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1 of 1 DOCUMENT

Doing Business in Japan

CHAPTER 14 Dispute Settlement

5-14 Doing Business in Japan § 14.07

§ 14.07 Transnational Litigation--Conflicts of Laws

[1] Introduction

[a] Coverage. Certain disputes arising out of international transactions may have to be brought before and settled by a Japanese court. This Chapter will cover Japanese law and practice concerning jurisdiction and other threshold questions such as a foreign corporation's standing to sue, security for costs and statutes of limitation, choice of law and proof of foreign law, recognition and enforcement of foreign judgments and arbitral awards, international judicial assistance for service of process and discovery, and other matters relating to such transnational litigation.

[b] Sources of Law. Since Japan is a civil law country, the codes and statutes are the primary authority. Courts must resolve all legal issues by applying relevant codes and statutes, directly or indirectly. The Code of Civil Procedure (CCP) n1 and the Act concerning the Application of Laws (*Horei*) n2 are particularly important for the present subject. n3 Japanese courts are also bound by various multinational conventions pertaining to international transactions. n4

Although judicial decisions are not the primary authority in Japan, they are nonetheless very important guidelines for practitioners. Therefore, court decisions will be presented as often as possible. Also, since this paper is intended for the use of English language readers, Japanese citations will be kept to a minimum, whereas materials in English will be referred to whenever available.

The new Code of Civil Procedure (Law No. 109, 1996) took effect on January 1, 1998, repealing the 100 year-old Code (Law No. 29, 1890, as amended). n5 No substantial changes were made in the transnational litigation section of the Code. For example, those provisions relating to the bases of court jurisdiction (Articles 1-34) were merely reorganized and grouped under different articles. A minor change, however, was made in the requirements for the recognition and enforcement of foreign judgments. That is, that the new code now affords protection against inadequate service of process not only to Japanese defendants, but also to those of alien status. The details of this revision are discussed in the Supplement to § 5.04.

Essentially, the newly revised Code of Civil Procedure was not intended to make any riveting changes that would affect the continuity and stability of the settled rules and practices in the field of transnational litigation. The following table provides a quick cross-referencing guide of the main articles discussed in Chapter 5 (Transnational Litigation--Conflict of Laws):

Cross-Referencing Table

Bases for Jurisdiction

Old Code Articles	New Code Articles
1 General Principal	4(1)
2 (1), 2 Residence: general forum	4(2)
3 Diplomats	4(3)
4(1) Corporate principal office: general forum	4(4)
4(2) State	4(6)
4(3) Branch office of a foreign corporate entity: general forum	4(5)
5 Place of performance	5(1)
8 Situs of property	5(4)
11 Anchored ship	5(7)
15(1) Place of tort	5(9)
21 Joinder	7
25 Choice of forum	11
26 General appearance	12

Parties/Standing/Legal Representative

Old Code Articles	New Code Articles
45 Applicable law	28
46 Partnership	29 (*see also* New Supreme Court Rules, Rule 14)
51 Foreigner's age, guardian, etc.	33
58 General rule of corporate representation	33 (*see also* New Rules, Rule 18)

Security for Litigation Costs

Old Code Articles	New Code Articles
107	75

Interpreter

Old Code Articles	New Code Articles
134	154

Service of Process Abroad

Old Code Articles	New Code Articles
175	108

Recognition of Foreign Judgments

Old Code Articles	New Code Articles
200	118

Translations

Old Code Articles	New Code Articles
249	New Rules, Rule 138

Taking Evidence Abroad

Old Code Articles	New Code Articles
264	184

Foreign Official Documents

Old Code Articles	New Code Articles
324	228(5)

The Japanese Code of Conflict of Laws, *Horei* (Law No. 10, 1898), was amended in 1989 in the field of domestic relations. Consequently, the *renvoi* and public policy (public order and good morals) provisions appear in Articles 32 and 33 (previously Articles 29 and 30), respectively. n6

[2] Jurisdiction and Other Threshold Questions

[a] Bases of Japanese Court Jurisdiction.

[i] Preliminary Notes: Territorial Competence Provisions in the Code of Civil Procedure. A major decision was rendered by the Supreme Court in 1981 that upheld the Nagoya High Court's decision in *Goto v. Malaysian Airline System, Ltd.* In *Goto* the Supreme Court made a rather general statement indicating that it is reasonable for a Japanese court to exercise jurisdiction over a foreigner or foreign corporation if, under the CCP provisions, it has territorial competence over a case as a general-forum court (CCP Articles 1, 2, and 4(3)), n7 special-forum court (CCP Articles 5, 8, and 15) n8 or otherwise (as provided under CCP Articles 21, 25, or 26) n9 35 Minshu 1224 (Sup. Ct., Oct. 16, 1981), 26 JAIL 122 (1982).

The Japanese Supreme Court is following, in effect, the French and German trend in recognizing the so-called "double function" (*Doppelfunktion*) of the CCP's territorial competence provisions. Until 1947, French courts would not entertain civil actions between two aliens. The reason for this being that under the traditional view, the French Civil Code only authorized French courts to entertain cases brought by French nationals against aliens [Article 14], or cases brought by aliens against French nationals [Article 15]). Therefore, in allowing a French court to entertain a case brought by one alien against another since 1947, the French Great Court of Cassation stated that if a particular French court has "*competence speciale*" (domestic venue) over the case (according to the territorial competence provisions of the French Code of Civil Procedure), then that court also has "*competence generale*" (international jurisdiction) over the international case. Herzog, Civil Procedure In France 187 (1967). To use the German term, the CCP territorial

competence provisions have "*Doppelfunktion*" in the context of international litigation. Since Germany has no statutes similar to the French Civil Code Articles 14 and 15, a German court that has "*ortliche Zustandigkeit*" (territorial competence) over an international case (*i.e.*, a case brought by a German national against an alien, a case brought by an alien against a German, or a case brought by an alien against another alien), also has "*internationale Zustandigkeit*" (international jurisdiction). This double-function theory seems to be the prevailing view in Germany today. Herrmann/Basedow/Kropholler, 1 Handbuch Des Internationalen Zivilverfahrensrechts 210 ff. (1982); Zoller/GeimeR, ZPO 71 ff. (1984); Tsuji, Doitsu Minjisoshoho No Jitsumu 124 (1994).

Those who are familiar with 1877 German CCP (ZPO) legislative history and the Japanese CCP (faithfully modeled upon the German ZPO in 1890, then revised in 1926), will easily find that the CCP territorial competence provisions were intended to provide the bases of jurisdiction over any persons regardless of nationality. *See* Hosokai, Minjisoshoho-Kaisei-Iinkai Giji-Sokkiroku (Minutes of the CCP Revision Committee meetings) 9-31 (1929); Fujita, Nichi-Bei Kokusaisosho No Jitsumu To Ronten (Transnational Litigation: U.S./Japan--Points and Authorities) 3-39 (1998).

Today, aliens both enjoy and suffer the consequences of receiving "national treatment" under the friendship, commerce, and navigation treaties. As Chief Justice Burger stated in *Sumitomo Shoji America, Inc. v. Aragliano, 157 U.S. 176, at 188 (1982):*

> The purpose of the Treaties was not to give foreign corporations greater rights than domestic companies, but instead to assure them the right to conduct business on an equal basis without suffering discrimination based on their alienage.

Article IV of the U.S./Japan FCN Treaty provides: "Nationals and companies of either Party shall be accorded national treatment with respect to access to the courts of justice within the territories of the other Party, in all degrees of jurisdiction, both in pursuit and in defense of their rights." This treaty provision seems to dictate that American and Japanese nationals and companies be treated equally in Japan, whether as plaintiffs or as defendants in the application of the Japanese CCP territorial competence provisions. The new (1968) Greek CCP Article 3 expressly says so. That is also the logical consequence of the German "Doppelfunktion" theory. Remindful of the recorded legislative intent of the Japanese CCP, Japanese judges will hopefully return to this simple, non-discriminatory rule of jurisdiction.

As will be shown below, however, Japanese lower courts, particularly the Tokyo District Court, seem to continually forget about the legislative history of the Japanese (and German) CCP, and remain spellbound by the French conceptual distinction between "competence generale" and "competence speciale." The end result of this conceptual distinction, however, completely differs in the two countries. The end result in France is that a French national can sue an alien freely in France, without being bound by the French CCP's territorial competence provisions. The end result in Japan is that Japanese courts hesitate to exercise jurisdiction against an alien even when the Japanese CCP's territorial competence provisions expressly allow for it.

[ii] Domicile or Residence (Herein Presence and Nationality). The fundamental Japanese jurisdictional principle is that a suit should be brought before the court sitting at the defendant's domicile (*Actor sequitur forum rei*). The Code of Civil Procedure begins with the following Articles:

> Article 1: A suit shall be subject to the jurisdiction of the court located at the place of the defendant's general forum.
>
> Article 2: The general forum of a person shall be determined by such person's domicile (*jusho*).

Japanese courts have often expressed their belief that the defendant's domicile rule is an internationally recognized basic rule of jurisdiction. A Japanese court sitting at the defendant's domicile can exercise jurisdiction over any action against him since it is his "general forum." And once the court has acquired jurisdiction, it cannot be affected by a subsequent

change of the defendant's domicile. n10

The Japanese concept of domicile, *jusho*, seems to include the U.S. legal concepts of both domicile and residence. Like the common law domicile, *jusho* is by definition the central place of one's life, n11 as determined by such factors as one's mental attitude toward the place, the physical characteristics of the place, the things one does therein, the people and things one lives with, and so forth. However, Japanese *jusho* can be acquired more quickly and easily than U.S. domicile. n12

Although Japanese courts have usually treated American domicile and Japanese *jusho* as the same thing, in *Beckhold v. Beckhold*, they were distinguished. n13 The petitioner, an American military man seeking a divorce, had come to Fukuoka, Japan, from New York as the manager of a U.S. Army PX. His wife had later joined him, and they had lived off base in an ordinary residential area for about one year. The court found that they had acquired *jusho* for the purpose of Japanese jurisdiction.

However, according to the Japanese conflicts rule, matters relating to divorce are primarily determined by the law of the husband's state, but if that state's conflicts rules point to Japanese law because of the parties' domicile, Japanese law governs the divorce case by way of *renvoi*. n14 The New York conflicts rule concerning divorce would seem to have dictated application of Japanese law if the parties had acquired a domicile in Japan. Nevertheless, the court found that under the New York conflicts rule, members of the U.S. armed forces and their dependents were not allowed freely to acquire a domicile in the place to which they were dispatched. Accordingly, the court exercised jurisdiction over this divorce case but applied New York domestic law and denied divorce by reason of recrimination. n15

Where a defendant has no *jusho* in Japan, he is still subject to Japanese jurisdiction if he has a residence (*kyosho*) in Japan. CCP, Article 2, paragraph 2 provides:

> In cases where a person is not domiciled in Japan, or if the domicile is unknown, such person's general forum shall be determined according to his place of residence, or, if there is no place of residence, or the place of residence is unknown, it shall be determined by such person's last domicile.

The Japanese concept of residence, *kyosho*, is a little different from the U.S. counterpart since it may include both a residence in the common law sense and a place of temporary sojourn. Although there is no specific rule as to the length of stay required for the establishment of *kyosho*, an alien staying in some fixed place for a few months will be amenable to the jurisdiction of a Japanese court sitting at the place. n16

However, a traveller who is staying in a hotel room or at the house of an acquaintance for a few weeks may not be considered as having thereby acquired *kyosho.* Since his mere presence does not constitute a basis of civil jurisdiction, such a traveller cannot be sued in Japan unless there is some other basis. n17

There appear to have been no reported cases applying the last domicile rule provided in CCP, Article 2, paragraph 2, and commentators have claimed that the rule should not be used in the determination of international jurisdiction. However, the fact that the defendant had his home in Japan in the past would indicate that a particular legal relationship may have been created in Japan while he was here. For example, a contract may have been made in Japan and the plaintiff may be suing the defendant for breach of that contract. In such a case, a Japanese court sitting at the defendant's last domicile should assume jurisdiction even if the defendant has left Japan permanently. n18

Another common basis for general forum jurisdiction is the defendant's nationality. However, the Japanese Code of Civil Procedure has no jurisdictional provisions covering a person with whom Japan has no contacts other than his nationality. Therefore, where a particular legal relationship has taken place entirely outside the territorial boundaries of Japan, even a Japanese citizen may not be sued in Japan. In a family law case, however, a suit against a nonresident Japanese may be brought before the Tokyo District Court. n19

[iii] Office, Place of Business or Officer (Herein Doing Business and Agent). In *Malaysian Airline*, the air crash took place in Malaysia, and the flight was between two cities in Malaysia. Malaysian Airline, however, maintained a branch office in Tokyo for its international flights to, from, and through Japan. Thus, under the general-forum provisions of CCP Article 4(3), Malaysian Airline is generally subject to Japanese court jurisdiction, without regard to where the cause of action arose or whether the cause of action was connected with the business operations of its Tokyo branch. n20 This is equivalent to the common law "doing business" jurisdiction, *Bryant v. Finnish Nat'l Airline, 15 N.Y.2d 426, 206 N.E.2d 439 (1965)* ; *Frummer v. Hilton Hotels International, 19 N.Y.2d 851, 227 N.E.2d 851 (1967)* .

