THE VALIDITY OF CHOICE-OF-FORUM AGREEMENTS IN JAPAN

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I

This article deals with both the validity of choice of forum agreements by which parties submit controversies that have arisen or may arise between them in connection with a specific legal relationship to the court of a particular country, and with the conditions for their validity in Japan.[1)]

Such agreements may be found in certain types of international contracts, for example, contracts for the supply of goods, contracts of service, employment contracts, insurance contracts, bills of lading, and contracts of guarantee, which are usually combined with choice of law agreements. Decisions of Japanese courts are principally concerned with employment contracts and bills of lading, but the same theory will apply to other contracts.

There are two types of choice of forum agreements, from the view point of Japanese courts. The first type of choice of forum agreement is the one which confers jurisdiction upon a Japanese court. A contract may provide; "Any dispute arising under this Bill of Lading shall be decided in Tokyo, Japan and the Japanese Law shall apply except as provided elsewhere herein."[2)] When the validity of such an agreement comes into question in a Japanese court, the court has to decide whether to accept

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1) Kawamata, Jurisdiction Clauses in Bills of Lading, 9 Kaiho Kaishi 3 (1962); Tsubota, The Validity of Agreements with respect to the Settlement of International Disputes, 444 Jurist 120 (1970); Kawakami, The Validity of Exclusive Jurisdiction Clauses, 256 Hanrei Taimuzu, 29 (1971). As to the comparative study of the laws of other countries, see Cown & Costa, The Contractual Forum, A Comparative Study, Canadian Bar Review (1965); The Validity of Forum Selecting Clauses, 13 Am. J. Comp. Law 157 (1964); Lenhoff, The Parties Choice of Forum, 15 Rutg. L. Lev. 414 (1961).

2) Export Insurance Co., v. Mitui Steamship Co., 274 N.Y.S. 2d 977 at 979 (1966).

jurisdiction conferred upon it solely by way of stipulation. If the clause is found valid, its effect is that the court will entertain the case. The second type of choice of forum agreement is the one which confers jurisdiction upon a foreign court. If the interpretation of the agreement leads to the conclusion that parties did not mean to exclude any forum but only wished to add an alternative forum in a foreign country otherwise not available, a Japanese court would not restrain from excercising jurisdiction over the case. However, if the agreemnet is interpreted to be an exclusive choice of forum agreement, a Japanese court has to decide the validity of such an agreement, and the conditions for its validity. The present discussion will be principally directed to this agrument.

Japan has no statutory provisions that state explicitely the validity of choice of forum agreements with international aspects. Only, Article 25 of the Civil Procedure Code provides that parties may designate by mutual agreement a competent court merely with respect to the first trial, and the agreement, stated above, is not valid unless it is concerned with a specific legal relationship and made in writing. According to Article 27 of the Civil Procedure Code, this provision does not apply where a specific court has exclusive jurisdiction over the case. Thus, it can be said that these provisions recognize the choice of forum agreements and that certain conditions exist for their validity in so far as domestic cases.

The straight application of these statutory provisions to international contracts is questionable. Rather, these problems should be determined by International Civil Procedure.[3] Since Japan has no statutory International Civil Procedure, however, it is appropriate to apply by analogy the provisions of the Civil Procedure Code stated above, as far as it is not against international aspects of the case and international practice reasonably established.[4]

3) Kawamata, supra at 48.

4) Tokyo Marine and Fire Insurance Co., v. Koninkleike Java China Baket Leinen N.V. Amsterdam, Osaka High Ct., Dec. 12, 1969, 586 Hanrei Taimuzu 29 at 32; Tokyo District Ct., Oct. 17, 1967, 18 Kakyu Minshu 1002, at 1008.

II

The leading case on the validity of choice of forum agreements is the decision of Daishinin in 1916.[5] Plaintiff brought a suit against the defendant in the Kobe District Court for the payment of wages under an employment contract. The contracting parties were both Belgians, domiciled in Japan and the contract contained a provision to the effect that any dispute arising from the contract should be exclusively submitted to the court of Liège, Belgium. The Kobe District Court declined to entertain the case and the defendant appealed. The Osaka Appelate Court reversed and remanded.[6] Defendant (appellant) appealed to the Daishinin. The Daishinin rejected the appeal for the following reasons:

