗

was henceforth regulated by the CEA (Arts. 22(4) and 24).<sup>10)</sup> Later, on the occasion of the complete revision of the Code in 1996, minor but important amendments were introduced to the rules on “recognition” which aligned the wording of the provision with the developments of case law. Today, rules on “recognition” are mainly included in the CCP (Art. 118), while “enforcement” continues to be regulated by the CEA (mainly Art. 24).<sup>11)</sup> Other specific rules are found in other different statutes. This is the case of the recognition of the effects of foreign insolvency proceedings, which is governed by the 2000 Act on the Recognition and Assistance for Foreign Insolvency Proceedings.<sup>12)</sup>

## 2. International Conventions

Generally speaking, Japan has signed no general regional nor bilateral conventions relating to REFJ. However, a few international sectorial conventions ratified by Japan, i.e. conventions which aim to regulate a specific and limited field of law, include provisions concerning the REFJ. These are: (1) the 1969 International Convention on Civil Liability for Oil Pollution Damage of 29 November 1969 (CLC 1969)<sup>13)</sup> as amended by the Protocol of 27 November 1992 (CLC PROT 1992)<sup>14)</sup> (Art. 10); (2) the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (FUND 1971) of 18 December 1971<sup>15)</sup> as amended by the Protocol of 27 November 1992 (Fund PROT 1992) (Art. 8),<sup>16)</sup> and (3) the 1997 Convention on

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↘ “Enforcement of Foreign Judgments in Japan”, *The International Lawyer*, Vol. 23, 1989, pp. 29ss.

11) For a general outline of the current system of the REFJ in English, see N Tada, “Enforcement of Foreign Judgments in Japan Regarding Business Activities”, *JAIL*, No. 46, 2003, pp. 75ss; Y Okuda, “Recognition and Enforcement of Foreign Judgments in Japan”, *YPIL*, Vol. 15, 2013/2014, pp. 411ss; T Kono, “Japan”, in Adeline Chong (ed.), *Recognition and Enforcement of Judgments in Asia* (ABLI Report, 2017), pp. 105ss; T Kono, N Tada and M Shin, “Recognition and Enforcement of Foreign Judgments Relating to IP Rights and Unfair Competition: The Transparency Proposal”, in J Basedow, T Kono and A Metzger, *Intellectual Property in the Global Arena* (Mohr Siebeck, 2010) pp. 293ss; J Yokoyama, *Private International Law in Japan* (Wolters Kluwer, 2017), pp. 151ss.

12) Act No. 129 of 29 November 2000. On Cross-border insolvency in Japan, see K Yamamoto, “New Japanese Legislation on Cross-Border Insolvency – As Compared with the UNCITRAL Model Law”, *JAIL*, No. 43, 2000, pp. 83ss.

13) Ratified on 3 June 1976 but denounced on 15 May 1998.

14) Ratified on 24 August 1994.

15) Ratified on 7 July 1976 but denounced on 15 May 1998.

16) Ratified on 24 August 1994.

Supplementary Compensation for Nuclear Damage (the 1997 Nuclear Damage convention) of 12 September 1997 (Art. 13).<sup>17)</sup>

The REFJ regimes established by these conventions do not substantially differ from the national one as provided by art. 118 CCP and 24 CEA (see *infra*). Under these conventions, judgments that fall within the subject matter of the convention shall be enforced in other contracting states as long as the rendering court has had jurisdiction in accordance with relevant provisions of each convention and the judgment is no longer subject to ordinary forms of review in the rendering State.<sup>18)</sup>

One of the notable differences between these conventions and national law is that fraud is admitted as an independent ground for refusing the enforcement of foreign judgments under the conventions but not under national law. In addition, the courts of the rendering state would be considered as having jurisdiction if international jurisdiction is assumed on the basis laid down by the conventions whereas, under national law, international jurisdictional rules of Japanese courts are applied *mutatis mutandis* to assess the jurisdiction of the foreign rendering courts (see *infra*). Finally, once recognized under these conventions, a judgment would be enforceable in each contracting State as long as the formalities required in that State have been complied with.

## II. The REFJ in Civil and Commercial Matters

### 1. Recognition and Enforcement Distinguished

Conceptually, Japanese law distinguishes “recognition” from “enforcement”. “Recognition” means that the “effects” of a foreign judgment would be admitted in Japan if that judgment satisfies a certain number of conditions.<sup>19)</sup> Concretely, a foreign judgment would either be treated as *res judicata* or its constituting effect

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17) Ratified on 15 January 2015.

18) Art. 10(1) CLC PROT 1992; Art. 8 FUND 1971 and Art. 13 (5) of the Nuclear Damage Convention.

19) Generally speaking, under Japanese law, there are three main effects in relation to the recognition of foreign judgments. These are (1) *res judicata* effect (*kihan-ryoku*), (2) the constituting effect (*keisei-ryoku*) and (3) the legal or constituent requirement effect (*hōritsu/kōsei yōken-teki kōryoku*). However, (3) is not considered as a proper effect of the foreign judgment *per se*. It simply relates to the existence of the judgment which is used as element in order to give rise to some substantive law effects (for example, the extension of the prescription period). Therefore, such effect is admitted only if Japanese law is applicable according to Japanese choice of law rules. See Y Nakanishi *et al.*, *Kokusaishihō* [*Private International Law*] (Yuhikaku, 2014), pp. 179-180.

would be admitted in the forum.<sup>20)</sup> “Enforcement” on the other hand refers to the coercive effect of the foreign judgment that allows the judgment creditor to seize the property of the judgment debtor if the latter fails or refuses to comply with the foreign judgment.

The “recognition” and “enforcement” are not only conceptually distinguished but also governed by different provisions contained in two different codes. Whereas recognition is governed by Art. 118 CCP, enforcement is governed by Arts. 22 (6) and 24 CEA. However, although conceptually different, recognition and enforcement are often used interchangeably. This is due to the fact that the requirements for the recognition of foreign judgments or their enforcement are identical. In addition, in an action for the enforcement of a foreign judgment, the judge needs to examine first whether the foreign judgment is recognizable before it is declared enforceable. Thus, it can be said that recognition is a preliminary step towards enforcement and that a foreign judgment would be enforceable as long as it is recognizable in Japan.

## 2. Recognition

### *a. Principles Underlying the Recognition of Foreign Judgments in Japan* *(i) “Civil and Commercial Matters”*

There is no definition under Japanese law of what would be considered as a “civil” or “commercial” matter. However, it is generally understood that “civil and commercial” matters are those matters of private law other than those relating to personal status and family affairs.<sup>21)</sup> In the field of REFJ and under the current system,<sup>22)</sup> the “civil” and “commercial” nature of a matter is less relevant as long as

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20) There are different theories in this regard. The traditional opinion is that the effects of foreign judgments as provided by the law of the rendering state are admitted in Japan by way of extension (extension theory); although, according to an increasing view, such reception would only be possible to the extent admitted under Japanese law (cumulation theory). Accordingly, the effects of foreign judgments would not be admitted if they go beyond those of equivalent Japanese judgments. See Y Nishitani, “Coordination of Legal Systems by the Recognition of Foreign Judgments – Rethinking Reciprocity in Sino-Japanese Relationships”, *Frontiers of Law in China*, 2019 (forthcoming).

21) Although the CCP does not include any provision defining what “civil and commercial” means, the Personal Status Litigation Act and the Domestic Relations Case Procedure Act delimit the subject matters that fall within the scope of application of both Acts. See the translation of both acts available at <http://www.japaneselawtranslation.go.jp/>.

22) According to a newly adopted reform, the enforcement of judgments relating to family matters will be subject to the jurisdiction of Family courts whereas under the current ↗

the foreign judgment to be recognized and/or enforced concerns a “legal relationship in private law”.<sup>23)</sup> In a landmark decision, the SCJ considered that “foreign judgments” which are entitled to recognition and enforcement are those rendered by foreign courts “with regard to legal relationships in private law” regardless of the name, procedure or form of the judgment.<sup>24)</sup> “Legal relationships in private law” are understood to be relationships between private persons or public authorities acting as private persons based on private law.

One of the much-debated questions in Japan is whether judgments awarding punitive damages can be considered as foreign judgments “concerning private law disputes”. In one court decision concerning the enforcement of an American judgment awarding punitive damages, the Tokyo High Court refused the enforcement of the foreign judgement after it denied the civil character of those damages. The court declared that punitive damages were akin to fines under Japanese law and should be considered as having penal but not civil character. The court then concluded that punitive damages did not fit with the definition of “judgement of a foreign court” that are entitled to enforcement under Japanese law.<sup>25)</sup>

On appeal, the SCJ reached the same conclusion as to whether punitive judgments should be recognized or not. However, the SCJ considered the issue from the point of view of the contrariety of punitive damages to public policy admitting therefore indirectly their “civil” character.<sup>26)</sup> In legal literature, there are opposing opinions on the question of how punitive damages should be

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regime, the enforcement of foreign judgments in general is subject to the jurisdiction of district courts. See the Act on the partial reform of the Personal Status Litigation Act (for personal status matters) and the Domestic Relations Case Procedure Act (for non-contentious family law cases) which main aim is to introduce new rules on international jurisdiction in civil status and family matters, Japanese Official Gazette (*Kanpō*) No. 92 of 25 April 2018, p. 3 (in Japanese only). The reform is expected to enter into force on 1 April 2019 (Decree No. 322 of 30 November 2018, *Kanpō*, No. 263, p.4).

23) In this sense, Yokoyama, *supra* n 11, pp. 151.