The *Malaysian Airline* case must be distinguished from *Helicol v. Hall, 466 U.S. 408 (1984).* In *Helicol*, the U.S. Supreme Court held that it was unreasonable for a Texas court to exercise jurisdiction over a Colombian helicopter company when the air crash took place in Peru in connection with a local flight. However, the Court found, quite contrary to the *Malaysian Airline* case, the following factual situation:

> Helicol never has been authorized to do business in Texas and never has had an agent for the service of process within the State. It never has performed its helicopter operations in Texas or sold any product that reached Texas, never signed any contract in Texas, never had any employee based there, and never recruited an employee in Texas. In addition, Helicol never has owned real or personal property in Texas and never has maintained an office or establishment there. Helicol has maintained no records in Texas and has no shareholders in that State. None of the respondents or their decedents were domiciled in Texas ... '(*Helicol v. Hall, 466 U.S. 408, at 411 (1984)).*

[iv] Place of Performance (Herein *Forum Contractus*). CCP, Article 5 provides:

> A suit concerning a property right may be brought before the court situated at the place of performance of the duty.

A suit concerning a property right (*zaisan-jo no uttae*) is the Japanese translation of the German term *vermogensrechtliche Klage* and includes any pecuniary suit, as distinguished from a family law or status action. However, this Article was originally intended to provide a *forum solutionis* for contractual obligations. n21 And, in practice, Article 5 has been invoked most often as a basis of jurisdiction over contract actions, perhaps partly because there is no other special forum for such actions since, under the present CCP, the place of contract-making does not of itself afford a basis of jurisdiction. n22

In breach of contract cases, the plaintiff usually seeks payment of damages instead of specific performance. Thus, a question arises as to whether Article 5 points to the place of performance of the obligation to pay damages or to the place where the originally contracted duty was to be performed.

In *Vacuum Oil Co. v. Dampffschiffsladerei Union A.G.*, a 1908 case dealing with an action for damages for imperfect performance of oil transportation from New York to Yokohama, the Great Court of Judicature held that the Yokohama District Court had jurisdiction over the case because Yokohama was the place of performance of the contract for carriage of oil by sea. n23 Moreover, a few commentators maintain that Article 5 points to the place of performance of the originally contracted duty. Since the witnesses and other evidence would be most conveniently produced before a court sitting at the place where the breach was committed (*i.e.*, where the contract was to be performed but was not actually or perfectly performed), this originally-contracted-duty theory seems to be well-grounded.

However, according to the majority view, CCP, Article 5 refers to the place of performance of that obligation which is the direct object of suit, *i.e.*, the obligation to pay damages in the case of breach of contract. If so, the place of performance necessarily would be either the plaintiff's or defendant's residence (or place of business), which has in and of itself nothing to do with trial convenience. Nevertheless, most lower courts in postwar Japan seem to follow the majority view.

There is no serious doubt that the place to perform an originally contracted duty is to be determined by the intention of the parties, express or implied, or if the intention is unascertainable, by the nature of the transaction. Therefore, the place to perform the originally contracted duty will be the same under any law and, consequently, it will not usually give rise to a troublesome conflict of laws question. However, as to the place to perform the obligation to pay damages for breach of contract, the situation is quite different: under Japanese n24 and perhaps English law, n25 the place is the plaintiff's (obligee's) residence or place of business, while under German n26 and French law, n27 it is the defendant's (obligor's).

It is the prevailing view in Japan that the place of performance is to be determined by the substantive law which governs the contract. In *Sogo Koeki K.K. v. Maersk Line*, for example, the bill of lading evidencing a contract for carriage of goods by sea from Hong Kong to Yokohama was subject to English law, and the Tokyo District Court found that under the English law, the place to pay damages for negligent carriage was Tokyo, the plaintiff's place of business. n28 Thus, the court took the case. In *Tokyo Trading K.K. v. Bank of Elba*, the same court dismissed a suit for lack of jurisdiction because the French law which governed the agency contract under discussion pointed to Paris, the defendant's place of business, as the place to pay damages. n29 In *Loustalot v. Admiral Sales Co.*, the court declined to exercise jurisdiction because the plaintiff failed to show that under California law the place of performance of the duty to pay the travel expenses was the plaintiff's (obligee's) residence in Tokyo. n30

[v] Place of Tort. CCP, Article 15 states:

> A suit relating to a tort may be brought before the court of the place where the act was committed.

A tort or tortious act consists of two elements: misconduct and injury. In many cases, the place where the misconduct took place would be the same as the place where the injury occurred, and if a tortious act were totally committed in Japan, there would be no room for serious controversy over Japanese jurisdiction. n31 As to cases where the misconduct took place in one place and the injury occurred in another, all writers seem to agree that each of them gives a basis of jurisdiction over the tort case. A typical example would be a product liability case involving a defective product which was manufactured in one country and caused injury in another.

In connection with an airplane accident in which 133 passengers were killed when a Boeing 727 crashed at Haneda Airport in 1966, the heirs of one of the victims sued the Boeing Company in the Tokyo District Court for the defective design of the airplane. The Boeing Company contested the court's jurisdiction, but the court rendered an interlocutory judgment confirming its jurisdiction based on the place of injury. n32

In *K.K. Kansai Tekko-sho v. Marubeni-America Inc.*, n33 an employee of the Boeing Company was injured in Seattle, Washington, while operating a power press machine made by the Kansai Tekko-sho, an Osaka heavy machine manufacturer. The injury allegedly occurred because of a defect in the machine's electronic computer system. The employee brought suit in a Washington State court against West Coast Machinery, Inc. (the local procuring agent for the Boeing Company), Marubeni-America, Inc. (the importer of the machine), and Kansai Tekko-sho (the manufacturer). As the plaintiff in Washington did not serve process upon the Osaka manufacturer, Marubeni-America filed a cross-complaint against the manufacturer for indemnification and effectively served the cross-complaint through required diplomatic channels.

While contesting Washington State jurisdiction, the Kansai Iron Works instituted a sort of counteraction against Marubeni-America in the Osaka District Court, seeking a "negative declaratory judgment" to the effect that it did not owe the obligation to indemnify Marubeni-America claimed in the Washington suit, since it had sold the machine on an "FOB Kobe" basis to the Japanese trading company Marubeni K.K., and not to Marubeni-America, Inc., a New York corporation. In turn, Marubeni-America, which did not maintain an office in Japan, made a special appearance in the Osaka District Court to contest the Japanese jurisdiction. The Japanese court, however, rendered an interlocutory

judgment confirming its jurisdiction on the grounds that since the allegedly defective machine was designed, manufactured, and sold in Osaka, the Osaka District Court was "the court of the place where the act was committed" (CCP, Article 15). According to the court's characterization the product-liability case, sounded in tort. n34

[vi] *Situs* of Property. The concept of *in rem* jurisdiction (or *quasi in rem* jurisdiction) is unknown in Japan. A justiciable controversy may arise between persons over a certain thing (*res*), but not between a person and a thing. A thing is an object of a suit; it cannot be a party to a suit. Thus, jurisdiction is always and necessarily *in personam.*

As to ships, Article 11 of the Code of Civil Procedure provides:

> A suit based on an obligation-right against a ship or any other obligation-right secured by a ship may be brought before the court of the place where the ship is located.

The type of suit referred to here is not a suit against a ship, but rather a suit against a shipowner or carrier based on a ship mortgage or maritime lien on the ship. n35

As to immovables, CCP, Article 17 provides:

> A suit relating to immovables may be brought before the court at the place where the immovable is located.

The type of suit referred to here is also a suit against the owner of the property involved or other person interested in it; the property itself is merely the object of the suit and never a party to it.

The above rules can be accepted without any serious objection from other countries. However, the Japanese rule of *forum rei sitae* extends far beyond actions on ships or immovables: even where an alien has no domicile or residence in Japan, a Japanese court can still exercise jurisdiction if any of the alien's assets are found in Japan. According to Article 8 of the Code of Civil Procedure:

> A suit concerning a property right brought against a person not domiciled in Japan, or whose domicile is unknown, may be brought before the court situated in the place where the subject matter of the claim, the subject matter of the security (*tanpo*) therefor, or any of the defendant's property which may be attached is located.

As pointed out earlier, "a suit concerning a property right" includes any nonfamily law case or nonstatus suit, n36 and the concept of attachable "property" includes anything that can be the object of a pecuniary right, tangible or intangible, real or personal. *Tanpo* includes "real security" and "personal security," *i.e.*, a surety.

The situs of an alien's industrial property is the place where his Japanese agent (whom the alien is required to appoint at the stage of application for a patent, trademark, utility model, etc.) n37 has his residence. The situs of personal security is the surety's residence, and the situs of an obligation-right, *i.e.*, a right arising from contract, tort, unjust enrichment, or voluntary management of affairs without mandate, is the residence of the defendant's obligor. n38 An obligation payable to the bearer of an instrument is located at the place where the instrument is present. n39

Although Article 8 would seem to allow jurisdiction based on the mere presence of assets, Japanese judges have tried to narrow the scope of Article 8's application to international cases. *Loustalot v. Admiral Sales Co. supra*, n40 is a good example. Plaintiff, a salesman dispatched to Japan by the defendant California corporation, had brought some samples into Japan. When he was fired, he returned the samples to the president of the defendant corporation, who had come to Japan with six suitcases of new samples which were, in plaintiff's understanding, under the custody of the Customs House at Haneda Airport. Plaintiff filed a petition with the Tokyo District Court for provisional attachment of defendant's assets, mainly the six suitcases containing new samples. However, the bailiff could not find the suitcases at

Haneda Airport. Instead, at the hotel where the president and his wife were staying, the bailiff attached (1) the samples which plaintiff had returned to the president, and (2) a typewriter which the president's wife had brought with her from the United States, allegedly among her own personal effects. Immediately after the provisional attachment, plaintiff filed the principal suit seeking payment of $2,500 for transportation expenses, which amount apparently far exceeded the value of the attached assets. Plaintiff contended that there were six suitcases containing new samples at Haneda or elsewhere in Japan, but defendant replied that the new samples had been brought to Japan after the provisional attachment procedure. Under the circumstances, the court denied jurisdiction:

> If the Code of Civil Procedure Article 8 is to be interpreted to the effect that Japanese jurisdiction extends to an alien defendant who has any attachable property in Japan, regardless of its nature, quantity, or value, the consequence will be very harsh to a defendant not residing in Japan_____ If the property involved is a tract of land which belongs to Japanese territory, and if the claim is directly related to the land, the relationship of Japan with the property is sufficient. However, where the property is movable, the relationship is very dim and remote. Attached in this case are, as the plaintiff himself made clear, a few samples and the like. In addition, since the plaintiff's activities as a salesman in the Far East for the defendant company were not restricted to Japan, it is but by a mere chance that these things are presently located in Japan. Such being the case, justice and fairness require us to rule that the relationship of Japan with the property involved is not sufficient to make the exercise of jurisdiction reasonable _____