(1) It is no doubt that Article 29 (now Article 25) principally provides about agreements on the first trial of domestic courts, and the validity of agreements by which parties designate foreign courts as the first trial court is determined by Private International Law. It seems to be in conformity with the notion of Private International Law to recognize the validity of agreements on foreign courts as well as agreements on domestic courts. Moreover, taking consideration that Civil Procedure Code permits parties to oust the jurisdiction of Japanese courts by arbitration contracts, it is clear that an attempt to exclude the jurisdiction of Japanese courts is not prohibited unless Japanese courts have exclusive jurisdiction over the case. Therefore, it can not be held that the agreement to exclude the jurisdiction of courts in Japan, the domiciling country of parties, and to submit disputes arising under the contract to the Liege Court in Belgium, the country of their nationality, is as a matter of course null and void. However, if Belgian law does not recognize the agreement and if Japanese courts should not entertain the case, the plaintiff would be deprived of his remedy. Accordingly, it is necessary to examine the contents of Belgian law in this respect, in determining the validity of the agreement by which the parties submit disputes to the Liège Court in Belgium.

5) Daishinin. Oct, 18, 1916, 22 Minroku 1916.
6) Osaka App. Ct., (Date Unpublished) 1116 Horitsu Shinbun 28.

(2) It is beyond question that the fact that the agreement altering the jurisdiction of courts effectively exists, must be proved by the party which claims this fact and therefore, the defendant has the burden of proving the contents of Belgian law.

Thus, the Court, in the first place, made its fundamental position clear that agreements conferring exclusive jurisdiction upon foreign courts are valid in principle and the jurisdiction of Japanese courts will be ousted thereby, even though the parties are domiciled in Japan and therefore, Japanese courts would have the jurisdiction over the case, but for the agreements. This view has been almost unanimously accepted in theory and judicial decisions in Japan.[7] In that sense, this judgement has a great significance even now.

Secondly, the Court held that two conditions were required for such agreements to be valid; (1) Japanese courts have no exclusive jurisdiction over the case, and, (2) the law of the foreign country designated by parties recognizes the agreements, and the foreign court will take the case.

However, the Court rejected the defendant's plea on the ground that the agreement should be treated as null and void, because the defendant did not prove the contents of Belgian law. Therefore, the Court seems to have an opinion that the choice of forum agreements should be treated null and void so far as it is proved that the agreements satisfies the conditions to be valid. From theoretical viewpoint, however, the objection may be presented that the burden should be upon the party who brings suit elsewhere than in the selected country to pursuade the court that the choice of forum agreement would be null and void, if choice of forum agreements should be *prima facie* valid and enforceable.[8]

III

In the next place, we will examine the validity of choice of forum

7) Watanabe, Comment on the case, Shogai Hanrei Hyakusen, 176 (1967); Kawamata, supra at 47; Egawa, Judicial Jurisdiction in Private International Law, 60 Hogaku Kyokai Zatshi 392 (1942); but see, Fujita, The Excess of Internationalism in Japanese Judges (3), 246 Hanrei Taimuzu, 17–20 (1970).

8) Watanabe, supra at 177; Reese, Contractual Forum: Situation in the United States, 13 Am. J. Com. Law 187, at 189 (1964).

agreements conferring exclusive jurisdiction upon foreign courts, contained in bills of lading. The first case is the decision of the Kobe District Court in 1919[9] between French parties.

Plaintiff is a French, domiciled in Japan and the consignee of the cargo shipped from Marseilles, France, to Kobe, Japan on a vessel owned by the defendant corporation, a French carrier. Plaintiff brought a suit against the defendant in the Kobe District Court to recover damages on the ground that the cargo had been soiled and damaged. It is clear and not disputed between parites that all suits on the "execution" of the bill of lading should be brought before the Commerce Court of Marseilles or the Commerce Court of la Seine in France, existed among the carrier, consignee and consignor.

On the validity of choice of forum agreements conferring exclusive jurisdiction upon French courts, the Court held; (1) since a choice of forum agreement is a matter of procedure, what effect will be given to the agreement executed in a foreign country (France) is not determined by the law of the place of conduct, but is determined by the law of this country, (2) taking consideration that the Civil Procedure Code permits an arbitration contract, it is proper to consider that agreement giving jurisdiction to a foreign court is not prohibited, and therefore, such an agreement is valid and enforceable unless the foreign court has no jurisdiction over the case under the law of that country, (3) since it is clear that the Commerce Court of Marseilles or the Commerce Court of la Seine has jurisdiction over the case, the agreement is valid and binding on parties, and this Court has no jurisdiction over the case.