24) SCJ judgment of 28 April 1998, *Minshu*, Vol. 52(3), 1998, p. 853; *JAIL*, No. 42, 1999, p. 155. On this decision, see Y Komuro, “Recognition and Enforcement of Foreign Judgments in Japan”, *JYIL*, Vol. 52, 2009, pp. 610ss; T Kono, “Case No. 68” in M Bälz *et al.* (ed.), *Business Law in Japan – Cases and Comments – Intellectual Property, Civil, Commercial and International Private Law* (Wolters Kluwer Law & Business, 2012), pp. 745ss.

25) See Tokyo HC judgment of 28 June 1993, H.J. 1471, 89; H.T. 823, p. 126. English summary available at *JAIL*, No. 37, 1994, p. 155.

26) SCJ judgment of 11 July 1997, *Minshu*, Vol. 51(6), p. 2573; *JAIL*, No. 41, 1998, pp. 104ss. On this decision, see T Kono, “Case No. 67”, in M Bälz *et al.*, *supra* n 24, pp. 739ss.



characterized. However, the prevailing opinion seems to be in line with the SCJ position. In other words, punitive damages awarded by foreign judgments can be regarded as civil in nature, although their compatibility with public policy can be questioned.<sup>27)</sup>

## **(ii) Automatic Recognition**

1. *The Principle.* As a general principle, foreign judgments are recognized in Japan without having to go through any formal or special procedures.<sup>28)</sup> Indeed, unlike “enforcement”, which always necessitates a special action the outcome of which will be the granting of an enforcement judgment against the judgment debtor,<sup>29)</sup> foreign judgments are in general automatically recognized in Japan as long as the requirements of Art. 118 CCP are satisfied. In practical terms, parties can rely on the effects of a foreign judgment in an action for a judgment or a summary judgment. One can also invoke the *res judicata* effect of a foreign judgment in order to dismiss a new claim brought before Japanese courts regarding issues decided by a foreign court.<sup>30)</sup>

As stated earlier, foreign judgments have generally *de plano* effect in Japan. This principle, however, is not without exception. For example, in international insolvency, the effect of foreign insolvency proceedings is not automatically recognized in Japan. Here, the recognition is declared under a special procedure prescribed by the 2000 Act on Recognition and Assistance in Foreign Insolvency Proceedings.<sup>31)</sup> This consists of filing a petition with Tokyo District Court<sup>32)</sup> by a foreign trustee/administrator appointed abroad.<sup>33)</sup> The recognition will be declared upon the fulfilment of certain requirements as stated in Art. 21 of the Act.<sup>34)</sup>

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27) Yokoyama, *supra* n 11, pp. 153-154; Kono, *supra* n 26, pp. 742-743.

28) The only exception to this rule is the recognition of foreign insolvency proceedings. See Yamamoto, *supra* n 12, p. 87.

29) See Tada, *supra* n 11, p. 78.

30) For a concrete example, see the Osaka HC Judgment of 9 April 2003, *H.T.*, Vol. 1841, 2004, pp.111ss; *JAIL*, No. 48, 2005, pp. 171ss (recognition of a Chinese judgment although the recognition was later refused for lack of reciprocity).

31) See Yamamoto, *supra* n 12; Yokoyama, *supra* n 11, pp. 157-158.

32) The Tokyo DC has exclusive jurisdiction in this regard (Art. 4).

33) Or the debtor in certain situations where the foreign trustee is not appointed in the foreign insolvency proceeding (Art. 2-1(8)).

34) The most important ones are the extraterritoriality of the effect of the foreign insolvency proceeding (Art. 21-2); contrariety to public policy (Art 21-3) and vexatious nature of the petition (21-vi). In addition, the court where the foreign insolvency proceeding was ↗

2. *Modalities of Recognition.* There are divergent views in Japan on whether it is possible to “recognize” foreign judgments by bringing a new action on the merits in relation to the same cause of action.<sup>35)</sup> This is particularly true as far as judgments ordering a performance are concerned.<sup>36)</sup> For some authors, such an action lacks legitimate procedural interest since *exequatur* proceedings can be instituted for the purpose of enforcement.<sup>37)</sup> However, according to the majority of Japanese authors,<sup>38)</sup> there is no reason to prohibit the relitigation on the same cause of action knowing that the *exequatur* proceeding is not necessarily more expeditious or less cumbersome. In addition, there may be a risk that the plaintiff will be precluded from bringing his or her claim due to the statute of limitation if he or she waits for the outcome of the *exequatur* proceedings and the foreign judgment is found not to fulfil the recognition requirements of Article 118 CCP. Thus, some authors consider it appropriate to allow the institution of proceedings on the merits of the same cause of action.<sup>39)</sup> In such a case, the foreign judgment will be treated as evidence but its recognition may be determined incidentally. When the foreign judgment meets all the requirements for its recognition, the said foreign judgment should be given full effect and the new Japanese judgment should

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↘ initiated should be competent according to Art. 17-1 Act. Reciprocity on the other hand is not required.

- 35) S Nakano, “Gaikoku Hanketsu no Shikkō [Enforcement of Foreign Judgments]”, in K Shindo (dir.), H Takahashi and S Kato (ed.), *Jitsumu Minji Soshō-hō Kōza (daisanki, dairoppen)* [*Courses on the Practice of Civil Procedure Law*] (Nippon Hyoron-sha, 3<sup>rd</sup> trim., 2013), vol. 6, p. 442.
- 36) With regard to declaratory and constitutive judgments, the academic opinion seems to be settled to deny the possibility for the successful party to bring the original claim anew on the basis that the claimant would have no interest in bringing such an action. For a representative view, see Y Aoyama, “Gaikoku Saibansho no Hankestu no Shikkō Hanketsu [Enforcement Judgment of Foreign Courts’ Judgments]”, in C Suzuki and Y Aoyama and A Mikazuki (ed.), *Chūkai Minji Shikkō Hō (1)* [*Commentaries on Civil Enforcement Law (1)*] (Daichi Hoki Shuppan, 1984), p. 398.
- 37) K Ishiguro, *Gendai Kokusai Shihō [Modern Conflict of Laws in Japan]* (Tokyo Daigaku Shuppankai, 1986), pp. 391ss.
- 38) In this sense, Y Honma, S Nakano, and H Sakai, *Kokusai Minji Soshō-Hō [International Civil Procedure]* (Yuhikaku, 2d ed., 2012), p. 199; Nakano, *supra* n 35, p. 444 footnote (3).
- 39) Aoyama, *supra* n 36, p. 398; A Takakuwa, “Gaikoku Hanketsu no Shōnin oyobi Shikkō [Recognition and Enforcement of Foreign Judgments]” in C Suzuki and A Mikazuki (dir.), *Shin Jitsumu Minji Soshō Kōza (7)* [*New Course on Practical Civil Procedure (7)*] (Nihon Hyoronsha, 1982), p. 152; H Takada, “Gaikoku Hanketsu no Kōryoku (Dai 200 Jō) [Effects of Foreign Judgments (Art. 200)]” in M Suzuki and Y Aoyama, *Chūshaku Minji Soshō Hō (4)* [*Commentary of the Code of Civil Procedure (4)*] (Yuhikaku, 1997), p. 366.

not be in contradiction with it.<sup>40)</sup>

### (iii) *Prohibition of the Révision au fond*

One of the fundamental principles under which foreign judgments will be recognized in Japan is the so-called prohibition of the “review of the merit” or “*révision au fond*”. The principle is clearly stated in Art. 24(2) CEA according to which “[a]n execution judgment shall be made without investigating whether or not the judicial decision is appropriate”. Although the prohibition to review the merit of the case is contained in a provision on the “enforcement” of foreign judgments, it is undisputed that the prohibition also covers “recognition”. Generally speaking, the principle of prohibition means that Japanese judges should refrain from re-examining the determination of facts and the application of law made by the foreign judge.<sup>41)</sup> Despite the apparent simplicity of the principle, it is sometimes difficult to discern the prohibited review from the permitted control of the foreign judgment.<sup>42)</sup> For example, one of the debated questions is whether the recognizing Japanese court would be bound by the findings of facts on the basis of which the foreign judgment was rendered and whether the principle prohibits the examination of new evidence as well as new facts not found in the foreign judgment.<sup>43)</sup> In this respect, opinions are divided. It is however admitted that the examination of facts, for the purpose of recognition, is different from revisiting what the foreign court performed and therefore does not entail a prohibited review.<sup>44)</sup>

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40) Aoyama, *supra* n 36. It is not clear to what extent this type of actions is used in practice and whether it can take the form of summary proceeding. But, in any event, it does not seem to provide sufficient procedural interests in the presence of the *exequatur* proceedings.

41) Nakanishi *et al.*, *supra* n 19, pp. 177-178.

42) For an example see the Tokyo DC judgment of 18 February 1991, *H.J.*, Vol. 1376, 1991, p. 79; *H.T.*, No. 760, 1991, p. 250; *JAIL*, No. 35, 1992, p. 177 in which the court declared that the enforcement of a foreign judgment awarding punitive damages “on a weak ground” was against public policy. The decision was severely criticized because the Tokyo DC by so doing, went beyond the permitted control to commit a prohibited *révision au fond*.

43) For an account on these questions, see Tada, *supra* n 11, pp. 79-80 and the cases cited therein.

44) See for example with regard to the assessment of whether the foreign court had jurisdiction or not, the Tokyo DC Judgment of 15 April 2010, *H.T.*, Vol. 1335, 2011, p. 273; *H.J.* Vol. 2101, 2010, p. 67; *JYIL*, Vol. 54, 2011, p. 540. See also the SCJ Judgment of 24 April 2014, *Minshu*, 68(4), 2014, p. 329; *JYIL*, Vol. 58, 2015, p. 463 in which the court ruled on the appeal of the case decided by the Tokyo DC that the party seeking enforcement need to prove “an objective factual relationship” that justifies the taking of jurisdiction by the foreign court in order to assess whether the foreign court had jurisdiction in tort actions. This ➤

***b. Prerequisites for Judgments Recognition***

In order for a foreign judgment to be recognized in Japan, it must be “a final and binding judgment rendered by a foreign court” in the meaning of Art. 118 CCP. This entails that foreign judgments need to satisfy a number of prerequisites in order to be eligible for recognition in Japan. These relate to the meaning of (i) foreign “court” and “judgment”, (ii) whether the rendering court belongs to a State diplomatically recognized by the Government of Japan and (iii) the finality of the foreign judgment.