It seems that the court as well as the parties proceeded on the premise that CCP Article 8 required actual attachment of property prior to the commencement of the principal suit. n41 However, as long as there is some *attachable* property within the district, the court is entitled to exercise jurisdiction over the owner of the property: actual attachment is not required under CCP Article 8. In this context, it is important to note that even if jurisdiction does not exist at the time an action is commenced, the defect can be cured *pendente lite* by a supervening event that creates a basis of jurisdiction before the statute of limitation has run. n42 Therefore, in determining the sufficiency of the basis of jurisdiction, if, as alleged (or admitted) by the defendant, the six suitcases containing new samples had been brought to Tokyo after the attachment procedure but before the close of the proceedings of the principal suit, the value of those new samples should have been added to that of the old samples. At any rate, this case seem to well illustrate the cautious attitude of Japanese judges in applying CCP provisions to transnational cases. n43

[vii] Other Special *Fora*

[A] Multiple Defendants. In *Inoue v. Aviacion i Commercio S.A.*, 1232 Hanrei Jiho 40 (Tokyo Dist. Ct., May 8, 1987), 31 JAIL 220 (1988), the court sustained an action brought by fifty-three surviving Japanese families against not only Iberia Airlines, but also Aviacion, a Spanish airline company. Iberia's plane carried Japanese passengers from Japan to Zurich, Paris, and Madrid, and was enroute to Rome when it collided with Aviacion's airplane at Madrid Airport while waiting for the take-off signal. Under the Warsaw Convention Article 28 (place of departure or ultimate destination), as well as under the Japanese CCP Article 4(3) (existence of a branch office in Tokyo), there was no question that Iberia Airlines was subject to Japanese jurisdiction, but Aviacion had no independent contacts whatsoever with Japan n44 The Tokyo District Court stated that as long as Iberia Airline argued that the accident was not caused by its own negligence, but by the negligence of the pilot of the Aviacion's airplane, a single court must hear both airline companies' arguments and render a simultaneous and consistent decision binding both companies. Otherwise, there is a risk that the Japanese court would find Aviacion, not Iberia, responsible for the collision and the Spanish court would find Iberia, not Aviacion, responsible, leaving the Japanese surviving families entirely remediless. Therefore, although Aviacion had no independent contacts with Japan, it was subjected to Japanese jurisdiction as a practically "indispensable" party to this airplane collision case.

In *R.W. Starge & Co. v. Lee*, 1398 Hanrei Jiho 87 (Tokyo Dist. Ct., Oct. 23, 1990), however, the Tokyo District Court did not exercise co-defendant jurisdiction over an English national, residing in Hong Kong, who was sued by an English

company in Japan as a co-defendant with a Japanese art company. In that case, the Japanese art company, a purchaser of an antique plate (Ming Dynasty), hired and sent as its agent, Mr. Lee, to receive the plate in London. While under Mr. Lee's temporary custody, the plate was stolen, and the seller's insurance company (R.W. Starge & Co.) paid the insurance money to the seller (risk of loss being borne by the seller until its arrival at Tokyo).

Upon subrogation, the insurance company sued both the Japanese purchaser and Mr. Lee. However, the Japanese court dismissed the suit against Mr. Lee for lack of jurisdiction, indicating that the cause of action against Mr. Lee was quite different and separate from that against the Japanese purchaser. As far as Mr. Lee was concerned, the court found that the plaintiff had a more adequate forum in bringing suit either in England or in Hong Kong.

From the standpoint of the most efficient and consistent method of dispute resolution, the *Aviacion* case seems to represent the better rule. However, this *R.W. Starge & Co.* case well illustrates the Japanese judges' hesitation in directly applying the CCP territorial competence provisions to foreign nationals.

[b] Limitations on the Exercise of Jurisdiction

A Japanese court sometimes has a basis for jurisdiction over a case, but nonetheless cannot or will not exercise it. Topics discussed below are limitations on the exercise of Japanese jurisdiction due to foreign sovereign immunity, a foreign country's exclusive jurisdiction, parties' agreements excluding Japanese jurisdiction, and trial inconvenience.

[i] Sovereign Immunity. It is an established rule of international law that foreign sovereigns and certain of their representatives, such as ambassadors and ministers, are immune from suit. n45 The organs of the United Nations and their staff also enjoy immunity among the member states. n46 There are also treaties and administrative agreements between the United States and Japan limiting Japanese court jurisdiction over the members, dependents, and bases of the U.S. armed forces in Japan. n47

As plaintiffs, foreign sovereigns can bring suit in a Japanese court. n48 However, they thereby subject themselves to Japanese jurisdiction over any counterclaim, set-off, or cross-action.

Since the American concept of domestic "sovereign immunity" is nonexistent in Japan, Japan, the state, can be sued like any other private person. In suing the Japanese Government, there is no discrimination against aliens since under Article 32 of the Constitution, no person shall be deprived of the right of access to the courts. However, Article 6 of the State Compensation Act n49 requires "mutual guarantee" (reciprocity) as regards damages for torts committed by the State or a local public entity. Thus, if a Japanese cannot sue a particular foreign state or its subdivision in that state's courts in tort (*i.e.*, if a "local remedy" is not available), the corresponding remedy in Japan will be denied to a national of such foreign state. Some scholars doubt the constitutionality of this reciprocity requirement, but, in any event, such mutual guarantee seems to exist between the United States and Japan. n50

[ii] Exclusive Jurisdiction of Another Country. A suit for confirmation of U.S. citizenship will not be entertained by a Japanese court since the subject matter is within the exclusive jurisdiction of the United States. n51 In addition, the internal affairs of a foreign corporation, such as the validity or effectiveness of incorporation, merger, and resolutions of a general meeting of shareholders, are under the exclusive jurisdiction of the country or state in which it has its principal place of business. n52

Further, a suit directly related to title to immovables, especially land, is understood to be subject to the exclusive jurisdiction of the country in which the property is located. In *Ratt v. The Federal Government of Burma*, n53 Ratt, allegedly the owner of a tract of land in Tokyo filed a petition with the Tokyo District Court seeking a provisional order to remove from the land some wire entanglements and a notice board saying, "This Property is the Property of the Burmese Government." Relying on the doctrine of sovereign immunity, the Government of Burma refused to appear before the court. However, the court entertained the petition and ruled in favor of the petitioner stating as follows:

> Since immovable property is the very core of the territorial sovereignty of one country, other countries have paid due respect to that country's power over the property by way of international comity. And it cannot be denied that as to a suit *directly* related to immovable property, many countries have long recognized the *exclusive* jurisdiction of the country sitting at the locale of the property. In view of the rationale and history of this tradition, we think that jurisdiction extends not only to a case where the parties are all private persons, but also to a case involving a foreign country as a party.

As mentioned earlier, a suit concerning the validity or incontestability of a patent, trademark, or other industrial property comes under the exclusive jurisdiction of the country of its registration. n54 Thus, a suit for damages for infringement of a foreign patent may possibly be dismissed without prejudice inasmuch as a Japanese court cannot finally decide the validity or the scope of claim of the foreign patent. n55

A choice-of-court agreement between the parties will be invalid if the choice conflicts with the rule of exclusive jurisdiction.

[iii] Jurisdictional and Arbitral Agreements. As discussed in detail already, where parties have agreed to submit a dispute to a foreign court, Japanese courts will not exercise jurisdiction unless the dispute comes under the exclusive jurisdiction of Japan. Similarly, where parties have agreed to settle a dispute by arbitration, in or outside Japan, Japanese courts will honor such agreement and a suit brought in violation of the arbitration agreement will be dismissed without prejudice. n56 The enforceability of a domestic or international arbitration agreement has never been doubted in Japan, which was among the first to ratify the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards, n57 as well as the 1958 New York (United Nations) Convention on the Recognition and Enforcement of Foreign Arbitral Awards. n58

Arbitration clauses contained in transnational contracts will be upheld in Japanese courts regardless of whether the countries to which the parties belong, or in which the designated place for arbitration is located, is a contracting party to the above Conventions. Thus, in *Compania de Transportes del Mar S.A. v. Mataichi K.K.*, n59 the Tokyo District Court dismissed an action on a charter party between a Panamanian steamship company (apparently owned by U.S. nationals) and a Japanese importer in honor of a New York arbitration clause contained in the charter party. The court made the following general statement:

> Indeed, this agreement provides for arbitration in a foreign country and is made subject to foreign law as regards all aspects concerning formation, validity, and procedure. However, it is reasonable to say that such a foreign arbitration agreement constitutes a bar to a suit brought in violation thereof as does a domestic arbitration agreement under our Code of Civil Procedure.
>
> For, what is the reason our Code recognizes an arbitration agreement as a bar to a suit? The parties have agreed that they do not have recourse to litigation but refer their disputes to arbitrators, private persons, to whose judgment they submit themselves. Such self-settlement of disputes would serve to reduce litigation in courts. Therefore, as long as the parties express their desire to rely on arbitration rather than litigation in courts, it is a wise national policy to respect the parties' intent and leave the dispute to their self-settlement. It is a matter of our national policy and has nothing to do with the prestige or power of our judiciary. Hence there is absolutely no necessity to demarcate national boundaries in honoring or rejecting the parties' intent in this regard.

Out of deference to arbitration clauses, Japanese courts tend to overlook a plaintiff's cry for individual justice. In *Hinode Chemical Industry K.K. v. Sanko Steamship K.K.*, n60 the defendant, a Japanese shipping company, chartered a Panamanian vessel from a London steamship company. The charter party contained an arbitration clause to the effect that any dispute arising from the charter party was to be settled by arbitration in London. The defendant contracted with the plaintiff, a Japanese trader, to carry phosphate rock from Egypt to Moji, Japan. The defendant issued a bill of lading

which stipulated, "All the terms, conditions, and exceptions contained in the Charter Party, are herewith incorporated." Upon arriving at Moji, the cargo was partly damaged through the defendant's negligence in unloading.

In an action for damages, the defendant contended that inasmuch as the charter party provisions were incorporated in the bill of lading, any dispute arising from the carriage contract was subject to arbitration in London, and that therefore the suit should be dismissed. The plaintiff argued: all the relevant facts pertaining to the negligent unloading occurred in Japan; both parties were Japanese; evidence could be most conveniently produced in Japan; the proceedings could be most effectively conducted in the Japanese language; the amount of damages incurred and sought in the action was only 663,500 yen or $1,850; and the London award would have to be enforced in a Japanese court anyway. Thus, the plaintiff contended that, under the particular circumstances of the case, it would be unfair, unreasonable, and violative of public policy for the complaint to be dismissed on the basis of the arbitration agreement. However, the court stated that the plaintiff had acquired the bill of lading as a merchant (*caveat mercator*), and thus dismissed the complaint without entering into the merits. n61

[iv] ***Forum Non Conveniens.*** In view of the possible extreme inconvenience and hardship which may be imposed on a nonresident defendant in terms of transportation, language, expenses, and production of evidence, there are situations in which it might be expected that Japanese courts would decline to exercise jurisdiction which otherwise obtained. However, in Japan a question of jurisdiction is to be answered on an all-or-nothing basis. It is not within the discretion of the court to decide whether to take or refuse a case brought before it, and there is no discretionary or conditional dismissal. Therefore, strictly speaking, Japan has no concept of *forum non conveniens.*

However, it may be argued that the objectives of the *forum non conveniens* rule can be accomplished in Japan, too, by invoking the principle of equity incorporated in the Civil Code: n62

Article 1:

> (1) All private rights shall conform to the principles of maintaining the public welfare.
>
> (2) The exercise of rights and performance of duties shall be carried out in accordance with the principles of good faith and trust.
>
> (3) No abuse of rights shall be permitted.

Article 90:

> A juristic act whose object is contrary to the public order or good morals is null and void.

Theoretically, if the presiding judge is reasonably convinced that the plaintiff's action amounts to an abuse of the right to sue or that it does not comply with the principle of good faith or good morals, he can dismiss the suit as an illegal action. Likewise, if the circumstances show that Japan is an extremely inconvenient place (*forum non conveniens*) from the defendant's point of view, and that the plaintiff can easily commence an action in a foreign court, with the result of much more trial convenience, a Japanese court may find that there is an abuse of the right to bring a suit in Japan and thus dismiss the case as an illegal action.

During the last two decades, a Japanese version of forum non conveniens has emerged, particularly in Tokyo District Court cases involving international multiple lawsuits. More specifically, when a Japanese defendant being sued in a foreign court files suit in Japan against a foreign plaintiff and seeks a declaratory judgment against that plaintiff (ruling that the Japanese party owed no liability to the foreign party), the Tokyo District Court typically refrains from exercising jurisdiction over the foreign party.