Thus, the Court recognized the validity of a choice of forum agreement conferring exclusive jurisdiction upon a foreign court unless the foreign court does not entertain the case under the law of that country. In contrast with the former case, it is proved that the foreign court designated by parties has jurisdiction over the case. Though the court did not mention whether the condition that the case is not subject to the exclusive jurisdiction of Japanese courts is required or not, it does not seem to mean that

9) Kobe District. Ct., Feb. 28 1919, 1539 Horitsu Shinbun 23.

such a condition is not necessary. On the contrary, it seems to be evident that France will have at least a concurrent jurisdiction over the case under the circumstances of the case.

In this case, Japan has a fairly significant relationship with the parties and the transaction involved. Japan is the place of domicil of the plaintiff and the place of destination. Moreover, the cargo actually arrived at Kobe, Japan. Therefore, Japan is a convenient forum to decide the issues, for example, the carrier's liability or the amount of damages. It must be noted that in spite of these facts, the Court recognized the validity of a choice of forum agreement ousting the jurisdiction of Japanese courts.

The next case is Tokyo Marine and Fire Insurance Co., Ltd, v. Koninkleike Java China Baketfart Leinen N.V. Amsterdam.[10)]

A Japanese corporation bought 21,478 bags of crude sugar from a Brazilian corporation and received a bill of lading issued by the defendant, a Dutch corporation engaged in international maritime transportation business. Defendant shipped the cargo and transported it from Santos, Brazil to Osaka, Japan. However, the cargo was damaged by sea water. Plaintiff, a Japanese maritime and fire insurance corporation paid to compensate damages in accordance with an insurance contract which the Japanese buyer had entered into for the cargo. Therefore, the plaintiff brought a suit on the ground that the plaintiff had been subrogated to claim against the defendant. There is a provision in the bill of lading;

"35 JURISDICTION

All actions under this contract of carriage shall be brought before the Court at Amsterdam, and no other court shall have jurisdiction with regard to any other action unless the carrier appeals to another jurisdiction or voluntarily submit himself thereto."

Then, the defendant claims that the court of Amsterdam has exclusive jurisdiction over the case and the Kobe District Court has no jurisdiction.

10) Osaka High Ct., Dec. 12, 1969, 586 Hanrei Jiho 29, Hiratsuka, Comment on the case, Jyuyo Hanrei Hyakusen 216 (1971).

The Court dismissed the suit.[11] With respect to the validity of the agreement of exclusive jurisdiction, the Court held as follows:

(1) "In general, an agreement to designate the court of a foreign country as the court of first instance having exclusive jurisdiction and precluding the Japanese courts is interpreted as valid in principle under the international civil procedure, as far as it concerns a case over which the Japanese courts have not exclusive jurisdiction and it is clear that the courts of said foreign country have jurisdiction thereover under the laws of said foreign country. The Japanese Courts do not have jurisdiction over the instant case, and it is clear . . . . . that the Court of Amsterdam has jurisdiction over the instant case. Therefore, said international exclusive jurisdiction agreement is held to be valid in principle . . . ."[12]

(2) In domestic cases, the agreement of jurisdiction must be in writing (Article 25, Paragraph 2 of the Civil Procedure Code) and it is interpreted to mean that both the offer and acceptance are required to be made in the same or separate writings. The signature of the shipper does not appear on the bill of lading, so it can not be held that the Brazilian corporation expressed in writing its intention to accept the agreement of jurisdiction. Accordingly, the agreement does not meet the conditions of the provision of the Civil Procedure Code mentioned above.

However, with respect to the agreement of international jurisdiction, the condition of writing should be mitigated. In the first place, the laws of domestic civil procedure of other countries (for example, Germany, France, England and America) do not require that an agreement of jurisdiction must be in writing. In the second place, the signature of a shipper on a bill of lading is not required by the laws of many countries including Japan. Therefore, it is not reasonable from the point of view of security of international transaction to impose restrictive conditions not common to the laws of foreign countries. The existence of the agreement and the explicity of the content thereof, are sufficient.

11) Kobe District. Ct., July 18, 1963, 14 Kakyu Minsyu 1661, 10 Japanese Annual of International Law 178 (1966) (English Translation); Tameike, Comment on the case, Kaiji Hanrei Hyakusen 202 (1967); Tanigawa, Comment on the case, 350 Jurist 134 (1966); Kubota, Comment on the case, 295 Jurist 89 (1964).

12) 10 Japanese Annual of International Law 178, at 184–85 (1966).

(3) In the light of the spirit of the International Maritime Transportation Law, an agreement of jurisdiction in a bill of lading shall not be held null and void merely because it benefited the carrier. Only those agreements the purpose of which was to escape the application of the law concerning public policy, which ought to be applicable, in order to indemnify the carrier from his liability or to benefit the carrier partially beyond reasonable limits should be held null and void. In this case, it is found that Holland is the country which adopts the Bill of Lading Unification Treaty and it can not be held that the agreement is to escape from the application of the law concerning public policy which ought to be applicable. Moreover, it is not interpreted to benefit the carrier beyond the reasonable limit.