***(i) Meaning of “Judgments” rendered by “Foreign Courts”***

With regard to (i) above, the SCJ considered that it was sufficient if the judgment to be recognized was the result of a procedure that guaranteed due process to the parties regardless of the name, procedures, or the form of the court. Accordingly, the term “court” may include any authority that regularly exercises judicial functions and is empowered to issue binding decisions on the parties.<sup>45)</sup> It may be debatable whether international courts, such as the International Court of Justice (ICJ), fit with the notion of “court” in the meaning of Art. 118 CCP. However, since international courts basically deal with public law matters in accordance with public international law, their judgments may be regarded as falling outside the scope of application of Art. 118 CCP.<sup>46)</sup> Another question may arise with regard the preliminary judgments of the Court of Justice of the European Union (CJEU). These rulings do not directly resolve civil and commercial disputes but clarify by way of interpreting the rules applicable to those disputes. In the absence of case law, the academic opinion is divided. While some authors consider that these rulings are also recognizable,<sup>47)</sup> others consider it to be enough to take them into consideration.<sup>48)</sup>

The CSJ also defined the term “judgment” in a broad sense to include “any judgment” decisions, orders, rulings or decrees that can be regarded as “judgments” for the purpose of recognition.<sup>49)</sup> In this sense, and unlike the traditional common

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↘implies that Japanese courts are not bound by the determination of fact made in the foreign judgment.

45) Tada, *supra* n 11, p.82.

46) C.f. Nakano, *supra* n 35, p. 445.

47) T Kono, “Gaikoku Saibanshō [Foreign Courts]”, in Takakuwa and Dogauchi, *supra* n 27, pp. 322-324.

48) Honma *et al.*, *supra* n 38, p. 180.

49) SCJ Judgment of 28 April 1998, *supra* n 24.

law position, “foreign judgments” entitled to be recognized are not limited to “money judgments” but also cover non-monetary judgments such as injunctions.<sup>50)</sup> Moreover, Japanese courts have held that default judgments,<sup>51)</sup> summary judgments<sup>52)</sup> and litigation costs orders<sup>53)</sup> also fall under the notion of “a judgment”. On the other hand, authentic instruments, settlements or interlocutory judgments do not fall under the notion of “a judgment”.<sup>54)</sup> Therefore, they are not recognizable in Japan, even if they have the same effect as one of a final and binding judgment in the rendering state.

### ***(ii) Meaning of Foreign State***

With regard to (ii), the question is whether the foreign judgment to be given effect in Japan should be rendered by a court of state recognized by Japan as such in the sense of public international law.<sup>55)</sup> In the field of choice of law, Japanese courts have manifested their readiness to apply the law of an unrecognized state if the application of that state is designated by Japanese choice of law rules.<sup>56)</sup> As far as the recognition of foreign judgments is concerned, there are no specific court decisions that have addressed this issue. However, the fact that a rendering State has not been diplomatically recognized by Japan does not seem to affect as such the recognizability of the judgments rendered in that State.

### ***(iii) Meaning of Final Judgments***

With regard to (iii), it is generally admitted that only final judgments are entitled to recognition in Japan. This requirement is expressly laid down in Art.

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50) See SCJ judgement of 24 April 2014, *supra* n 44 in which the enforcement of a permanent injunction rendered by an American court was examined. On this decision, see B Elbalti, “The Jurisdiction of Foreign Courts and the Recognition of Judgments Ordering Injunction – The Supreme Court Judgment of April 24, 2014”, *JYIL*, Vol. 59, 2016, pp. 395ss.

51) The SCJ judgment, *ibid* was a default judgment. See also Nagoya DC, Judgment of 6 February 1987, *H.J.* Vo. 1236, p. 113; *JAIL*, Vo. 33 1990, p.189.

52) Judgment of Tokyo DC, 25 February 1998, *H.T.*, No. 972, p. 258.

53) Judgment of the SCJ, 28 April 1998, *supra* n 24 (recognition of a litigation costs compensation order rendered by the Courts of Hong Kong).

54) See, Honma *et al.*, *supra* n 38, p. 181 ; Yokoyama, *supra* n 11, p. 151; Tada, *supra* n 11, p. 82; Kono, “Japan”, *supra* n 11, p. 107.

55) Kono, *supra* n 47, pp. 318-321; Nakano, *supra* n 35, p. 445. Kono, Tada and Shin, *supra* n 11, p. 298.

56) See Y Satoh, “Law Applicable to Personal Status of Korean and Chinese Nationals Before Japanese Courts”, *JYIL*, Vol. 55, 2012, pp. 323ss.

118 CCP first sentence and Art. 24(3) CEA both of which use the wording “final and binding judgment [*kakutei hanketsu*]”. This is generally understood in a sense that the foreign judgment is no longer subject to ordinary appeal according to the law of the rendering state. Accordingly, judgments against which appeal, or any other form of review is pending or available abroad, will not be eligible for recognition. In application of this principle, interim injunctions or provisional measures do not fall within the notion of “a final and binding judgement” in the meaning of Art. 118 CCP.<sup>57)</sup> In addition, since under Japanese law interlocutory judgments (*chūkan hanketsu*) have no *res judicata* effect, these judgments will not be regarded as “final and binding” judgment in the meaning of Art. 118 CCP.<sup>58)</sup>

### *c. Requirements for the Recognition of Foreign Judgments*

It should be mentioned from the outset that under Japanese law, and unlike common law countries, there is no distinction between prerequisites for the recognition of foreign judgements and defences against such recognition.<sup>59)</sup> The party seeking recognition should establish that the foreign judgment fulfils all the requirements of Art. 118 CCP including the prerequisites discussed above. Therefore, it can be said that the grounds for judgment recognition are also grounds for refusal of recognition. The outcome will depend on whether the party seeking recognition proves that the foreign judgment satisfies all these conditions or whether the party opposing recognition proves that one or more of these conditions are not satisfied. Art. 118 CCP sets forth four conditions for the recognition of foreign judgments. These are (i) indirect jurisdiction; (ii) service of process; (iii)

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57) On the refusal to give effect to a provisional order in an abduction case, see SCJ judgment of 26 February, 1985, *Katei Saiban Geppo*, Vol. 37-6, p. 25; *JAIL*, No. 28 (1985) p. 225. In academic literature, however, there are some opinions supporting the recognition of foreign provisional measures in exceptional cases. See, e.g., S Nakano, “Gaikoku Hozen Meirei no Kōryoku [Effectiveness of Foreign Provisional Orders]”, in Takakuwa and Dogauchi, *supra* n 27, p. 414.

58) Kono, “Japan”, *supra* n 11, p. 107; Yokoyama, *supra* n 11, p. 151.

59) Under traditional common law, the party seeking recognition should only establish that the foreign judgment is *prima facie* recognizable by showing that the judgment in question is final and conclusive, rendered by a competent court and concerns money judgment of a certain sum. When these “prerequisites” are established, it is for the defendant to establish that the foreign judgment should not be recognized by invoking one of the accepted defenses to recognition such as the judgment was obtained by fraud, in violation of natural justice or public policy or inconsistent with prior local judgment.

public policy and (iv) reciprocity.

**(i) Indirect Jurisdiction**

According to Art. 118 (i) CCP, foreign judgments should be rendered by courts having jurisdiction (indirect jurisdiction). It is understood that, in the absence of applicable treaties on the question,<sup>60)</sup> the indirect jurisdiction of the foreign court should be assessed from the point of view of Japanese law.<sup>61)</sup> In the absence of specific rules for indirect jurisdiction, Japanese courts usually refer to the domestic rules of international direct jurisdiction<sup>62)</sup> to determine whether the exercise of jurisdiction by the foreign rendering court is acceptable or not. This is justified on the basis of the rule of “*jōri*”.<sup>63)</sup> “*Jōri*”, which is often translated as the

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60) As mentioned above, a few sectorial conventions ratified by Japan contained rules of REFJ (*supra* I-2). According to these conventions, the judgments rendered by contracting states having jurisdiction as provided for by the convention in question are entitled to recognition and enforcement.

61) SCJ judgment of 28 April 1998, *supra* n 24. According to the SCJ, Art. 118 (i) means that, *viewed from the principles of international civil procedure of Japan*, the foreign court had indirect jurisdiction.

62) I.e. rules of international jurisdiction on the basis of which Japanese courts would accept to hear disputes involving foreign elements. As far as disputes in civil and commercial matters are concerned, these rules, which were introduced in 2011 and entered into effect in 2012, are found in the CCP (Arts. 3-2 to 3-12). On the newly adopted jurisdictional rules, see Yokoyama, *supra* n 11, pp. 133-148; K Takahashi, “Japan’s Newly Enacted Rules on International Jurisdiction: with a Reflection on Some Issues of Interpretation”, *JYPIL*, Vol. 13 (2011), pp. 146ss; *idem*, “The Jurisdiction of Japanese Courts in a Comparative Context”, *JPIL*, Vol. 11(1), 2015, pp. 103ss; M Dogauchi *et al*, “New Japanese Rules on International Jurisdiction: Part One”, *JYIL*, Vol. 54 (2011), pp. 260ss; Y Nomura *et al*, “New Japanese Rules on International Jurisdiction: Part Two”, *JYIL*, Vol. 55 (2011), pp. 263ss; Japan Federation of Bar Associations (ed.), *New Legislation on International Legislation of the Japanese Courts: Practitioner’s Perspective* (Shōji Hōmu, 2012) pp. 93ss.; M. Dogauchi, “Forthcoming Rules on International Jurisdiction”, *JYPIL*, Vol. 12, 2010, pp. 212ss; Y Okuda, “New Provisions on International Jurisdiction of Japanese Courts”, *YPIL*, Vol. 13, 2011, pp. 369ss; D Yokomizo, “The New Act on International Jurisdiction in Japan : Significance and Remaining Problems”, *ZJapanR/J. Japan. L.*, Vol. 34, 2013, pp. 95ss; Y Nishitani, “International Jurisdiction of Japanese Courts in a Comparative Perspective”, *Netherlands International Law Review*, 2013, pp. 251ss.