Following the 1973 *Kansai Tekko* case, which was discussed in detail earlier in the text (§ 5.02[3][e] and § 5.04[3]), many similar actions for declaratory judgments have been brought by Japanese companies. These companies essentially want to avoid the possibility of having any adverse judgments rendered by American courts being enforced against them. A typical example is *Mazaki Bussan K.K. v. Nanka Seimen, Inc.*, 1390 Hanrei Jiho 98 (Tokyo Dist. Ct., January 29, 1991). In that case, Mazaki Bussan's noodle-making machine was sold to a Los Angeles noodle maker through Nanka Seimen, a local purchasing agent. Luna, an employee at the noodle making factory, lost three fingers while operating the machine, and brought a product liability action in Los Angeles against Mazaki Bussan and fifty co-defendants. After one year of discovery and other court proceedings, Luna joined Nanka Seimen (Doe-I). Nanka Seimen then filed a cross-complaint against Mazaki Bussan for indemnification.

As in the *Kansai Tekko* case, Mazaki Bussan filed an action for a declaratory judgment against Nanka Seimen with the Tokyo District Court. Although the Tokyo District Court conceded that the allegedly defective machine was manufactured in Tokyo and, therefore, could have exercised jurisdiction under CCP Article 15 (place of tort), the court declined to do so due to extraordinary circumstances under which the exercise of jurisdiction would be unreasonable and against the concept of natural justice *(jori)*. n63 The circumstances the court considered extraordinary in this case included: (1) Mazaki Bussan may win the Los Angeles case, and the Tokyo court proceedings may turn out to be completely meaningless; (2) such double litigation may well result in conflicting judgments, which will give rise to an undesirable international friction; (3) the Los Angeles case had already proceeded quite substantially, and Japan should pay due respect to the efforts of the Los Angeles court for the efficient resolution of the dispute; (4) Los Angeles is more convenient for trial as almost all of the relevant evidence is located in Los Angeles; and (5) Nanka Seimen has no property or office in Japan. Therefore, it could not have anticipated to be sued in Japan. However, Mazaki Bussan should have anticipated being sued in Los Angeles inasmuch as it had sold the machine there and earned profits therefrom. *See also Enkei Automotive K.K. v. Yoshida*, 1401 Hanrei Jiho 98 (Shizuoka Dist. Ct., Hamamatsu Br., July 15, 1991).

In *Miyakoshi Machinery K.K. v. Gould Inc.*, 1348 Hanrei Jiho 91 (Tokyo Dist. Ct., May 30, 1989), however, an action for declaratory judgment was sustained. In *Miyakoshi*, Miyakoshi and Gould were parties to a technological assistance agreement in which Gould offered Miyakoshi such assistance in Japan through its affiliate company. Things, however, did not go well, and Gould sued Miyakoshi in Ohio for theft and misappropriation of certain technological know-how established by Gould. Miyakoshi immediately filed a counterclaim against Gould in Tokyo seeking declaratory judgment. The Tokyo District Court did not consider this unreasonable because the alleged theft and misappropriation of technology took place in Tokyo (place of tort) and the case was closely connected with Tokyo as it being the site where the technological assistance agreement was to be performed (place of performance). The same result was reached when the lawsuits were between the same contracting parties and the Japanese lawsuit was immediately brought after the foreign lawsuit. *Shinagawa Bricks K.K. v. Houston Ceramics, Inc.*, 703 Hanrei Times 246 (Tokyo Dist. Ct., June 19, 1989), 33 JAIL 202 (1990).

However, the Tokyo District Court considered it an abuse of process when a foreign plaintiff in a California court filed another lawsuit in Tokyo against the same California defendant company for the same cause of action. As a result, it declined to hear the case. *Greenlines Shipping Corp. v. California First Bank*, 515 Hanrei Times 132 (Tokyo Dist. Ct., Feb. 15, 1984), 28 JAIL 243 (1985). Also, in *Mukoda v. The Boeing Co.*, 1196 Hanrei Jiho 87 (Tokyo Dist. Ct., June 20, 1986), the surviving Japanese families of an air crash in Taiwan first brought their product liability action along with the surviving Taiwanese families against the Boeing Company in California. Upon dismissal of the case on the grounds of forum non conveniens, *Nai-Chao v. Boeing Co., 555 F. Supp. 9* (N.D. Cal, 1982) , the families brought another action against the Boeing Company in Tokyo. The Tokyo District Court expressed its discomfort with the plaintiffs' forum-shopping, and following the U.S. District Court's decision, refused to exercise jurisdiction against the Boeing Company, indicating that the case should be brought in Taiwan.

In *Inoue v. Korean Airlines*, 1240 Hanrei Jiho 27 (Tokyo Dist. Ct., June 23, 1987), the surviving Japanese families of the passengers in the Korean airplane shot down by the Soviet Air Force in September, 1983, first filed their action

against the Korean Airlines in Washington, D.C. They filed another in Ontario, Canada, together with the Korean and other surviving families. Pending these two foreign actions, the Japanese plaintiffs then brought a third action against Korean Airlines in Tokyo (place of business due to a branch office being located there and place of final destination). The Tokyo District Court entertained the case on the notion that the airline company's assets in Washington, D.C., and in Ontario, Canada, might not be sufficient to cover the judgments for all of the Japanese, Korean, and other plaintiffs and that the enforceability of the foreign judgments in Korea (and in Japan) was not clearly established.

[c] Other Threshold Questions

In addition to the question of jurisdiction, there are other threshold barriers which a plaintiff must get through before he can obtain a judgment on the merits. Among others, service of process, a nonresident's duty to deposit security for costs, a foreign corporation's or partnership's standing to sue, types of relief unavailable in Japan, and international double litigation (*lis pendens*) will be discussed below. Although the question of statutes of limitation (extinctive prescription) is understood in Japan to go to the merits of the claim, it will also be dealt with herein.

[i] Service of Process. Service of process does not "go to jurisdiction" in civil law countries. In the United States, service of process has been held to be *sufficient* as well as *necessary* for the establishment of jurisdiction *in personam.* n64 However, in a civil law country, service of process is not a fact giving the court jurisdiction but merely a method of notifying the defendant of a *pending* lawsuit. n65 Since there is a possibility of the defendant's general appearance (voluntary submission to the court's jurisdiction), service of process can be made without first determining whether the court has jurisdiction over the particular case brought before it, except perhaps where foreign sovereigns are sued. n66 Ordinarily, the court examines whether or not it is entitled to exercise jurisdiction over the particular case after the completion of service of process.

Service of process in civil law countries is strictly an official function performed by the court. The plaintiff's attorney prepares and files a complaint, but never a summons; he cannot effect service of process on his own, *e.g.*, by direct mail or personal delivery to the defendant. n67

Service of process in Japan can only be effected by the court clerk in charge of the case, with the assistance of a bailiff or a mailman, the latter acting by law as an officer of the court. n68 The process server delivers the complaint and summons in person to the defendant or his legal representative, or to an employee or person residing with him who possesses sufficient capacity to comprehend reason, at his *jusho* (domicile), *kyosho* (residence), place of business or office. n69 If the defendant has no such place in Japan, the complaint and summons may be served at any place in Japan where the serving officer meets the defendant or the representative of the defendant corporation. n70 The same is true where the clerk meets the defendant in person at the courtroom. n71

If the defendant is living in a foreign country and cannot be served in any of the abovementioned ways, the presiding judge will request the assistance of the competent authorities of the foreign country, or the Japanese consular officers stationed in that country, to effect service of process. n72 The problems of international judicial assistance for service of process abroad will be discussed in detail in the last section of this Chapter.

Where the defendant's domicile, residence, present whereabouts, place of business or office, either in Japan or abroad, is unknown, where service of process abroad in an ordinary manner appears to be impossible or ineffective, or where no certificate of service has been received for more than six months after the date of transmission of the summons and complaint to the competent authorities of the foreign country pursuant to the Hague Conventions, the presiding judge may authorize his clerk, upon motion by the plaintiff, to effect service by way of publication (*koji sotatsu*). This involves posting the summons on the court's notice board and publishing it in the *Official Gazette* or newspapers. n73

Some special measures are provided in the Code of Civil Procedure to insure justice and fairness in proceedings commenced through service of process by publication. For instance, there will be no such constructive admission (*gisei*

jihaku) as is made in the case of default upon actual service of process, but the plaintiff must prove all the facts alleged in the complaint. n74 The court will *ex officio* examine whether it has jurisdiction over the case. n75 Also, the defendant may appeal (*koso*) to a higher court for trial *de novo*, within one week (or two months for a party living outside Japan) after acquiring *actual* knowledge of a default judgment. n76

In *Oka Construction K.K. v. Newland*, n77 a Japanese construction company sued both Aubrey H. Newland and Newland & Co., his Hong Kong corporation, in the Tokyo District Court, to recover plaintiff's share of the construction money which Newland had received from the builder. According to the plaintiff, Newland & Co. had been doing business in Japan on a continuous basis, but had not duly registered its place of business and its representative in Japan as required by Article 479 of the Commercial Code. Newland, who had been acting in the name of Newland & Co., was therefore personally liable to the plaintiff severally and jointly with Newland & Co., under the Commercial Code, Article 481, paragraph 2. Plaintiff proved that Newland's whereabouts were unknown and that ordinary service abroad as provided for by CCP, Article 175 was impossible in Hong Kong. Thus, proceedings against Newland and Newland & Co. were commenced by service by publication, and the plaintiff obtained a judgment against both. About six months later, the plaintiff found a car owned by Newland personally and applied for a compulsory sale of the car. Through this action, the defendant acquired actual knowledge of the litigation and its outcome. The defendant filed a *koso-appeal* within one week of learning of the litigation, and prevented the execution of the judgment, *i.e.*, the compulsory sale of his car. The Tokyo High Court sustained this late *koso-appeal* and reversed the judgment below, finding that since the Hong Kong corporation had in fact duly registered its place of business and representative in Japan by the time the transaction involved took place, Newland was not personally liable under the Commercial Code, Article 481, paragraph 2. The Supreme Court upheld the high court's decision.

[ii] Security for Costs. Where a plaintiff is a nonresident, *i.e.*, a person who has no *jusho* (domicile), office or place of business in Japan, upon the defendant's motion, the court will order the plaintiff to post security for costs. n78 The defendant can refuse to appear until the plaintiff deposits the security with the court, n79 and the court may dismiss the complaint if the plaintiff fails to deposit the security within a specified period of time. n80 However, plaintiffs who belong to countries which are parties to the Hague Convention on Civil Procedure are exempt from the duty to post security for costs. n81

In one case, a Canadian wife petitioning for divorce was not required to offer security because she had been living in Japan for a few years and thus had obtained *jusho*. n82 In another case, it was held that a hotel at which an officer of an American corporation usually stayed while in Japan was not considered an office or place of business within the meaning of the Code of Civil Procedure, Article 107. Therefore, the corporation was ordered to deposit security for costs. n83

Costs contemplated to be covered by the security are mainly possible fees for experts on conflict of laws, patents, medicine, etc., or fees for translators and stenographers. Attorneys' fees are not considered to be costs for litigation in this context. As a rule of thumb, in a typical transnational case, including one for the enforcement of a foreign judgment, Japanese courts will usually order nonresident plaintiffs to deposit yen 1,000,000. The security money will bear interest at 1.2 percent per annum. n84

[iii] Foreign Corporation's and Partnership's Standing to Sue. A foreign corporation intending to do business in Japan on a continuous basis is required under the Commercial Code, Article 479 to qualify as such by registering the local office and the name of the local representative. Article 481 of the same Code prohibits a foreign corporation from engaging in continuous business in Japan until it has so registered.

The old Commercial Code further provided that a foreign corporation's existence would be denied where it had failed to enter the required corporate registration. Therefore, a noncomplying foreign corporation could not bring a suit in its own name. In *Gustat Foch GmbH. v. Maruzen K.K.*, n85 the Great Court of Judicature dismissed an action on a promissory note brought by a German company because although the company had been doing substantial business

through its branch office in Japan, it had neglected the registration requirement.