(4) "Since said jurisdiction provision is contained in the printed agreement form of the Defendant, it shall be held null and void as being against the public policy and good morals in case it is judged to benefit the Defendant beyond reasonable limits, because of the Defendant's unreasonable use of its strong economic position as a business enterprise."[13] However, in this case, there are no such circumstances and furthermore, the parties are merchants. Therefore, the agreement is not against public policy and good morals.

Thus, the Court recognized the validity of a choice of forum clause in this case, and further continued; "the effect of such agreement is interpreted to bind the successor of said legal matters . . . . , this Court is of the opinion that the effect of said international exclusive jurisdiction agreement binds the Plaintiff."[14]

"Accordingly, the jurisdiction of Japanese courts over this suit is precluded by said international exclusive jurisdiction, and the suit filed with this Court is improper. Hence, this Court dismisses this suit.. . . . . ."[15]

Plaintiff appealed. The Osaka High Court affirmed the decision of the Kobe District Court, quoting the reasons of this decision in a whole way. The High Court added the following reasons to the claims which the defendant had supplemented in the appellate trial with respect to the

13) 10 Japanese Annual of International Law 178, at 187–188 (1966).
14) Ibid., at 188.
15) Ibid., at 188.

validity of a choice of forum agreement designating a foreign court.[16] Such an agreement should not be interpreted, in itself, to lessen a carrier's liability unreasonably, nor place a shipper at an unjust disadvantage. Certainly, additional expense and labour will be required if a shipper brings a suit in a foreign court. However, a party who brings a suit cannot but bear a certain degree of expense and labour for the maintenance of the suit. Therefore, it can not be held null and void as against public policy.

The last case is the decision of Tokyo District Court rendered in 1967.[17] Plaintiff brought a suit in Tokyo District Court to recover the value of a cargo of pickles which had been damaged and spoiled in transit between Hong Kong and Yokohama on a vessel owned by the defendant, Danish corporation engaged in maritime transportation. Plaintiff is a Japanese holder of a bill of lading which the defendant had issued to the consignor of the cargo. The bill of lading provided;

"All claims . . . . . arising under this bill of lading shall be decided according to Danish law in the Court at Copenhagen City, to the exclusion of judicial proceedings in any other country, upon the carrier's choice." (Translation)

Defendants expressed their intention that they selected the jurisdiction of the Copenhagen Court and claimed that the jurisdiction of the Tokyo Distict Court was excluded. The Court held as follows:

(1) It can be held that a choice of forum agreement in a bill of lading is concluded between parties so far as the agreement is described explicitely in the bill of lading.

(2) The conditions for its validity are, (a) the case is not subject to the exclusive jurisdiction of Japanese courts, and (b) the foreign court designated by parties has jurisdiction over the case. Since these two conditions are satisfied in this case, the agreement is valid.

(3) However, according to the law of Hong Kong that governs the contract, all liabilities of the carrier are exempted unless a suit is brought within one year after delivery. In this case, the defendant exercised the right to

16) Osaka High Ct., Dec. 12, 1969, 586 Hanrei Jiho 29; As to other issues, see Hiratsuka, Comment on the case, Jyuyo Hanrei Hyakusen 216 (1970).

17) Tokyo District Ct., Oct. 17, 1967, 18 Kakyu Minsyu 1002.

choose a foreign court after the expiration of statute of limitation. If the jurisdiction of the Japanese court, which existed at the institution of the suit, should be excluded thereby, and the plaintiff be exempted from his liability, this consequence is too hard to the plaintiff. Such an exercise of the right should not be permitted.

Thus, in contrast with Tokyo Marine case the Court held that the jurisdiciton of the Japanese court was not excluded. In this case, Japan has a significant relationship with the parties and the transaction involved. Plaintiff is a Japanese corporation. The place of destination is Yokohama, and the cargo actually arrived at Yokohama. However, these circumstances are nearly the same as in Tokyo Marine case. The difference which the Court in Tokyo Marine case indicates, is that the clause is one which provides that the carrier may voluntarily select a particular court upon his choice. It is, however, doubtful whether different conclusions may be justified merely by this difference. It should be interpreted that the clause is not valid and enforceable if it deprives the plaintiff of all his remedy and results in remarkable disadvantage for the plaintiff for Japanese courts to decline to entertain the case.