63) See the above mentioned SCJ judgments of 28 April 1998 and 24 April 2014. In 1998, the SCJ held that the rule of “*jōri*” requires that “impartiality be maintained between parties and a speedy and fair trial be secured” and that these principles are reflected in the Japanese rules of territorial jurisdiction included in the CCP. After the 2011 reform, the SCJ held in 2014 that the rule of “*jōri*” implies the application *mutatis mutandis* the newly adopted ↗



principle of “reason” and “justice”,<sup>64)</sup> may have different meanings depending on the context, but it generally refers to the principles on the basis of which Japanese judges, facing a situation of lack of applicable legal provisions, deduce the applicable solution to the case that the legislature would have enacted. However, scholars, and to a certain extent, courts diverge on whether these rules of international jurisdiction to be applied as a matter of *jōri* should be strictly complied with (*dōitsu-setsu* – identical rules theory) or not (*hidōitsu-setsu* – distinct rules theory).<sup>65)</sup> Lower courts generally tend to apply Japanese rules of international jurisdiction when the jurisdiction of foreign courts is to be examined.<sup>66)</sup>

As for the SCJ, the court dealt with the issue of indirect jurisdiction of foreign courts on two occasions. In the first decision rendered in 1998,<sup>67)</sup> the SCJ considered that the indirect jurisdiction of the rendering court “should be determined [...], *basically* in accordance with the provisions of the Code of Civil Procedure on the territorial jurisdiction of the courts from the viewpoint of whether it is appropriate to recognize the given foreign judgment, *taking into consideration the specific circumstances of each case*” (emphasis added). Using almost the same wording, the SCJ reiterated the same principle of the solution in 2014 (*supra* n 44) by stating that the jurisdiction of the foreign court “should be determined [...] *basically* by applying *mutatis mutandis* the provisions on international jurisdiction under the CCP of Japan, from the point of view of whether it is appropriate or not

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↳ provisions on international jurisdiction.

64) Some other scholars translate it as “common sense”. See for example, Hayakawa, *supra* n 64, p. 371. The origin of the notion of *jōri* dates back to the so-called “Canons for Juridical Proceedings” of 1875 which provided that judges should apply their reason in the absence of legislation of customary law when dealing with civil litigation. These Canons have not been formally repealed and sometimes invoked as the statutory foundation for “*jōri*”. Generally, “*jōri*” is regarded as a secondary of law in Japan. For details on the notion of “*Jōri*”, see Y Noda, *Introduction to Japanese Law* (University of Tokyo Press, 1976), p. 222. On the notion of “*jōri*” in the field of PIL, see Y Sakurada, “*Jōri*”, in Y Sakurada and M Dogauchi (dir.), *Chūshaku kokusai shihō (dai 1 kan) [Private International Law Annotated (Vol.1)]*, (Yuhikaku, 2011), pp. 46ss.

65) On this debate, see Elbalti, *supra* n 50, p. 401, 407ss.

66) In this sense, Takeshita, *supra* n 10, p. 62; Tada, *supra* n 11, p. 84. For a more recent view, Kono, “Japan”, *supra* n 11, p. 108. For a more nuanced opinion, see Komuro, *supra* n 24, p. 616. In some published court decisions, it was held that rules of direct jurisdiction and those of indirect jurisdiction should not be identical. See for example, Nagoya DC judgment of 6 February 1987, *supra* n 51.

67) SCJ judgment of 28 April 1998 *supra* n 24.



that, *in the extent of specific circumstances of the individual case*, Japan recognizes a judgment rendered by the foreign court” (emphasis added).

In both cases, scholars’ opinion is not unanimous in the evaluation of the SCJ ruling. A number of authors considered that SCJ adopted the identical rule theory.<sup>68)</sup> Others consider instead that the SCJ adopted the distinct rules theory.<sup>69)</sup> Therefore, the approach to be followed in assessing whether the foreign court had jurisdiction or not continues to be controversial among academics.<sup>70)</sup> However, it seems clear that, in any case, the Japanese rules for international jurisdiction “should, in principle, be thresholds to judge if the requirements of jurisdiction of foreign courts in Article 118(i) of the CCP could be satisfied”<sup>71)</sup> even when in particular cases a different solution would be reached, taking into consideration the specific circumstances of each case.<sup>72)</sup>

Regardless of whether Japanese courts should follow the identical rules theory or the distinct rules theory, Japanese courts have concretely upheld the indirect jurisdiction of a foreign rendering court on the following grounds: the defendant’s domicile,<sup>73)</sup> the place of performance of the contractual obligation,<sup>74)</sup> the place of tort,<sup>75)</sup> in the case of related actions,<sup>76)</sup> and the defendant’s appearance and choice of court agreement.<sup>77)</sup> In a number of other cases, the foreign judgments were refused

68) For an opinion expressed in English in this sense, see Yokoyama, *supra* n 11, pp. 151-152. For detailed analyses see Elbalti, *supra* n 50, p. 401.

69) For example, although his opinion is not binding on Japanese courts, the Judicial Research Officer of the SCJ (*Saikou Saibansho Chousakan*) explains that the SCJ did not adopt the identical rule theory. With regard to the 1998 judgments, see Y Kawabe, “Saikō Saibanshō Chōsakan Kaisetsu [Explanatory Remarks on the Supreme Court Decisions]”, Hosō Kai (ed.), *Saikō Saibanshō Hanrei Kaisetsu Heisei 10 (1998) Nendo (Jō) [Explanatory Remarks on the Supreme Court Decisions 1998 (1)]*, p. 339. With regard to the 2014 judgments, see T Hirose, “Saikō Saibanshō Chōsakan Kaisetsu [Explanatory Remarks on the Supreme Court Decisions]”, *Hōsō Jihō [Law Association Journal]*, Vol. 67, No. 9 (2015), p. 339. For opinions in this sense expressed in English, see Okuda, *supra* n 11, pp. 413-414; Kono, Tada and Shin, *supra* n 11, p. 308.

70) For an overview see Elbalti, *supra* n 50, p. 407.

71) Kono, “Japan”, *supra* n 11, p. 109.

72) In this sense, Tada, *supra* n 11, p. 85.

73) SCJ judgment of 28 April 1998, *supra* n 24.

74) Tokyo DC judgment of 14 January 1994, *H.J.*, No. 1509, p. 96.

75) SCJ judgment of 24 April 2014, *supra* n 44; Tokyo DC judgment of 13 February 1998, *H.T.*, No. 987, p. 282.

76) SCJ judgment of 28 April 1998, *supra* n 24, and 24 April 2014, *supra* n 44.

77) Nagoya DC judgment of 6 February 1987, *supra* n 51.

recognition on the basis of lack of jurisdiction of the foreign rendering court. The main grounds of refusal in those cases were the fact that the place of performance of the contractual obligation or the place where the tort occurred was not in the rendering state.<sup>78)</sup> In a more recently reported case, a South Korean judgment ordering the transfer of registration of a patent registered in Japan was refused enforcement because the matter was considered as falling under the exclusive jurisdiction of Japanese courts.<sup>79)</sup>

## (ii) *Service of the Process*

In order to protect judgment debtors who were sued abroad without prior notice and were not given the opportunity to defend their cases abroad, Japanese courts are required to examine whether the losing defendant was properly served with the documents instituting the proceedings before the rendering court (Art. 118 (ii) CCP *ab initio*). In this respect, the SCJ has identified the tests in light of which this requirement should be examined.<sup>80)</sup>

First, the SCJ held that “[t]he serving of process necessary to commence an action against defendants mentioned in Art. 118(ii) CCP does not have to comply with [the Japanese rules of] civil procedure”. Therefore, what matters in respect of Art. 118(ii) is to make sure that the respondent was duly served. The service would be considered as properly effectuated when (1) the defendant was given “actual knowledge of the commencement of an action” and (2) that the service did not “hinder the exercise of [the defendant’s] right to defence.”

With regard to (1), the appropriateness of methods and forms of service should be examined since, in some cases, the service would not be acceptable even if it complies with the procedural rules of the foreign state. Article 118(ii) explicitly excludes service by public notice (the publication on the foreign court’s

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78) For examples with case references, see M Nagata, “Wagakuni ni Okeru Gaikoku Hanketsu no Shounin Shikkou [Recognition and Enforcement of Foreign Judgments in Japan]”, in Japan Association of International Economic Law (ed.), *Kokusai Keizaiho Kouza 2 - Torihiki, Zaisan, Tetsuzuki [International Economic Law II – Transactions, Property and Procedure]* (Houritsu Bunkasha, 2012), p. 220. See also Tada, *supra* n 11, p. 86.

79) Nagoya HC judgment of 17 May 2015, *Juristo [Jurist]*, No. 1487 of December 2015, p. 106 note D Yokomizo (in Japanese). Heads of exclusive jurisdiction are set out in Art. 3-5 CCP. Paragraph 3 of the said Article states that actions relating to “the existence or absence or the validity of an intellectual property right [...] that arises through a registration establishing that intellectual property right is under the exclusive jurisdiction of the Japanese courts if that registration was made in Japan.”