Despite the old Commercial Code provision, Japanese courts tried to avoid harsh results by according retroactive effect to a registration entered after the accrual of the cause of action. In *Far East Superintendence v. Nihon Seifun K.K.*, n86 the plaintiff English corporation demanded that the Japanese defendant honor a bill of exchange. The defendant refused, denying the corporate existence of the plaintiff, whereupon the plaintiff registered the corporation and sued the defendant. Both the Tokyo District Court and the Tokyo Appellate Court denied retroactive effect to the plaintiff's registration and dismissed the complaint. On appeal, the Great Court of Judicature reversed and remanded, stating that once a foreign corporation entered a registration, its existence could no longer be denied, and it was irrelevant whether the cause of action arose before or after the registration. In *China Traders Insurance Co. v. Tokuda*, n87 the plaintiff Hong Kong corporation, facing the defense of nonqualification, complied with the corporate registration requirement *during* the litigation, and its complaint was sustained.

Such judicial treatment, supported by commentators, forced the legislature to amend the provisions of Article 481. Under the revised statute, a foreign corporation is still prohibited from transacting business in Japan on a continuous basis until it enters the required registration, but the legislature deleted the much criticized language which denied the existence of an unqualified foreign corporation. It is now settled that failure to comply with the Article 481 registration requirement does not impair an unqualified foreign corporation's standing to sue in Japanese courts or affect the validity of a contract made by such a corporation, although the failure may give rise to an administrative sanction. n88

As to the procedural status of a foreign partnership, it now seems well settled that a foreign partnership has full capacity to sue and be sued in its own name, separate from the individual partners. n89 Generally, an unincorporated association or a group of persons having a common interest can sue and be sued if it has a duly appointed representative. n90

[iv] Relief Unavailable in Japan

As to remedies for torts, *Horei* Article 11, paragraph 3 specifically provides that the applicable foreign law of torts notwithstanding, the injured party may only seek such damages and other remedies as are recognized by Japanese law. In other areas too, even if the particular type of relief sought in a suit is available under the applicable foreign law, the Japanese court must dismiss the case where such relief is unavailable in Japan. Of course, ordinarily the presiding judge will give an alien plaintiff an opportunity to amend the complaint so that he can be granted proper equivalent relief, if any is available.

It seems universally accepted that the question of availability of a specific type of remedy is a matter of procedure to be determined by the law of the forum. In *George v. International Air Service Co.*, note 20, *supra*, the Tokyo District Court stated that although California law governed the employment contract, it could issue an order for back pay in dealing with the employee's petition for provisional relief since the question of availability of such provisional salary payment was a purely procedural matter to be determined by the *lex fori.* n91

Practically speaking, there seem to be very few remedies that are unavailable in Japan in transactional cases (nonfamily law cases), but the following deserve mention:

[A] Damages. Only a lump sum judgment is available in an action for damages for tort or breach of contract. *Punitive damages* may not be awarded either in tort or in contract, n92 and *triple damages* are foreign to Japan. n93

[B] Injunctions. Lacking a history of chancery or equity courts, it is tacitly understood in Japan that a court may not grant injunctions or other equitable remedies without statutory authorization. Presently, injunctions are available for infringements of patents, trademarks, copyrights, and other statutorily established industrial property n94 or real property, n95 and for unfair competition n96 or illegal corporate actions. n97 However, they are not generally available for ordinary torts or breaches of contract.

In *The Petition of Deutsche Werft A.G.*, n98 Deutsche Werft A.G., a German company, entered into a technological assistance agreement with the Waukesha Bearing Corp., a Wisconsin corporation, whereby Deutsche Werft granted Waukesha a license to use its know-how to manufacture oil-lubricated stern tube sealings for ship propeller shafts, and Waukesha promised not to disclose or use the know-how outside the United States. However, Waukesha signed a subsequent joint venture contract with Chuetsu Metal Mfg. K.K., a Japanese company, and incorporated Waukesha-Chuetsu Limited for the purpose of manufacturing the same type of stern tube sealings in Japan using the said know-how. Deutsche Werft filed a petition with the Tokyo District Court asking for a provisional disposition enjoining Waukesha-Chuetsu from using the know-how.

The district court ruled that there was no appropriate injunction remedy available in Japan to a holder of know-how where the know-how was infringed by a "third party" because know-how had not yet been established as "a right that is good against the whole world." Thus, the court summarily dismissed the petition. Upon appeal, Deutsche Werft argued that: Waukesha-Chuetsu was but an *alter ego* of Waukesha; Waukesha was abusing the "corporate veil" concept; and, under certain circumstances, contractual rights should be protected by a restraining order against a third party as well as against the contracting party. However, the Tokyo High Court affirmed the lower court's ruling, refusing to pierce the corporate veil. n99 The High Court stated that a holder of know-how could not apply for an injunction against a third party because there were no provisions in the Japanese law affording him such relief.

[C] Provisional Relief. Before commencing a suit, one can file a petition for provisional relief when an emergency so requires. For example, in intercorporate disputes, shareholders or directors may apply for a temporary suspension of the power of the representative director of the company and for the appointment of an acting representative director. n100 When the payment of a debt is endangered, a creditor may obtain a provisional attachment of the debtor's assets in an *ex parte* proceeding. n101 Where an employee's or other claimant's economic life is imperiled, provisional payment of salary or partial payment of claimed damages will be ordered, usually after giving the respondent an opportunity to refute the petition. n102

In addition, it should be noted that such pre-commencement, provisional relief is available in spite of a jurisdictional or arbitral agreement excluding Japanese court jurisdiction, and notwithstanding applicable foreign law to the contrary. n103 Generally, the court is empowered to exercise its discretion in determining the type of necessary provisional disposition, n104 but as illustrated by the *Deutsche Werft* case *supra*, it would be impractical to expect Japanese judges to exercise such discretionary power as is expected in common law countries.

[v] Pendency of Foreign Action. The Code of Civil Procedure, Article 321 provides:

> No party shall bring a suit concerning a matter presently pending before a court.

This is called "prohibition of dual suits." A suit brought *pendente lite* will be dismissed as an illegal suit. No "stay," compulsory or discretionary, is available in such a situation.

The Tokyo High Court has held that "a court" in CCP, Article 231 denotes a Japanese court. Therefore, a plaintiff cannot be prevented from bringing another suit in Japan pending an action previously brought by him in a foreign country, *Republic of China v. K.K. Chinese International Times.* n105

Under this rule, a defendant in a pending foreign action can also commence a counteraction in Japan. In *Toho K.K. v. Hachisuka*, n106 in 1957, Hachisuka and her affiliated California corporation brought an action before the Los Angeles County Superior Court against Toho, a Japanese movie company, and its American representative for damages for tort and breach of contract allegedly committed in Los Angeles. In 1960, pending this action, Toho instituted a suit in Tokyo against Hachisuka, seeking a "negative declaratory judgment" declaring that Toho owed no such tort liability as was claimed by Hachisuka in the California court. With the *Republic of China* case in mind, defendant Hachisuka raised no

objection to the legality of this action by Toho, and the Tokyo District Court entertained Toho's action without saying anything about the prohibition of dual suits. As a court not only has the power, but also a duty to examine whether CCP Article 231 is violated or not, it is understood that the Tokyo District Court took it for granted that Toho, a defendant in the pending foreign action, could commence another action in Japan without any procedural barrier. n107

Similarly, in *K.K. Kansai Tekko-sho v. Marubeni-America, Inc.*, n108 Kansai, a cross-complaint defendant in a then pending Washington product liability suit, brought an action in the Osaka District Court against Marubeni-America, the cross-complainant in the Washington suit, seeking a negative declaratory judgment that Kansai owed no such obligation to indemnify the American importer as was claimed in the Washington case. The Japanese court entertained the action and, upon Marubeni-America's default, rendered a judgment on the merits in favor of Kansai. This Osaka judgment worked later as a bar against the attempted enforcement of the Washington judgment in Japan. n109

At present, international double litigation seems to be unavoidable, as it is not prohibited in any country. Since no court can enjoin another country's court from proceeding upon a conflicting action, conflicting judgments may be rendered in two countries. This problem will be discussed in the section dealing with enforcement of foreign judgments.

[vi] Statutes of Limitation and No-Action Clauses. An obligation-right must be exercised within a certain period of time after its accrual. This time limitation is generally called *jiko*, extinctive prescription. For instance, an obligation-right as to merchandise prices must be exercised within two years. Medical fees are subject to a three-year limitation. Ordinary contractual rights are subject to extinctive prescription after ten years, n110 but between merchants, five years. n111 A tort claim must be exercised within three years after the injured party acquires knowledge of the identity of the wrongdoer, and in any case, within 20 years after the commission of the tort. n112

In Japan, the obligation-right is considered to be extinguished with the passage of the time limitation. Consequently, statute of limitation questions are characterized as substantive rather than procedural and are to be determined by the law governing the substance of the obligation-right.

In *Cassel v. Tokyo Nylon K.K.*, n113 for example, a New York lawyer was permitted to collect legal fees from a Japanese client after the running of the Japanese two-year time limitation. The plaintiff worked for the defendant Japanese company in connection with some joint venture negotiations in New York. The defendant agreed to pay $50 per hour for plaintiff's legal services. On October 14, 1964, the plaintiff billed $2,000, but the defendant refused to pay in full, apparently dissatisfied with the outcome of the negotiations. On August 4, 1968, the plaintiff brought suit before a Japanese court sitting at the defendant's place of business. According to the Japanese Civil Code, an attorney's fee claim will be extinguished by virtue of extinctive prescription unless exercised within two years after the completion of the legal services. However, under the New York statute of limitation, such a contractual claim can be exercised within six years after the accrual of the cause of action.

The defendant argued that the Japanese Civil Code prescription was applicable as the *lex fori* since the issue was concerned with procedure. However, the court stated that inasmuch as the issue affected the life of an obligation-right, it had to be decided by the law governing the substance of the particular obligation-right. Since the obligation-right arose under the legal service contract entered into in New York, it was governed by New York law in the absence of the parties' intention to choose other law. Thus, the court applied New York law and sustained the New York lawyer's complaint. n114

In this connection, it is worth mentioning here that the validity of "no-action" clauses restricting the time of an action has been upheld in Japan. For example, in *Allied Industrial Corp. v. Great American Insurance Co.*, n115 the defendant, an American insurance company doing business in Japan, insured the plaintiff against theft or embezzlement by its employees. One of the plaintiff's American employees stole and embezzled corporate money, and suit was brought on the employee fidelity insurance policy. The Commercial Code, Article 663 provides that a claim on an insurance policy can be exercised within two years after its accrual, but the defendant pleaded that there was a clause in the policy stating

that no action could lie unless brought within six months after the notice of the claim. The plaintiff brought suit a few months after the stipulated time limitation had run, arguing that such a private limitation on the commencement of suit should not be upheld because it was against Japanese public policy. However, the Tokyo District Court rejected this argument:

> The clause under discussion is an agreement that the insured shall not sue after the stipulated period of time has run. Viewed from the general purposes of civil procedure, there seems to be no reason why such agreement should be deemed to be against public policy. The stipulated period of time does not seem to amount to an unreasonable restriction on the right to sue.

From the viewpoint of contract law, the above no-action clause can be considered a special kind of resolutory condition similar to a common law "condition subsequent." A suspensive condition type of no-action clause was also upheld in *Cress v. Home Insurance Co.*, n116 in which the validity of the following standard no-action clause in an automobile insurance policy was questioned:

> No action shall lie against the company until the amount of the insured's obligation-duty to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company. Nothing contained in this policy shall give any person any right to join the company as a co-defendant in any action against the insured to determine the insured's liability.

The plaintiffs, the heirs of an automobile accident victim, nevertheless sued the American insurance company directly and argued that the no-action clause was a "procedural" agreement designed to restrict the injured party's (or his heirs') "right to sue" and, as such, violated Japanese public policy concerning civil procedure. However, the Tokyo District Court interpreted the clause to be a "substantive" agreement providing for a suspensive condition dependent on the coming into existence of the insurance company's obligation-duty to indemnify the insured. Since an automobile owner was not legally required to insure himself for more than a certain amount (now yen20,000,000, then yen500,000), n117 the court stated that such a no-action clause in an insurance policy could not be regarded as violative of public policy so far as the amount in excess of that compulsory insurance money was concerned.