IV

Some conclusions may be drawn from the foregoing.

(1) In the first place, we can state that the choice of forum agreements conferring exclusive jurisdiction upon foreign courts are valid in principle. In other words, there is no general prohibition of such agreements. The effect of the agreements is that the jurisdiction of Japanese courts is excluded and the courts must decline to entertain the case. This view was declared in the decision of Daishinin rendered in 1916, and followed by other courts[18] and writers.[19] The fact that the Civil Procedure Code recognizes the validity of choice of forum agreements with respect to internal courts,

18) Kobe District Ct., Feb. 28 1919; Osaka High Ct., Dec. 12, 1969; Tokyo District Ct., Oct. 17, 1967.

19) Kawamata, supra at 47; Kawakami, supra at 41; Ehrenzweig=Ikehara=Jensen, American-Japanese Private International Law, p. 28 (1964); Tameike, supra at 203; Watanabe, supra at 177. But see, Fujita (3), supra at 19–20.

seems to affect significantly the attitudes of courts and writers.[20]

(2) Certain conditions, however, exist for their validity. The first question is whether certain subject matters must be regarded of such a nature as to make choice of forum not permissible. It has been said that choice of forum agreements are null and void when Japanese courts have exclusive jurisdiction over the case.[21] However, such a situation rarely occurs in international contract cases. The second question is whether the foreign court, designated by parties, has jurisdiction over the case under the law of that country and will entertain the case. When the foreign court declines to take the suit, Japanese courts must take it.[22] In other words, the jurisdiction of Japanese courts is not excluded if the foreign court chosen turns out not to be available. Without this condition, the plaintiff would be deprived of all his remedy. As previously mentioned, the burden to prove the contents of foreign law with respect to this point is upon the party who claims that the agreement is valid.[23] Thirdly, the Civil Procedure Code[24] requires choice of forum agreement must be concerned with a specific legal relationship. This condition will be applied to international choice of forum agreements.[25]

(3) Also, Civil Procedure Code requires choice of forum agreements must be in writing. In Tokyo Marine Case, whether the provision should be applicable to international choice of forum agreements became an issue. The Court held that the written form is not necessary, and the existence of the agreement and the explicity of its contents were sufficient. A contrary view has been asserted that the choice of forum agreements conferring exclusive jurisdiction upon foreign courts must be in writing. This does not mean, however, that the agreement must be necessarily included in a written document signed by both parties.[26] Accordingly, except in adhesion contracts, practical differences may be minor.

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20) Kawakami, supra at 41.
21) See note 19.
22) See note 19.
23) Daishinin, Oct. 18 1916.
24) Article 25, Paragraph 2 of the Civil Procedure Code.
25) Kawakami, supra at 42.
26) Fujita (3), supra at 19–20.

(4) The next problem is the validity of choice of forum agreements contained in adhesion contracts and other contracts where one of parties can be regarded as having such economic power as makes it possible to prescribe the conditions for the transaction. In Tokyo Marine Case, it was held that the standardized contracts should be void against public policy when it was judged to benefit the one party beyond reasonable limits, because of unreasonable use of his superior bargaining power, but in this case, since there were no such circumstances and parties were merchants, the clause was not against public policy. In contrast with choice of law clauses,[27] however, choice of forum clauses conferring exclusive jurisdiction upon foreign courts contained in adhesion contracts are almost invariably disadvantageous to adherents. Therefore, such a clause shall be null and void unless it is proved that an adherent explicitely agreed to the clause or the foreign court designated is a convenient forum for the adherent.

(5) A choice of forum clause in a bill of lading conferring exclusive jurisdiction upon the court of a foreign country where the principal office is located, is not in itself in violation of the International Maritime Law, nor against public policy unless the clause is remarkably unreasonable.[28] A choice of forum clause in a bill of lading designating the court of a foreign country that does not adopt the Bill of Lading Unification Treaty in order to eacape the carrier's liability that can not be exempted under the Treaty, may be null and void against public policy.[29]

27) Matsuoka, The Validity of Choice of Law Clauses in Adhesion Contracts, Handai Hogaku No. 72·73, p.177 (1970).

28) Tokyo Marine and Fire Insurance Co., v. Koninkleike Java Baketfart Leinen N.V. Amsterdam, Kobe District Ct., July 18, 1963, Osaka High Ct., Dec. 12, 1969. Kawamata, supra at 62–64; Tameike, supra at 203; Kubota, supra at 92; Hiratsuka, supra at 218. But see, Fujita (3), supra at 19–20.

29) Kawamata, supra at 62. Tameike, supra at 203.