80) SCJ judgment of 28 April 1998, *supra* n 24.

bulletin board) or other similar methods.<sup>81)</sup> It should also be considered whether the defendant understands the content of the document he or she receives. In this regard, one question may arise: is a (Japanese) translation necessary to be attached with service? Academic opinions are divided. Some argue that a translation is to be necessarily attached unless the addressee voluntarily receives the complaint. Others argue that a translation would not be necessary as long as the addressee is able to recognize the content of the complaint.<sup>82)</sup> Japanese courts, however, found it necessary in a number of reported cases that the original document be accompanied with a Japanese translation.<sup>83)</sup> Despite the aforementioned, in a recent case the Tokyo HC said it was not necessary.<sup>84)</sup> Following this judgment, whether a translation is necessary should seemingly be determined on a case-by-case basis.

With regard to (2), it is not sufficient that the defendant is given actual knowledge of the commencement of the action. The service should also be made in a timely manner so that the defendant is given sufficient time to arrange for his or her defence. Accordingly, if the time provided is considered too short, the validity of the service will be denied.<sup>85)</sup>

The SCJ has subsequently considered that, where an international treaty is applicable, the service requirement would not be satisfied when the service is made in a way that does not comply with the methods prescribed by the said treaty. Japan is a contracting state of the 1954 Hague Convention on Civil Procedure and

81) However, service by public notice towards a foreign defendant is not prohibited under the CCP (Art. 110(1)(3)).

82) I Kasuga, "Sōtatsu (Sōtastu Jōyaku 10 jō a ni yoru Chokusetsu Yūbin Sōtatsu) [Service of Process (Service by post in accordance with Art. 10 (a) of the Hague Service Convention)]", in Takakuwa and Dogauchi, *supra* n 27, p. 348.

83) See Tokyo DC, judgment of 21 December 1976, *H.T.*, No. 344, p. 102; *JAIL*, No. 22, 1979, p. 160; Tokyo DC judgment of 11 November 1988, *H.J.*, No. 1315, p. 95; *JAIL*, No. 33, 1990, p. 208 (divorce action).

84) Judgment of Tokyo HC, 24 September 2015, *H.J.*, No. 2305, p. 68. The case however was particular since the service by post to the defendant in US without a Japanese translation was made in the rendering State (United States) and not in Japan and therefore falling outside the scope of application of the Hague Service Convention (*see infra*). The court also found that the defendant was capable of understanding the content in English.

85) See the Tokyo DC judgment of 24 February 1998 (*H.J.*, No. 1657, p. 97; *H.T.*, No. 995, p. 271) in which the court found that a delay of 20 days accorded to the defendant to send back the documents served to him otherwise he would be considered as having accepted the service voluntarily as reasonable and therefore concluded that the service was validly effectuated. For an English summary see Y Nishitani, "The Operation of the 1965 Hague Service Convention in Japan", *ZJapanR/J.Japan.L.*, No. 17, 2004, pp. 218-219.

the 1965 Hague Service Convention<sup>86)</sup> in addition to a number of bilateral conventions on judicial assistance.<sup>87)</sup> In the event that one of the said treaties are applicable, the service of documents that is not made in accordance with the manner set out in that treaty should not be regarded as service which fulfils the requirement of 118(ii). Accordingly, if the service of process abroad had to be conducted through diplomatic channels, personal service would be regarded as non-valid.<sup>88)</sup>

With regard to the application of the 1965 Hague Service Convention, it was not clear whether service through postal channels directly effectuated to the defendant, which is allowed under Art. 10(a),<sup>89)</sup> would satisfy the requirement of Art. 118(ii) CCP. This is due to the fact that, when ratifying the 1965 Hague Convention, the Japanese Government did not object to the sending of judicial documents by postal channels and declared that the use of this method would not constitute an infringement to its sovereignty.<sup>90)</sup> One might, therefore, consider that the postal service would be permitted under the Convention when the service is to be effectuated to a person resident in Japan. However, Japanese courts have so far denied the compatibility of service through postal channels with Art. 118(ii) and accordingly refused to recognize foreign judgments on that ground.<sup>91)</sup> The

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86) Both conventions, which were ratified on 28 May 1970, were implemented by the Act on Special Provisions Concerning Civil Procedure Attendant upon Implementation of the Convention on Civil Procedure and Another Convention [Act No. 115 of 5 June 1970].

87) The list of countries with which such bilateral conventions were concluded is available at <https://www.hcch.net/en/states/authorities/details3/?aid=261> (last visited 10 July 2018).

88) In the 1998 SCJ judgment (*supra* n 24) which concerned the recognition of an order on litigation cost issued by Hong Kong Courts, it was found that the service directly effectuated on the defendant by the plaintiff attorney did not satisfy Art. 118(ii) CCP because such a service method was not provided for by the treaties concluded between Japan and the United Kingdom, which had sovereignty over Hong Kong at that time.

89) Service through postal channels is also permitted under the 1954 Hague Convention Art. 6 (1).

90) Conclusions and Recommendations adopted by the Special Commission on the Practical Operation of the Hague Apostille, Evidence, and Service Conventions (28 October to 4 November 2003), para. 57.

91) See for example, Tokyo DC judgment of 26 March 1990, *Kin'yu Shoji Hanrei*, No. 857, p. 39; *JAIL*, No. 34, 1991, p. 174 in which the court, after expressing its "wonder why the Japanese Government has not declared its opposition [...] to Article 10(a)" of the [1965 Hague Convention], considered that "[s]uch (attitude of our government) could only imply its recognition of the effect of *de facto* of the act of notice by postal channel, and not to be understood as having positively introduced a new method of service". See also, following ✓

Government later indicated that “the absence of a formal objection does not imply that the sending of judicial documents by postal channels to the addressee is always considered valid service in Japan.”<sup>92)</sup>

Another question concerned the necessity of attaching a Japanese translation of the document to be served. The official position of the Japanese government is that such a translation is always required both from a practical point of view (it allows the judicial official performing the service to recognize the content of the document to be served) and protection of defendant (ensuring actual knowledge of the service at the same level of domestic cases).<sup>93)</sup> Japanese courts have so far denied the validity of services that have been effectuated without Japanese translation attached to the original document regardless of the language ability of the respondent.<sup>94)</sup> However, it was considered valid under the convention the service made by way of registered mail together with a Japanese translation through a consular agency even when the documents that were served to the defendant included a non-translated letter according to which the defendant would be assumed to have accepted the service voluntarily if he did not send the said documents back within 20 days after the served documents.<sup>95)</sup>

Finally, even when the tests explained above are not satisfied, the service requirement can be regarded as satisfied if the defendant appears before the foreign court despite the irregularities affecting the service (Art. 118(ii) *in fine*). Put differently, the defects of service will be cured by the defendant’s appearance before the court. This is the solution reached by the SCJ in its 1998 judgment. The SCJ, however, explained that “appearance” in the meaning of Art. 118 CCP is to be differentiated from “submission” as a ground for international jurisdiction.<sup>96)</sup> Indeed, for

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the same reasoning, the Tokyo DC Hachioji Branch judgment of 8 December 1997 in a case concerning the enforcement of a return of child order. English summary of the case is available at Nishitani, *supra* n 85, pp. 217-218.

92) On the operation of the 1965 Hague Convention from a Japanese perspective, see Nishitani, *supra* n 85, pp. 215ss. See also K Takeshita, “Sovereignty and National Civil Procedure: An Analysis of State Practice in Japan”, *Journal of East Asia and International Law*, Vol. 9, 2016, pp. 361ss; Y Ohara and A Sagawa, “Japan”, in ABA Section of Antitrust Law, *Obtaining Discovery Abroad* (American Bar Association, 2005, 2<sup>nd</sup> ed.), pp. 171ss.

93) See Nishitani, *supra* n 85, p. 228. On the opposing views in legal literature, see Takeshita, *supra* n 10, pp. 64-66.

94) Tokyo DC judgment of 26 March 1990, *supra* n 91; Tokyo DC Hachioji Branch judgment of 8 December 1997 *supra* n 91.

95) Tokyo DC judgment of 24 February 1998, *supra* n 85.

96) Cf. Art. 3-8 CCP acknowledging voluntary appearance as a head of jurisdiction of ✎

the purpose of Art. 118(ii), it is not necessary that the defendant “accepts” the jurisdiction of the foreign court and discusses the merits of the case. It is sufficient that the said defendant responds to the action and appears before the foreign court even if the only purpose is to contest its jurisdiction regardless of whether he or she decides to withdraw from the case at a later stage. From the above, it is clear that the SCJ considers it sufficient that the defendant “is given the opportunity to defend and actually takes measures of defence” before the foreign court.

### (iii) *Public Policy*

Art. 118(iii) conditions the recognition on the absence of contrariety of the foreign judgment to public policy from the point of view of “the content of the judgment and the litigation proceedings”. Hence, public policy is a two-pronged requirement including “substantive” public policy and “procedural” public policy.

It is generally understood that public policy can be triggered only when two complementary elements are met. These are (1) the contrariety of the foreign judgment, i.e. the impact of its effect on the Japanese legal order; and (2) a close connection of the case in question with Japan. The SCJ made it clear that “the mere fact that the foreign judgment contains an institution that does not exist in Japan” does not necessarily lead to conclude that the public policy requirement is not fulfilled. However, the conclusion would be different when the given institution is against the basic principles or the basic ideas of the legal order in Japan.<sup>97)</sup>

The control of public policy can prove very difficult in certain situations since it can border on the prohibited *révision au fond*.<sup>98)</sup> Indeed, in examining whether the foreign judgment is compatible with public policy, the courts are also required to consider, among other elements, the facts upon which the foreign decision was based.<sup>99)</sup> Thus, Japanese courts may be in situations where a thorough examination of the facts, including new evidence, is necessary.<sup>100)</sup> Such an examination can

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↘ Japanese courts. On submission as a head of jurisdiction in Japan, see H Tezuka, “Agreement on Jurisdiction (including Cases of Jurisdiction by Appearance)”, in Japanese Federation of Bar Associations (ed.), *New Legislation on International Jurisdiction of the Japanese Courts: Practitioner's Perspective* (Shoji-Homu, 2012), p. 133s.