The plaintiffs also argued that the no-action clause amounted to an "impossible condition" designed to deprive the injured party of any remedy where the insured's whereabouts were unknown or, as in this case, the insured (the negligent party) died in the automobile accident, for in such a situation the injured party (or his heirs) might not be able to obtain a judgment against the insured (or his heirs) after "actual trial." The defendant insurance company responded that the requirement of "actual trial" would be satisfied by bringing a suit in Japan against the insured or his heirs through service by publication, Japan being entitled to exercise jurisdiction over the case because the accident took place in Japan. n118 The court sustained the defendant's view and the Tokyo High Court affirmed.

[3] Applicable Laws and Proof of Foreign Law

[a] Choice of Law Rules

There have been no significant developments seen in the Japanese choice of law rules in the past 15 years. *Yamada v. Kuramoto*, (Osaka Dist. Ct., 1987), 31 JAIL 218 (1988), however, may deserve mention here. The plaintiff, a Japanese student sitting in the passenger seat of an automobile was seriously injured in a car accident in California. The driver, another Japanese student, was killed in the same accident. Alleging that the driver was negligent, the plaintiff sued the deceased driver's parents in Osaka. Under the Japanese tort and succession law, the legal heirs (including parents, in the absence of any children) become successors to the whole of the deceased's assets and liabilities. Under California law (law of the place of tort), however, the Osaka District Court found that the deceased's estate, but not the heirs, were directly responsible for the damages sustained by a third person injured due to the negligence of the deceased. Thus, the court dismissed the plaintiff's claim against the Japanese parents, holding that pursuant to *Horei* Article 11, such a claim

can be sustained only if (and to the extent that) both California and Japanese laws recognize it.

[i] Preliminary Notes

[A] ***Horei*** (Act Concerning Applications of Laws). In dealing with a transnational civil case, the court must determine which country's law governs the substance of the claim. The Japanese rules concerning choice of law are codified in the Act Concerning Applications of Laws (*Horei*). n119

[B] Governmental Regulations. Today, a number of statutes and executive orders of various countries restrict the scope of freedom of contract in every field of international transactions. There are trade regulations, foreign exchange restrictions, foreign investment controls, doing-business qualifications for foreign corporations, antitrust regulations, and so forth. Needless to say, these regulatory laws displace the ordinary choice of law rules as to those matters subject to their direct regulation. However, these regulatory statutes and executive orders do not usually affect ordinary contract issues such as capacity to contract, scope of an agent's authority, misrepresentation, mistake, warranty, impossibility, frustration, risk of loss, statutes of limitation, and the like. As the Japanese trade regulations will be discussed elsewhere, n120 this section will concentrate on the normal choice of law rules in Japan.

[ii] Contracts

[A] Party Autonomy

Horei Article 7 provides:

> (1) With regard to the formation and effect of a juristic act, the question as to which country's law is to govern shall be determined by the intention of the parties.
>
> (2) In the cases where the intention of the parties is unclear, the law of the place where the act is done shall govern.

[I] Express Choice A juristic act (*horitsu koi*) is an act to effect a juristic (legal) consequence according to the manifestation of intention of the party or parties, such as a waiver and release (unilateral juristic act), and a contract (bilateral juristic act). n121 Under paragraph 1, the parties to a contract are accorded "party autonomy," *i.e.*, the freedom to choose the governing law. n122 In Japan, the parties' choice is decisive, rather than merely a circumstantial factor in the determination of the governing law. Moreover, *Horei* does not require "substantial contacts" or "reasonable relationships" or "good faith" in the parties' choice of the governing law. n123 This principle of party autonomy extends to all types of contract and all contractual issues, with a few exceptions to be discussed later on.

[II] Implied Choice. Even where the parties to a contract have not expressly chosen the governing law, Japanese courts will try to ascertain the intention of the parties through examination of the parties' nationalities, the language in which the contract was written, and other circumstances attending the contract-making process. For example, in *Bank of India v. Hatailamani*, n124 a current account contract between the Osaka Branch of the Bank of India and an Indian partnership was held governed by Indian (*i.e.,* Anglo-American) partnership law principles with respect to the issue of whether a former partner had been released from his joint and several liability to the bank for earlier overdraftings. The bank account contract was made in Japan and related to business in Japan. However, the court emphasized that the parties involved were all Indians and all documents were written in English, and that the contract had been made in disregard of the standard bank contract forms recommended by the Bank of Japan.

In *Bolonakis v. Singer Sewing Machine Co.*, n125 the respondent, a New Jersey corporation, employed the petitioner, an American citizen, as a general manager of its Japanese branch for a period of unspecified duration. The petitioner was dismissed after about one year, allegedly without justifiable reason. Challenging the validity of the dismissal, he filed a petition for payment of unpaid salary as a provisional disposition according to the Japanese Code of Civil Procedure.

However, the Tokyo District Court turned down the petition. In the case of a large company in Japan, employment for a period of unspecified duration means for life, and dismissal without cause is regarded as abuse of the employer's rights. However, the present employment contract was made between American nationals in New York and was drafted in English. In addition, payment of the petitioner's salary was partially to be made in New York. Under the circumstances, the court found that the parties had impliedly chosen New York law as the law governing the employment although the services were to be rendered in Japan. Relying on New York case law, the court concluded that the dismissal was valid.

In this particular case, the court could have reached the same conclusion by simply applying paragraph 2 of *Horei* Article 7, but Japanese courts generally refrain from directly applying that paragraph without making any effort to find implied choice of law by the parties. Such a judicial attitude, encouraged by most commentators, makes the Japanese rule almost the same as the modern American approach of "center of gravity" or "the most significant relationship," n126 except that the parties' express choice is decisive in Japan, but not necessarily so in the United States.

[B] Lex Loci Contractus. Where the parties to a contract did not choose the governing law at the time of contracting and the court cannot find any reasonably implied choice of law by the parties, under *Horei* Article 7, paragraph 2, the law of the place of contracting (*lex loci contractus*) governs the formation and effects of the contract.

As to contracts made by correspondence "*inter absentes*" or between persons in different places, *Horei* Article 9, paragraph 2 states:

> For the formation and effects of a contract, the place from which the offer is dispatched shall be regarded as the place of the act. In the cases where the offeree is unaware, at the time of his acceptance, of the place from which the offer has been dispatched, the place of the offeror's domicile shall be regarded as the place of the act.

Therefore, if a Japanese exporter A offers by mail or telex to sell some goods to a U.S. importer B, and B accepts, Japanese law governs the sales transaction in the absence of the parties' intention to the contrary. n127 [However, it should be noted that acceptance with qualifications is not an acceptance but an offer (counteroffer)]. n128 Of course, where an agent of a Japanese principal is a resident of France or goes to France and enters into a contract with a French company, the contract is not a contract *inter absentes* or between persons in different places. Therefore, even where the principal in Japan instructs his agent in France to make a specific offer to the French company and it accepts such offer, Japan is not the place of contracting as defined by *Horei* Article 9, paragraph 2. n129

[C] Particular Issues

As mentioned above, the law expressly or impliedly selected by the parties or, in its absence, the law of the place of contracting determines the formation (*seiritsu*) and effects (*koryoku*) of a contract. *Seiritsu* means the "coming into existence," "creation," or "formation" of a contract. *Koryoku* refers to the "validity" or "legal consequences" of the contract or the "substantive contents" of the obligation-rights and obligation-duties arising under the contract.

Thus, subject to a few exceptions to be discussed below, the governing law under *Horei* Article 7 covers all imaginable contractual issues, such as questions of offer and acceptance, formalities (statutes of frauds), integrity, the essential validity (necessity of consideration, mutuality, etc.), interpretation and construction, suspensive and resolutory conditions, breach of contract and remedies therefor, discharge, acts of God, impossibility, excuse for nonperformance, and statutes of limitation. In short, *Horei* adopts a whole contract approach rather than an issue-by-issue approach.

[I] Capacity to Contract. There are, however, a few exceptions to the above rule. One of them is provided in *Horei* Article 3 with respect to capacity to contract:

> (1) The legal capacity of a person shall be governed by the law of the country of which he is a national.

> (2) In the case where an alien who does not have legal capacity according to the laws of the country of which he is a national but who has legal capacity according to Japanese law, commits a juristic act in Japan, such person shall be regarded as having legal capacity notwithstanding the provisions of the preceding paragraph.
>
> (3) The provisions of the preceding paragraph shall not apply to juristic acts governed by the Family Law or the Law of Succession n130 or to juristic acts relating to immovables situated abroad.

Under *Horei* Article 3, it is clear that whether a person is above or under legal age is to be determined by the law of the country of which he is a national. However, it is generally accepted that whether or not a married woman has capacity to enter into a binding contract is more a question as to the effects of marriage than as to her capacity; hence it is to be determined not by the law of her nationality, but by the law of the country of which her husband is a national according to *Horei* Article 14. As to incompetency or quasi-incompetency due to mental unsoundness, deafness, blindness, or because a person is a spendthrift, there are also special provisions in *Horei*. n131 However, it is agreed that Article 3, paragraph 2 (the principle of *favor negotii*) should equally apply to a transaction in Japan by a married or incompetent alien as well as by a minor.

The rule of *favor negotii* does not apply to a transaction involving immovables situated in a foreign country. n132 Here, according to the basic rule of paragraph 1, the law of the country of which a person is a national determines the issue of capacity. Nevertheless, even under *Horei* Article 3, paragraph 1 or paragraph 3, there is a possibility that Japanese courts will apply Japanese law by reason of *renvoi*, n133 where, with respect to the issue of capacity, the whole law of the country of the person's nationality dictates application of the law of the person's domicile and the domicile is in Japan. n134

[II] Formalities. As to the formalities of a contract, *Horei* Article 8 provides:

> (1) The formalities for a juristic act shall be determined by the law governing the effects of such act.
>
> (2) Formalities in compliance with the law of the place of the act shall be deemed valid notwithstanding the provisions of the preceding paragraph, provided that this shall not apply to the juristic acts either creating or disposing of real rights or of other rights which must be registered.

Since the law selected by the parties or, in its absence, the law of the place of contracting governs the effects of a contract, the formality requirements (statutes of frauds) are satisfied if the contract complies either with the law chosen by the parties or with the law of the place of contracting.

Under the Japanese general law of contracts, there is no statute of frauds or parol evidence rule. No contract will be held unenforceable merely because it was made orally. Thus, in *Marubeni I'ida K.K. v. Ajinomoto K.K.*, n135 an oral $1,500,000 sales contract was held binding and enforceable. Also, in *Compania de Transportes del Mar S.A. v. Shin Nomura Trading K.K.*, n136 an international charter party was found to have been consummated when the parties reached a mutual agreement, without final execution of documents. In both cases the governing law was Japanese law.

[III] Interpretation of Foreign Terminology. When foreign terminology is employed in a contract, it is reasonable to determine its meaning with reference to the law of the country of that language without regard to what law governs the contract in general. Thus, in determining the legal meaning of "option" (the right to accept or reject an irrevocable offer), a Japanese court referred to Anglo-American contract law although the contract involved was made in Japan in connection with immovables located in Japan and thus subject to Japanese law. n137 In *Oppenheim v. Greenberg*, n138 the Supreme Court directed the lower court to consult U.S. partnership law as to whether a withdrawing law partner was entitled to the refunding of "key money" previously contributed by him for the purpose of establishing a joint law office in Tokyo with another American lawyer qualified to practice law in Japan.

[IV] Details of Performance. The modes and minor details of performance are often said to be governed by the law of the place of performance (*lex loci solutionis*). However, that law is only applicable to the extent it is consistent with the principal governing law under *Horei* Article 7 or with the parties' intention. Examples of relevant issues are days of the week and business hours during which delivery may be tendered, the currency in which a debt may be discharged, and measurements (the metric or non-metric system).

[V] Assignment. As to an assignment of a contractual right, *Horei* Article 12 states:

> The law of the place of the obligor's domicile shall govern the validity of an assignment of an obligation-right against third persons.