97) SCJ judgment of 11 July 1997, *supra* n 26. However, the SCJ failed in this decision to examine the connection test and was criticized by some authors on this ground.

98) In this sense, see for example T Kono, “Case No. 67”, *supra* n 26, p. 742.

99) See Tokyo DC judgment of 6 September 1969, *H.J.* No. 586, p. 73; *JAIL*, No. 15, 1971, pp. 181ss. See also Takeshita, *supra* n 10, p. 71 and the court decisions cited therein.

100) Y Hayakawa, “Jittaiteki Kōjo [Substantive Public Policy]” in Takakuwa and Dogauchi, ↗

easily go beyond the limits of the permitted control for the purpose of recognition and could lead the court to commit the prohibited *révision au fond*.<sup>101)</sup>

There is a debate on the time at which public policy should be examined. Some authors opine that the principle of automatic recognition entails public policy to be determined at the time when the judgment becomes final and conclusive in a rendering state. However, if one considers that, on the one hand, automatic recognition simply refers to the needlessness of any special procedure for recognition and that, on the other hand, it is only after the examination of all the requirements of Art. 118 CCP that one can reach the conclusion as to whether the foreign judgment is recognizable or not, it can be said that the point in time at which public policy should be determined is the time when the condition is examined and not when the foreign judgement becomes final and conclusive. Simply put, whether the foreign judgment conforms to the conception of public policy in Japan should be examined in light of the conception that prevails at the time when the recognition is sought.<sup>102)</sup>

### (1) Procedural Public Policy

Procedural public policy aims at ensuring that judicial proceedings before the rendering court were conducted in a way that guaranteed minimum due process for the losing party. This basically means that the right to a fair trial and the right to be heard should have been safeguarded before the foreign court. Violations of procedural public policy include, *inter alia*, the case of fraud by falsification of documents,<sup>103)</sup> procedural defects,<sup>104)</sup> partiality and dependence of the foreign judges,

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<sup>101)</sup> *supra* n 27, p. 359.

<sup>102)</sup> See the example of the Tokyo District Court judgment of 18 February 1991, *supra* n 42.

<sup>103)</sup> In this sense, Takeshita, *supra* n 10, p. 72. See Tokyo HC judgment of 15 November 1993, *Katei Saiban Geppou*, Vol. 46-6, p. 47. Although the case concerns a family matter issue, it is a practical example in which a lower court examined public policy taking into consideration the circumstances which occurred after the foreign judgement had become final in the rendering state. This approach is supported by some scholars, see Takada, *supra* n 39, pp. 367 and 384.

<sup>104)</sup> In a case relating to the validity of marriage, see Tokyo HC judgment of 27 February 1990, *H.J.* No. 1322, p. 139; *JAIL*, No. 34, 1991, p. 166. For a case where the fraud defense was not accepted, see Tokyo DC judgment of 14 January 1994, *supra* n 74; Tokyo DC judgment of 13 February 1998, *supra* n 75.

<sup>105)</sup> See Nagoya DC judgment of 6 February 1987, *supra* n 51 in which the court considered that the delays for the defendant to appear before the foreign court was reasonable and that he was given plenty of opportunity to defend his case.



corruption, etc... In courts' practice, it was considered that a default judgment as a sanction for disobedience imposed on an uncooperative judgment debtor did not violate public policy.<sup>105)</sup> However, in a different case, a foreign judgment which became final because the defendant failed to file an appeal due to the fact that the notice of decision dismissing the case was not made to the defendant himself but to his attorney who had already resigned was considered as incompatible with public policy.<sup>106)</sup>

Finally, the existence of a conflicting local Japanese judgment can also be treated within the framework of public policy in the absence of a specific rule on the issue. Foreign judgments would be denied recognition when they are found incompatible with final and conclusive Japanese judgments.<sup>107)</sup> The rule applies regardless of whether the rendering court was seized first with the dispute or not.

## (2) Substantive Public Policy

Substantive public policy aims at protecting the fundamental principles, essential ideas and notions underlying the Japanese legal system. What matters here is not the foreign judgment itself, but the consequences that are likely to take place had the effect of the judgment in question been recognized.<sup>108)</sup> As mentioned earlier, the consequences that might be regarded as incompatible with the fundamental principles and ideas of Japan would trigger the public policy defence only to the extent that there is a close connection with Japan.

The simple fact that a foreign judgment is different or includes a solution that would not have been reached had the Japanese courts decided the case is not sufficient to trigger the public policy defence. Accordingly, the non-application by the foreign court of Japanese law which would have been applied according to Japanese choice of law rules was not considered against public policy.<sup>109)</sup>

Institutional differences would not affect the recognizability of foreign judgments unless these differences go beyond acceptable limits. For instance, a

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105) See Mito DC Ryugasaki Branch judgment of 29 October 1999, *H.T.* No. 1034, p. 270.

106) Tokyo DC judgment of 29 January 2008 (2008WLJPCA01298006).

107) See Osaka DC judgment of 22 December 1977, *H.T.*, No. 362, p. 127; *JAIL*, No. 23, 1980, p. 200. In academic literature, however, there has been no consensus on how Japanese courts should deal with this issue. For details, see, M Dogauchi, "Naikoku Hanketsu to no Teishoku [Conflict with Local Judgments]", in Takakuwa and Dogauchi, *supra* n 27, pp. 365 ss.

108) Takeshita, *supra* n 10, p. 66.

109) Tokyo DC Hachioji Branch judgment of 13 February 1998, *supra* n 75.



Korean judgment ordering a payment calculated on the basis of the agreed interest between the parties (48% per year) was held compatible with public policy although, in practical terms, only a maximum of 20% per year is allowed in Japan.<sup>110)</sup> In a different case, a Korean judgment awarding damages calculated on the basis of the statutory rate of 20% per year was found compatible with public policy although the statutory rate in Japan was only 6%.<sup>111)</sup> The same conclusion was reached with regard to the recognition of a Californian Judgment ordering a payment of the attorney's fees which were approximately 1.7 times higher than those that would have been ordered in Japan.<sup>112)</sup> On the other hand, foreign judgments ordering payment of debts might be refused recognition if the debts arise from, for instance, drug dealing, gambling,<sup>113)</sup> or human trafficking.<sup>114)</sup>

One of the issues that have been discussed at length in Japan relates to the contrariety of punitive damages to public policy in Japan.<sup>115)</sup> Academic opinions diverge. For some authors, judgments awarding punitive damages are not judgments rendered in civil and commercial matters and therefore are not recognizable.<sup>116)</sup> For others, punitive damages can in principle be recognized under certain conditions, notably when the awarded amount does not exceed the amount normally awarded in Japan.<sup>117)</sup> For some other scholars, punitive damages are in principle incompatible with public policy in Japan due to the difference in nature (civil v. criminal) and function (compensatory v. punitive/sanction). The SCJ seems to be of this opinion. In its landmark ruling rendered in 1997,<sup>118)</sup> the Court held

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110) Tokyo DC judgment of 13 December 2013, 2013WLJPCA12138015.

111) Tokyo DC judgment of 12 February 2009, *H.J.*, No. 2068, p. 95.

112) Tokyo DC judgment of 9 September 2003, 2003WLJPCA09090007. For other reported cases in which the foreign judgment in question was not found contrary to public policy, see Tada, *supra* n 11, pp. 89-90.

113) Cf. in the field of the applicable law the Tokyo DC judgment of 29 January 1993, *H.T.*, No. 818, p. 56 in which it was stated that the foreign (Nevada) law allowing the collection of gambling debts would not violate the public policy in Japan.

114) In this sense, Honma *et al.*, *supra* n 38, p. 192.

115) See Kono, "Case 67", *supra* n 26. One more issue relates to the recognition of a foreign judgment ordering the registration of the mother-child relationship between a mother and twins born by a foreign surrogate mother. See, SCJ judgment of 23 March 2007, *JYIL*, Vol. 51, 2008, p. 552. On this decision, see D Yokomizo, "Recognition of a Foreign Judgment on Children Born through Surrogate Pregnancy", *JYIL*, Vol. 60, pp. 399ss.

116) Adopting this point of view, Tokyo HC judgment of 28 June 1993, *supra* n 25.

117) Adopting this point of view, Tokyo DC judgment of 18 February 1991, *supra* n 42. In academic literature expressed in English, see Kono, "Case 67", *supra* n 26.

118) SCJ judgment of 11 July 1997, *supra* n 26.

that punitive damages in the case have “clear purpose of punishment and general prevention. Thus, [they are] incompatible with the fundamental principles of the Japanese system of compensatory damages because the Japanese system just purports to restore the actual loss caused to the victim. In Japan, the punishment of the offender and general prevention are left to criminal or administrative sanctions”. However, this does not mean that the foreign judgment as a whole would be denied recognition. *In casu*, only the punitive part was refused recognition, while the compensatory part was recognized and enforced in Japan (partial recognition and enforcement).