This Article is interpreted very narrowly. Only such issues as whether it is necessary for assignor A to give advance notice to obligor B or to obtain B's advance approval in order to effect the assignment; whether and how assignee C can demand B's performance where B has already performed his obligation to A or to another assignee D or garnisher E, and whether C can demand D or E to return the thing or money B delivered or paid, will be decided by the law of the country in which obligor B ordinarily resides. n139

[VI] Agent. Where a contract is made through an agent, the scope of his authority is primarily determined by the law governing the power of attorney--*i.e.*, in an ordinary case, the law governing the contract for the employment of the agent. n140 Where the agent exceeds or entirely lacks such authority, the question of validity or ratification of a contract made by him is determined by the law governing that contract, not by the law governing the power of attorney, since this is one of the questions concerning the effects (*koryoku*) of the contract. n141

Commentators maintain that a principal should not be bound by an unauthorized contract unless the law governing the power of attorney so holds. However, one case held that in light of the principle of *favor negotii* expressed in *Horei* Article 3, paragraph 2, a principal is liable for an unauthorized act by his agent if the law of the place of contracting so dictates. n142

An agent's commission and other problems between a principal and his agent are, of course, determined by the law governing the power of attorney. However, where the principal has never given the apparent agent any authority, the relationship between the two is not a contractual one, but rather a kind of "voluntary management of affairs" or tort. Thus, it is subject to the law of the country in which the unauthorized act took place. n143

[D] Bills, Notes, and Checks. Japan is one of the original members of the 1930 and 1931 Geneva Conventions for the unification of laws concerning bills of exchange, promissory notes and checks, and for the settlement of certain conflicts of laws in connection with these negotiable instruments. n144 The Bills of Exchange and Promissory Notes Act n145 and the Checks Act, n146 which codified those Geneva Conventions, contain conflicts rules that modify the general rules laid down by *Horei*.

Under these laws, the capacity of a person is primarily determined by the law of his country, but where his country's conflicts law dictates the application of the law of another country (*e.g.*, the law of his domicile), this latter law is applied, regardless of whether such country is Japan or not; even where a person lacks capacity under his country's law, he is bound by an instrument if he has the requisite capacity under the law of the country in which he signs the instrument. n147 (It should be noted that the principle of *favor negotii* applies here even where Japan is not the place of contracting.)

As to formalities, the law of the place of contracting (the law of the place where a party affixes his signature on the instrument) applies. However, where the obligation-duties entered into on the instrument are invalid at the place of contracting but are valid at a place where a subsequent contract is entered into on the instrument, the subsequent contract will not be invalidated because of the formal defects of the previous contract. n148

The obligation-duties of the acceptor of a bill of exchange or maker of a promissory note are determined by the law of the place where these instruments are payable. n149 The effects of the signatures of other parties are determined by the law of the country in which the respective signatures were affixed. n150 In the case of a check, the law of the country in which a party affixed his signature determines his obligation-duties arising under the check. n151 The question of whether acceptance may be limited to part of the sum or whether a holder is bound to accept partial payment is determined by the law of the place where the instrument is payable, n152 as are the measures to be taken in case of loss or theft of the instrument. n153 However, the time limit for the exercise of the right of recourse is determined by the law of the place where the instrument is issued. n154

[iii] Torts and Other Noncontractual Obligations

Hovei, Article 11, paragraph 1, provides:

> The formation and effect of obligation-rights arising from the voluntary management of affairs, unjust enrichment or torts, shall be governed by the law of the place where the events giving rise to such obligation-rights have occurred.

In cases of noncontractual obligation-rights, the Japanese courts have applied this Article even where the obligation-right does not squarely fall within the voluntary management of affairs (*jimu-kanri*), unjust enrichment (*futo-ritoku*), or tort (*fuokoi*). n155

[A] Voluntary Management of Affairs

Voluntary management of affairs (*jimu-kanri, negotiorum gestio, Geschaftsfuhrung ohne Auftrag*), is a voluntary intervention such as the rescue of a drowning child or a mountain climber in distress, the salvage of a vessel, n156 or the emergency repair of an absent neighbor's roof damaged by a typhoon. Such a voluntary action is ordinarily regarded as a praiseworthy human activity, but sometimes may be condemned as "officious intermeddling," depending on the circumstances. n157 In any event, the question of whether a particular voluntary intervention gives rise to a claim to recover expenses incurred is determined by the law of the place where the act was done.

[I] Unauthorized Agents and Principals. The relationship between an apparent agent or unauthorized agent and a principal is considered to be that of "voluntary management of affairs" if the principal has benefited from the agent's act. Accordingly, it is governed by the law of the place where the agent's act was done.

[II] Unrequested Suretyship. It has been held that where a person becomes a surety of the principal debtor without being requested by the latter to do so, the relationship between the two is that of *negotiorum gestio*, and the applicable law is determined by *Horei* Article 11, paragraph 1. n158

[B] Unjust Enrichment. Restitution of unjust enrichment (*futo-ritoku, ungerechtfertigte Bereicherung, enrichissement sans cause et enrichissement injuste ou illegitime*) is claimed in respect to, *e.g.*, money paid or things delivered by mistake or pursuant to an ineffective contract or a *quantum meruit* for work done or services rendered under a contract found to be null and void. Such a claim for restitution is governed by the law of the place where the causal facts occur, *i.e.*, where the act of enrichment takes place. For example, where A has had B's car painted without B's approval or knowledge, the question of whether A can recover the painting expenses from B on the basis of unjust enrichment is determined by the law of the place where A has had the car painted, under *Horei* Article 11, paragraph 1.

As in the case of *negotiorum gestio*, the Japanese courts have seldom been confronted with international conflicts involving unjust enrichment. The only directly applicable case appears to be *Interocean Union Lines v. K.K. Banno Bros.* n159 in which the defendant chartered and used the plaintiff's vessel without obtaining the necessary governmental permit in accordance with the Japanese foreign exchange and trade control law. The district court found

that the charter party was illegal and void, but ordered the defendant to restore the enrichment obtained through the ship services rendered by the plaintiff under the void contract. The Japanese law of unjust enrichment was applied because the ship had been delivered to a Japanese port for the defendant's use.

[C] Torts

As to the law governing tort liability, *Horei* Article 11, paragraphs 2 and 3, provides for the application of the *lex fori* rather than the *lex loci delicti commissi* in certain cases. The result is very close to the English approach. n160

> (1) The formation and effect of obligation-rights arising from the voluntary management of affairs, unjust enrichment or torts, shall be governed by the law of the place where the events giving rise to such obligation-rights have occurred.
>
> (2) The provisions of the preceding paragraph shall not apply to torts in the cases where the events occurring in a foreign country are not unlawful according to Japanese law.
>
> (3) Even when events occurring in a foreign country are unlawful according to Japanese law, the injured person may claim compensation only for damages or other remedies recognized by Japanese law.

[I] Place of Wrong. There is a question as to whether the place of wrong under *Horei* Article 11, paragraph 1, refers to the place of the misconduct or the place of the injury. (In determining the basis of jurisdiction, this question is not so important inasmuch as both countries involved may have jurisdiction over the same tort. n161 However, here the question is A *or* B, not A *and* B.) Some writers claim that the law of the place of the misconduct prevails because it would be unjust to treat the defendant (actor) in accordance with law other than that of the place where he does the act. However, more commentators favor the law of the place of the injury. By way of compromise, a recent view asserts that as regards torts involving manufacture of modern products or the operation of factories, the law of the place of the injury should govern.

In *Toho K.K. v. Hachisuka*, n162 the court was bold enough to state that where "a part of" the injury occurred in Japan, the law of Japan "alone" determined the existence and contents of the alleged tort liability. According to Hachisuka's allegations, Toho's representative came to Los Angeles where he committed fraud or misrepresentation concerning the exportability to Japan of an American motion picture. Relying on his words, Hachisuka borrowed $14,000 for the purchase of the film through her affiliated California corporation. She also went to Japan and stayed a few weeks in Tokyo for purposes of negotiation, thus spending quite a substantial sum of money. The alleged damages included such amounts and the profits expected from the showing of the film in Japan. Although Hachisuka was at that time living in Los Angeles under a permanent resident visa, the court held that Japan was the place of injury and that, in light of *Horei* Article 11, paragraphs 2 and 3, the case was to be decided by Japanese law "alone". The court found that the parties had merely entered into a joint speculative enterprise; that Hachisuka voluntarily contributed the 14,000 U.S. dollars; and that the speculation failed because of Japanese import regulations. Thus, the alleged facts did not constitute a tort under Japanese law. (It would seem that since Hachisuka's tort claim was to fail under *Horei* Article 11, paragraph 2, the court need not have determined where the place of the wrong was under Article 11, paragraph 1).

[II] Japanese Tort Law. Because of *Horei* Article 11, paragraph 2, if a suit is to be filed in Japan, it is essential to know what constitutes a tort under Japanese law irrespective of the law of the place of the wrong. Except for special statutory torts such as infringement of a patent or other industrial property rights, n163 fires, n164 automobile accidents, n165 mining pollution, n166 or nuclear pollution, n167 the Civil Code Article 709 generally determines the creation and effects of tort liability: "A person who intentionally or negligently violates the rights of another is obligated to compensate for damages arising therefrom." Under this "*all-inclusive* unitary tort" provision, n168 the Japanese courts have developed a surprisingly comprehensive tort law; thus, most torts that are recognized under American law, from battery, assault, and trespass to wrongful death on sea or land, defamation, nuisance, privacy, and product liability, n169

are also actionable in Japan under Civil Code Article 709. The Civil Code also contains provisions regarding *solatium* for pain and suffering, vicarious liability for acts done by one's child or employee, maintenance of defective buildings, joint tortfeasors and comparative negligence. n170

[III] Remedies Available Under Japanese Tort Law. As discussed earlier, damages for torts are awarded on a lump sum basis only; there are no punitive damages; and the injunction remedy may be invoked only under special statutes. n171 In the case of defamation, public announcement of apology can be ordered. n172

[iv] Property

[A] The Lex Situs Rule. Real rights (*bukken, ius in rem, droit reel, Sachenrecht*, right *in rem*) such as ownership, possession, hypothec, pledge, lien, etc., over both movables and immovables are generally governed by the *lex situs. Horei* Article 10 provides:

> (1) Real rights (*bukken*) and other rights which are to be registered shall be governed by the law of the place where their subject is located.
>
> (2) The acquisition or loss of rights referred to in the preceding paragraph shall be governed by the law of the place where their subject is located at the time when the said acquisition or loss is completed.

The *lex situs* determines, first of all, what types of real rights are entitled to recognition. For example, French law imposes a compulsory hypothec on a husband's immovables in favor of his wife, but such a property interest is not recognized so far as immovables situated in Japan are concerned. Whether possession is regarded as a right *in rem* separate from that of ownership depends on the *lex situs.*

The *lex situs* also determines requirements of registration, delivery, or possession for the creation, existence, or transfer of a particular real right. n173 For example, ownership, hypothec, and other real rights over immovables in Japan are not effective *vis-a-vis* third parties unless they are registered in the Immovables Register. n174 A holder of an American mortgage on an American car may lose its protection as soon as the car is brought to Japan unless he enters the registration according to the Automobile Hypothec Act. n175

[B] Particular Issues

[I] Passage of Title and Risk of Loss. Where acquisition, transfer, etc. of a real right is effected through a contract, a conflict arises between the *lex situs* and the *lex contractus.* For example, A contracts in Japan with B to sell a house in Germany. If the parties choose Japanese law or do not stipulate as to the governing law, the sales contract is governed by Japanese law. n176 Under Japanese law, where a specific thing such as a house is sold, title passes, as between the parties, as of the time of contracting in the absence of a contrary stipulation. n177 Under German law, however, title passes only by registration. The question thus arises as to when title passes from A to B. Despite the sales contract provisions of *Horei* Article 7, it is unanimously accepted that since the transfer of title, *i.e.*, the acquisition and loss of a right *in rem*, is specifically mentioned in *Horei* Article 10, paragraph 2, the *lex situs*, German law, determines when title passes in this case.