It is worth mentioning here that irrespective of their punitive function, punitive damages would be regarded as compatible with public policy to the extent that they purport to compensate actual loss suffered by the victim. It is in this sense that the SCJ in its landmark ruling of 1998<sup>119)</sup> stated that the fact that the standards used by the rendering foreign court to award full compensation of litigation costs contained punitive evaluation due to the bad faith of the judgment debtor did not prevent the recognition of the award. As it was rightfully indicated, “[t]he decisive factor for the recognition seems to have been that the amount of [damages] did not exceed the amount of actual expenses.”<sup>120)</sup>

#### (iv) *Reciprocity*

According to Art. 118 (iv), a foreign judgment will be refused recognition if reciprocity (mutual guarantee) is not respected.<sup>121)</sup> The former SCJ (Great Court of Cassation) first held that reciprocity would be satisfied if Japanese judgments were recognized in the rendering state under “the same or more lenient” conditions than those provided for by Japanese law.<sup>122)</sup> However, announcing a *revirement* in case law, the SCJ later declared that reciprocity exists “if, in the rendering state, judgments rendered by the courts of Japan that are of the same type as the judgment at issue are capable of being recognized in accordance with conditions that are not different in any material respect from those in the Art. 118 of the

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119) SCJ judgment of 28 April 1998, *supra* n 24.

120) Kono, “Case No. 68”, *supra* n 24, p. 754. This view is shared by a number of legal scholars. For a representative view expressed in English, see Takeshita, *supra* n 10, p. 68-69; Yokoyama, *supra* n 11, pp. 153-154; Kono, *supra* n 26, p. 743.

121) For a brief overview on the development of the reciprocity requirement in Japan, see Elbalti, *supra* n 4, p. 192; Okuda, *supra* n 4.

122) The former Japanese Great Court of Cassation judgment of 5 December 1933, *Horitsu Shinbun [Law Newspaper]*, Vol. 3760, 1933, p. 16.

CCP.”<sup>123)</sup> This position was later confirmed by a subsequent SCJ ruling in 1998.<sup>124)</sup> Accordingly, it can be said that, in order to establish reciprocity with a foreign country, three conditions should be satisfied: (1) Japanese judgments of the same kind (2) are likely to be recognized in the rendering court (3) pursuant to requirements that do not substantially differ from the ones accepted in Japan.

With regard to (1), it is not sufficient that the courts of the rendering state refused to recognize any Japanese judgment. The judgments should rather be of the same kind. Hence, if the foreign court refuses to recognize Japanese money-related judgments, but accepts judgments rendered in family cases, reciprocity can be established with regard to the recognition in Japan of those judgments.<sup>125)</sup> With regard to (2), it is not necessary to show the existence of a treaty between Japan and the rendering court, nor that a Japanese judgment has been recognized in the rendering State. Rather, it is sufficient to show from the general recognition practice in the rendering state that Japanese judgments are, in general, likely to be recognized there. Finally, with regard to (3), the simple fact that the rendering state adopts conditions that are not admitted in Japan or that the recognition requirements are stricter than those admitted in Japan does not necessarily lead to denying reciprocity with that state.<sup>126)</sup> However, if the recognition system in Japan and the rendering state are substantially different, reciprocity with that state will be denied. This would be the case if the foreign state refuses to recognize foreign judgments in the absence of a treaty or when its courts review the merits of foreign judgments.<sup>127)</sup>

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123) SCJ judgment of 7 June 1983, *Minshu*, Vol. 37(5), p. 611; *JAIL*, No. 27, 1984, pp. 119ss.

124) SCJ judgment of 28 April 1998, *supra* n 24.

125) Indeed, as it will be indicated below, Japanese courts refuse to recognize Chinese judgments on the basis of reciprocity because Chinese courts have refused on the basis of reciprocity to recognize Japanese judgments in civil and commercial matters. However, with regard to divorce and other family matters, Japanese courts accept to recognize Chinese judgments because Chinese courts do not require reciprocity for the recognition of Japanese judgments in these matters. See, Nishitani, *supra* n 20. Elbalti, *supra* n 4, p. 207 footnote 116 and the references cited therein.

126) For example, although foreign judgments are automatically recognized in Japan, the simple fact that in the rendering state foreign judgments are not automatically recognized would not lead to deny reciprocity with that state. In this sense, Nishitani, *supra* n 20. The same is true with regard to the jurisdictional requirement or public policy.

127) In this sense, Nishitani, *supra* n 20. See Tokyo DC judgment of 20 July 1960, *supra* n 5, in which the enforcement of a Belgium judgment was refused recognition because Belgian courts at that time practiced the *révision au fond*. See also the Fukuoka DC judgment of 25 March 1982, *JCA Journal*, Vol. 12, 1984, p. 2 in which a Hong Kong judgment was ✓

It is unclear however whether the *simple* fact that the courts of the rendering state have denied reciprocity with Japan would lead to the refusal of recognition in Japan. In this respect, Japanese courts have refused to recognize and enforce Chinese judgments because Chinese courts have denied reciprocity with Japan. This situation has led to a stalemate in the reciprocal recognition relationship between China and Japan.<sup>128)</sup> Some Japanese scholars have criticized the solution adopted by Japanese courts on the ground that what matters with regard to reciprocity is not the practice of the foreign court or the existence of precedent denying reciprocity with Japan but the recognition rules themselves. These rules should be clearly stricter than the Japanese recognition rules in order to justify the refusal of recognition on the basis of reciprocity.<sup>129)</sup> Therefore, according to this view, regardless of whether there is a precedent by which reciprocity with Japan has been denied, reciprocity should nevertheless be affirmed if the recognition rules are “milder” than the Japanese rules.<sup>130)</sup>

However, it can be said that the decisive factor to refuse the recognition of the Chinese judgments was not the *mere* fact that Chinese courts had denied reciprocity with Japan, but the fact that foreign judgments, including Japanese judgments, were very much unlikely to be recognized and enforced in China.<sup>131)</sup>

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↘ refused enforcement because the court considered that Japanese judgments are not covered by the Foreign Judgment (Reciprocal Enforcement) Act of Hong Kong. There seems to be a third non-published case in which an Indian judgment was refused recognition for want of reciprocity due to the absence of treaty. Tokyo DC judgment of 4 July 1960 reported in Nakano, *supra* n 35, p. 456, and footnote No. 74. However, the same author considers that nowadays reciprocity with India would be upheld.

128) Osaka HC judgment of 9 April 2003, *supra* n 30 and the Tokyo DC judgment of 20 March 2015, *H.T.*, No. 1422, p. 348 as affirmed in appeal by the Tokyo HC judgment of 25 November 2015 (LEX/DB 25541803), *JYIL*, Vol. 61, 2018 (*forthcoming*). On these judgments, see Elbalti, *supra* n 4, pp. 206-208.

129) In this sense, Okuda, *supra* n 11, p. 418.

130) Okuda, *ibid.*

131) See Elbalti, *supra* n 4, p. 201ss. However, the situation seems to have been changed after the recent reported cases in which foreign judgments from Singapore and the United States were recognized and enforced by Chinese courts. See Y Wang, “A Turning Point of Reciprocity in China’s Recognition and Enforcement of Foreign Judgments: A Study if the *Kolmar Case*”, *Nederlands Internaal Privaatrechts*, 2017, pp. 772ss; R. A. Brand, “Recognition of Foreign Judgments in China: The *Liu Case* and the ‘Belt and Road’ Initiative”, *Journal of Law and Commerce* (*forthcoming*) available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3198312](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3198312); W. Zhang, “Sino-Foreign Recognition and Enforcement of Judgments: A Promising ‘Follow-Suit’ Model”, *Chinese Journal of* ↗

Indeed, in these decisions, the court did not only point out that Chinese courts had refused to give effect to Japanese judgments but also emphasized that there had been no single precedent showing that Chinese courts were willing to enforce foreign judgments on the basis of reciprocity in the absence of a treaty.<sup>132)</sup>

This general attitude of Japanese courts can be best illustrated by a Nagoya DC judgment rendered in 1987. In this case, the DC found that reciprocity was guaranteed with the then West Germany on the ground that “in their recent decisions” German courts were liberal in affirming the existence of reciprocity and therefore “it [was] highly probable” that judgments rendered in Japan would be recognized there.<sup>133)</sup> What is interesting in this case is that the Nagoya DC reached this conclusion despite the fact that, at that time, the predominant view among German scholars was against the affirmation of reciprocity with Japan. Although this situation can be distinguished from the one where a precedent denying reciprocity exists, it nevertheless shows that what matters for Japanese courts is the high probability of the recognition of Japanese judgments in the rendering state. Therefore, it can be said that Japanese courts would be willing to affirm reciprocity with a foreign state disregarding a precedent in the court practice of that state if it is established that, in practice, Japanese judgments are likely to be recognized.<sup>134)</sup>

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↘ *International Law*, Vol. 16, 2017, pp. 515ss; L. Zhu, “The Kolmar v. Sutex Case on Reciprocity in Foreign Judgments Enforcement in China: A Welcome Development or Still on the Wrong Track?”, *Frontiers of Law in China*, Vol. 13(2), 2018, pp. 202ss.

132) In the 2015 judgments *supra* n 128, the courts indicated that the judgment creditor was invited to submit any evidence showing the likelihood of the recognition and enforcement of foreign judgments other than Japanese judgments by Chinese courts but the judgment creditor failed to do so. This has led the courts to declare that, “considering the current situation” in Chinese law and court practice, reciprocity could not be established, and subsequently the Chinese judgment should not be recognized. This suggests that the position of Japanese courts would change if Chinese courts change their attitude.

133) Nagoya DC judgment of 6 February 1987, *supra* n 51.

134) Whether this would lead to the recognition of Chinese judgments in light of the recent developments in Chinese court practice is still to be shown. In the author’s view, however, these recent developments are unlikely to influence the attitude of Japanese courts. The reason for the aforementioned is that Chinese courts affirmed reciprocity only with countries where it was shown that Chinese judgments had already been enforced there. This means that where it is shown that no Chinese judgements have been recognized in the rendering State, Chinese courts would continue to deny reciprocity with respect to those countries. In other words, the change of attitude of Chinese courts concerns only a very limited number of countries and does not show the likelihood or the high probability of recognizing foreign judgments in China where precedents of refusal to enforce Chinese judgments exist. ↗

In any case, and despite the fact that reciprocity is a mandatory requirement for granting recognition to foreign judgments, it can be said that Japanese courts have been generous so far in deciding whether reciprocity exists with foreign States. Indeed, since the 1983 SCJ judgment,<sup>135)</sup> and except the two single Chinese cases mentioned above, all challenges to bar the recognition and enforcement of foreign judgments on the basis of reciprocity have been doomed to failure<sup>136)</sup> to the extent that it is established that judgments rendered in Japan are likely to be given effect in the rendering state.<sup>137)</sup>

### 3. Enforcement

Unlike recognition, the enforcement of foreign judgments is subject to a declaration of enforcement. Under the system currently in place in Japan,<sup>138)</sup> the enforcement of foreign judgements, be they rendered in civil and commercial matters or family matters, are subject to Arts. 22(6) and 24 CEA which dictate that the enforcement of foreign judgments is subject to the issuance of an enforcement judgment (*shikkō hanketsu*). Accordingly, a successful party is required to file a

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↘ In light of the special critical situation between China and Japan only a truly radical change in the attitude of Chinese courts would influence the attitude to Japanese courts. Unfortunately, such a radical change is very much unlikely to happen as far as the recognition of Japanese courts' judgments is concerned.

135) Even before 1983, there were only three reported cases in which foreign judgments were refused recognition and enforcement. See the cases cited *supra* n 127. One of the cases concerned the recognition of a Belgian judgment. However, it is now generally considered that reciprocity would be established since Belgium abolished *révision au fond* in 2004. It is also generally admitted that Indian judgments would meet the reciprocity requirement. With regard to Hong Kong, reciprocity was found to exist in two cases. These are the Tokyo HC judgment of 31 March 1982, *Minshu* Vol. 37(5), p. 632; *H.J.* No. 1042, p. 100 and the SCJ judgment of 28 April 1998 *supra* n 24.

136) In almost all cases where reciprocity was discussed, Japanese courts ended up by affirming it with regard to the rendering state in question. This includes judgments rendered in Hong Kong; Switzerland (Zurich); United States (California; Hawaii; Columbia D.C.; Wisconsin; Nevada; Texas; New York; Virginia; Maryland; Minnesota; Oregon; Illinois); England and Wales; Germany; Australia (Queensland); Korea; Haiti; France; Mexico and Singapore. For details and references of these cases; see M Haga, *Gaikoku Hanketsu no Shōnin* [Recognition of Foreign Judgements in Japan] (Keio University Press, 2018), pp. 296-333; for details in English, see Tada, *supra* n 11, pp. 91-92.

137) This means that judgments rendered in States where recognition is not possible in the absence of a treaty or are subject to *révision au fond* would be denied effect when their recognition is to be sought in Japan. See Elbalti, *supra* n 4, pp. 217-218.

suit and obtain an enforcement judgment. According to Art. 24 (1) CEA, the enforcement proceeding can be petitioned before (1) the district court having jurisdiction over the general venue of the judgment debtor or (2), in cases that court cannot be determined, the district court having jurisdiction over the subject matter of the claim or the seizable property of the judgment debtor is situated.

During the enforcement proceeding, the court before which the enforcement is sought has to examine whether the foreign judgment fulfils the conditions set forth in Art. 118 CCP as explained above. In doing so, the court is explicitly prohibited from reviewing the merit of the case (Art. 24 (2) CEA). The petition will be dismissed if one of the recognition requirements is not satisfied (Art. 24 (3) of the CEA). The enforcement judgment must declare that the compulsory execution of the foreign judgment is permitted (Art. 24 (4) CEA). Once the enforcement judgement is rendered, it will serve as a title of debt (*saimu meigi*) necessary to initiate the actual execution of the judgment (Art. 22 (6) CEA).

### III. Prospects of Future Developments

The current recognition system in Japan does not suffer from serious shortcomings. It is therefore very unlikely that any reform would be implemented in the future. In addition, case law has played a very important role in clarifying the meaning of the requirements. This explains why the current system has been extended recently to cover the recognition of judgments rendered in personal status and family matters as well.<sup>139)</sup>

There was in the past attempts to elaborate a legislative “Proposals” dealing, *inter alia*, with the recognition and enforcement of foreign judgments in intellectual property matters.<sup>140)</sup> The merit of these Proposals is that they pointed

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138) The situation will change after the new reform of personal status and family matters enters into force. See *supra* n 22.

139) Japanese Official Gazette (*Kanpō*) No. 92 of 25 April 2018, *supra* n 22.

140) See the Japanese “Transparency Proposal on Jurisdiction, Choice of Law, Recognition and Enforcement of Foreign Judgments in Intellectual Property” which contains special rules dealing with private international law aspects of intellectual property. The Proposal was finalized in 2009. On this initiative see *Intellectual Property in the Global Arena.*, *supra* n 11. The book includes a Chapter on the recognition and enforcement of foreign judgment which details the Proposal’s proposed solutions compared with the Japanese rules and followed by comments. See Kono, Tada and Shin, *supra* n 11. There was also another initiative to elaborate “Principles on Private International Law on Intellectual Property” proposed by the so-called “Waseda Group” of the Waseda University Global-COE Project which contains a number of provisions dealing with the REFJ. Translation of the ↗



out a number of issues that deserve to be discussed and improved in the current recognition system, although, the Proposals themselves were based on some fundamental principles prerequisites for the REFJ under the current regime. Important issues that the Proposals intended to improve include: the possibility to enforce foreign provisional measures and foreign not “final and binding” judgments; the standards on which the jurisdiction of foreign courts should be examined; and inconsistent or incompatible judgments resulting from parallel litigation and those which do not.

With regard to reciprocity, it is interesting to point out that this requirement was kept as a mandatory ground for refusing the recognition of foreign judgments in legislative Proposals mentioned earlier.<sup>141)</sup> It was also maintained for the recognition of judgments concerning personal status and family matters. However, interestingly, reciprocity was abandoned for the recognition of foreign insolvency proceedings.<sup>142)</sup> In the academic debate, and despite the existence of some strong views calling for the abolition of the reciprocity requirement,<sup>143)</sup> some Japanese authors are still in favor of maintaining of reciprocity as a ground for non-recognition especially with regard to judgments rendered in countries where foreign judgments cannot be recognized in the absence of a treaty or those rendered in China.<sup>144)</sup>

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↘ Waseda draft proposal is available at <http://www.win-cls.sakura.ne.jp/pdf/19/21.pdf> (2008 draft).

141) For the Transparency Proposal, see Kono, Tada and Shin, *supra* n 11, p. 330. See also Art. 28 of the Waseda Proposal, *ibid*.

142) Reciprocity was abandoned as a limit to the access of foreign creditors to national proceedings. On the principle of abolishing reciprocity and rationale behind it, see Yamamoto, *supra* n 12, pp. 92-93. It has not been also included in Art. 21 of the 2000 Act which deals with the conditions for the recognition of foreign insolvency proceedings. See Y Nakanishi, “Shōnin no Rironteki Seikaku [The Theoretical Nature of Recognition]”, *Kinyū/shoji Hanrei [The Financial and Business Law Precedents]*, Vol. 1112, 2001, pp. 121ss.

143) See Nishitani, *supra* n 20, for whom “*de lege ferenda*, the reciprocity requirement ought to be abolished”. See also Okuda, *supra* n 4, p. 170 who even went further and required that the reciprocity as requirement be declared “unconstitutional” because it is, in the author views, incompatible with the protection of property rights guaranteed by the Japanese Constitution.

144) On this issue, see Elbalti, *supra* n 4. For a detailed overview, see Haga, *supra* n 136, pp. 344ss.



### Concluding Remarks

Japan has been generous in recognizing and enforcing foreign judgments. The requirements set out in Art. 118 CCP have been interpreted in a reasonable way which could strike a good balance between conflicting interests. Therefore, it can be safely said that unless there are good reasons justifying non-recognition, foreign judgments are very likely to be recognized and enforced in Japan.

Placing the Japanese recognition regime within its regional context, it can be said that the system, as it stands, has not created insurmountable hurdles for the recognition of judgments rendered in other Asian jurisdictions which adhere to the principle of recognition, be they common law or civil law jurisdictions. Nonetheless, a better refinement of the standards for indirect jurisdiction would be welcomed. The same can be said with regard to the service requirement. An approach that focuses more on the defendant's rights without being too formalistic would be welcomed as an improvement. Finally, the establishment of a clear test for the recognition of judgments resulting from parallel litigations should be discussed.

In relation to Asian countries that do not adhere to the principle of recognition, the reciprocity requirement, even relaxed, would continue to be a serious hurdle. In this respect, there is nothing to be expected from Japan as it is very unlikely for reciprocity to be abolished. In order to remediate this situation, one alternative would consist in a more positive adherence to the principle of recognition by the Asian jurisdictions where such a principle is either completely not admitted or admitted in an unduly narrow manner. Another alternative would be the conclusion of international conventions. The forthcoming Hague Judgment Convention would, therefore, have a very important role to play<sup>145)</sup> although an eventual ratification of the future convention by Japan would certainly depend on the number of ratifications and the countries that will accept to ratify it.<sup>146)</sup>

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<sup>145)</sup> Detailed information on this project available at <https://www.hcch.net>

<sup>146)</sup> On the policy of Japan in ratifying international conventions, see H Sono *et al.*, "Uniform Law Treaties: Their Reception, Implementation, Success and Failure", *JYIL*, Vol. 60, 2017, pp. 4ss and specially T Fujita, "When Does Japan Not Conclude Uniform Private Law Conventions?", Same Volume, pp. 59ss.