As to risk of loss, although in many countries risk of loss and transfer of title are considered to be interchangeable, the Japanese Civil Code treats the two matters independently. n178 As a result, it is accepted in Japan that risk of loss is determined by the law governing the contract pursuant to *Horei* Article 7. n179

[II] Stoppage in Transitu. The common law institution of an unpaid seller's right of stoppage *in transitu* is unknown to most civil law countries, including Japan. In *Siebel Hagner & Co. v. The Peninsular & Oriental Steam Navigation Co.*, n180 an English company A sold some steel plates situated in Antwerp, Belgium to B, a German company. B caused the goods to be shipped from Antwerp to Yokohama, Japan, by the defendant's vessel and acquired

the bill of lading. In Antwerp, B resold the goods on the vessel and endorsed the bill of lading to C, another German company. In Zurich, Switzerland, C in turn sold the goods in transit and re-endorsed the bill of lading to the plaintiff, an English company. B failed to pay A for the goods, and A exercised the right of stoppage *in transitu* and instructed the defendant carrier to refuse to deliver the goods to the plaintiff and to retain the goods for A. The plaintiff, the holder of the bill of lading, sued the defendant carrier for surrender of the goods.

The Yokohama District Court stated that an unpaid seller's right of stoppage *in transitu* is a matter of real rights within the meaning of *Horei* Article 10, paragraph 1, because (1) it is a device to enable the unpaid seller to resume "possession" of the goods to be sold (indirect possession through the carrier), and also because (2) the immediate question was whether the carrier who wasn't a party to the sales contract had a "retention right" with respect to the goods as against the present owner, namely, the holder of the bill of lading embodying the title to the goods. Therefore, Japanese law was applicable as *lex situs*. Thus, since an unpaid seller's right of stoppage *in transitu* is not recognized in Japan and no such "retention right" is given to the carrier under Japanese law, the court ordered the defendant carrier to surrender the goods to the plaintiff. It is significant that the plaintiff in this case was not the original purchaser but a *bona fide* subsequent purchaser of the goods while in transit.

Where the *original* purchaser is claiming the delivery of goods and where the sales contract and bill of lading are governed by Anglo-American law, Japanese courts protect the unpaid seller's justified expectation. In fact, two years after the *Siebel Hagner* case, *supra*, the Great Court of Judicature sustained a U.S. seller's stoppage *in transitu* in *Beckel & Co. v. Canadian Pacific Ry. Co.'s Royal Mail Steamship Line*. n181 In that case, no subsequent *bona fide* purchasers were involved, and the carrier was able to stand directly in the seller's place.

[III] Maritime Liens and Ship Mortgages. Although mortgages and liens are rights *in rem*, the issue of priority or ranking among liens or mortgages on a vessel is decided by the law of the country in which the vessel is registered--an exception to *Horei* Article 10. Thus, in *Texaco Inc. & Caltex Overseas, Ltd. v. National Bulk Carriers (The Rocky Point)*, n182 U.S. maritime law was applied in determining the priority between preferred liens on an American vessel. However, all the parties involved in that case were Americans. In an old case involving a Japanese *bona fide* creditor, the Russian Government's mortgage on a Russian ship was denied priority over that of the Japanese creditor because the ship mortgage had never been registered or otherwise made knowable to third parties. n183

[IV] Pledge of Bank Deposits. Not only real property (movables and immovables), but also an obligation-right (*saiken*, a contractual right such as a bank deposit) may be an object of a pledge. However, an obligation-right is personal and has no *situs.* Therefore, a pledge of an obligation-right is governed by the law which governs the substance of the obligation-right. In connection with a garnishment by a Japanese creditor of a Chinese debtor's time deposit claim against the Tokyo branch of a Thailand bank, Japanese law was held applicable to the issue of the validity of the pledge of the time deposit claim *vis-a-vis* the creditor although the time deposit certificate was then in the possession of the Hong Kong branch of the bank, *Sakurai v. Bangkok Bank.* n184 Unlike a negotiable instrument, according to the court, the certificate was not a movable but rather a mere document evidencing the existence of the time deposit claim, and the validity and effects of the pledge of the time deposit claim had to be determined by the law governing the time deposit contract. As the contract was entered into in Japan according to Japanese banking customs without any stipulation as to the governing law, it was governed by Japanese law under *Horei* Article 7.

[V] Marital Property and Succession. As to questions of marital property, *Horei* Articles 14 and 15 specifically refer to the law of the country of which the husband is a national, and as to questions of succession (inheritance), *Horei* Articles 25 and 26 dictate application of the law of the decedent's country. In these matters, *Horei* does not distinguish between movables and immovables. This is the so-called unitary system as compared to the scission system adopted in common law countries. However, it is important to note that by virtue of *renvoi*, n185 Japanese law may become applicable, resulting partially in the common law scission system. For example, in *Yamada v. Denimson*, n186 a husband and wife, U.S. citizens domiciled in Japan, owned movables and immovables both in Japan and in the United States. As to the issues of the marital property system and succession, *Horei* required reference to the law of the

couple's home state whose conflicts law in turn dictated application of Japanese law as to all movables because it was the *lex domicilli*, and also application of Japanese law as to immovables situated in Japan because it was the *lex situs.*

The *renvoi* rule must particularly be kept in mind in estate planning because the Japanese Civil Code, like other continental civil codes, imposes "forced heirship" (*iryubun*) whereby spouses, children and parents receive a portion of a decedent's estate in disregard of the decedent's will. n187

[b] *Lex Fori* Preference

It has often been pointed out that a court generally tends to apply the local law of the state in which it sits. A New York court quite frankly stated, "Basically it is our law that governs from the mere fact that the litigation is before us; it is a truism that a case before the courts of New York is to be decided by New York law." n188 The mechanical black-letter rules laid down in the 1934 Restatement of the Conflict of Laws have been much criticized and discarded in the United States. In Japan, however, the black-letter rules provided for in *Horei* have been faithfully adhered to, and Japanese courts have shown no notable preference for the law of the forum so far as commercial transactions (contracts, torts, property) are concerned.

The devices most commonly used to enable judges to apply their own law are "characterization," "renvoi," and "public policy." n189

[i] Characterization: Substance or Procedure

In Anglo-American choice of law practice, the technique most often employed to achieve the application of *lex fori* is substance-procedure characterization. In Japan, however, the substance-procedure characterization is not prevalent, and standard textbooks have paid no special attention to it. The word "characterization" is exclusively used on the substantive law level, *e.g.*, in determining whether an issue is a matter of contract or tort, and courts and commentators seem to have paid little attention to whether courts can apply Japanese law as a result of such substantive characterization.

[A] Statutes of Limitation. As previously explained in detail, it is understood in Japan that a statute of limitation goes to the substance of the obligation-right and obligation-duty in question. Thus, a New York lawyer was able to recover his legal fees after the Japanese three-year statute of limitation had run, but before the New York six-year limitation expired. n190 The court specifically rejected the defendant's argument for procedural characterization.

[B] Rules of Evidence. Although rules of evidence are the heart of trial procedure, Japanese courts have often applied foreign rules of evidence, even where the substance of the claim was greatly affected. For example, in *Tsuji v. British India Steam Navigation Co.*, n191 the defendant carried several cartons of sheepskins from India to Hong Kong, from where another steamship company carried them to Yokohama. Upon arrival at the Yokohama Port, it was found that a part of the goods had been stolen. In an action brought by the consignee for damages, the court applied British law, the law governing the successive carriage contract, to determine the defendant's liability. It was shown that under British law, an "entire loss" of goods is *prima facie* presumed to have occurred during the carriage by the first carrier, whereas "damage" to or "partial loss" of goods is presumed to have occurred during the carriage by the last carrier. Since the plaintiff could not present any evidence to rebut this *prima facie* presumption, judgment was rendered against the Japanese consignee in favor of the English first carrier.

In an action for enforcement of a London arbitration award, the defendant Japanese company alleged that there had been a prior understanding between the parties that a dispute as to whether the Japanese company did its "best" to obtain the necessary Japanese Government approval for the subject-matter transaction was to be outside the scope of the arbitration clause although the clause unqualifiedly stated, "*Any* dispute arising under this Agreement shall be finally settled by arbitration in London." However, the Tokyo District Court did not permit the defendant to produce a witness to substantiate that allegation, ruling that under English law, the law governing the agreement including the arbitration

clause, parol evidence may not be produced for the purpose of contradicting a written agreement. n192

[C] Interest on Judgment. This is considered in Japan to go to the substance of the claim as a matter of course. Accordingly, the rate of interest is determined by the law governing the claim, not by Japanese law as the *lex fori.* n193

[D] Provisional Remedies. In *George v. International Air Service Co.*, n194 as a pretrial provisional remedy, the Tokyo District Court ordered the respondent California company to pay unpaid salary to the petitioner, a dismissed employee. In rejecting the respondent's contention that no such remedy was available for a dismissed employee under California law, which governed the employment contract, the court stated that the question of what type of provisional relief is available in a given case is a matter of procedure and therefore is determined by the law of the forum.

[E] Appointment of Lawyer. In *Chase Manhattan Bank v. Tokyo Labor Relations Board*, n195 the Tokyo District Court stated that the question of who can represent a foreign corporation in a Japanese court, *i.e.*, who can appoint a lawyer and issue to him a power of attorney to represent the foreign corporation in court, is a matter of procedure to be decided by the law of the forum. Thus, a power of attorney issued by one of the vice-presidents of the petitioner New York bank rather than by the president was held insufficient. n196

[ii] *Renvoi.* In Japan, the *renvoi* rule can be invoked only where the law of the country of which a person is a national (*lex patriae*) is primarily applicable under *Horei*. *Horei* Article 29 provides:

> In the cases where the law of the country of which a party is a national is to govern, and according to the law of such country Japanese law is to govern, Japanese law shall govern.

Horei adopts the so-called *lex patriae* rule as to personal matters such as capacity, marriage, divorce, and parent-child relationships, and succession matters such as heirs, wills, and estate administration. n197 Accordingly, *renvoi* can be employed in these fields. For example, under *Horei* Article 16, divorce is governed by the law of the country of which the husband is a national. However, under American conflicts law, divorce is generally governed by the law of the parties' domicile. Thus, according to *Horei* Article 29, a divorce case between an American husband and Japanese wife would be decided by the Japanese local law if the parties were domiciled in Japan. Consequently, there have been hundreds of divorce cases involving American soldiers and Japanese wives in which the courts found that the parties were domiciled in Japan and used the *renvoi* rule in order to grant divorces to the deserted Japanese women and to give adequate protection to their children according to the Japanese Civil Code. n198

Under *Horei* Article 15, the marital property system is governed by the law of the country of the husband's nationality as of the time of marriage, and therefore *renvoi* may be invoked. In *Hawley v. Hawley*, n199 the parties were married in Japan in 1948. In the following year, the English husband borrowed money from the Tokyo branch of the Hong Kong-Shanghai Bank, and his Canadian wife pledged stock certificates which had been given to her by her Canadian father. The husband could not repay the loan and in 1952 the bank foreclosed the stock certificates for the balance of some $12,000. At that time, the parties were living separately, and before their subsequent divorce, the wife sued her husband demanding compensation for loss of the stock certificates. In dealing with whether, under coverture, the Canadian wife could retain or acquire separate property in her own name or sue her husband, the court first looked at English law in accordance with *Horei* Article 15. The court found that under English conflicts law, the law of the place of the husband's present domicile governs the marital property system concerning movables and that stock certificates are considered movables in England. Since the husband had been continuously living in Japan for several years, the court applied the Japanese law in accordance with *Horei* Article 29, and rendered judgment in the wife's favor.

However, Japanese law will not be applied where *Horei* primarily selects foreign law not as the *lex patraie* but as the *lex loci contractus, lex loci delicti*, or *lex situs,* even if the law is the same as the law of the country of which a party is a national and the conflicts law of that country would remit the issue to Japanese law. Therefore, the use of *renvoi* is not permitted in ordinary commercial transactions (except for the issue of capacity to contract).

U.S. v. K.K. Meiji Gomu Seisakujo n200 posed a special problem in this context. The plaintiff, the U.S. Air Force, sought a judgment for damages with interest thereon from the date of demand until payment. The war materials procurement contract in question was made subject to "U.S. law," but the plaintiff contended that Japanese law should be applied as to the interest rate because U.S. conflicts law would remit the issue to Japanese law either as the law of the forum or as the law of the place of performance. The court naturally denied the *direct* relevancy of U.S. conflicts law. n201 However, being unable to ascertain the American interest rate applicable here, and wanting to be faithful to the "U.S. law" chosen by the parties, the court eventually applied the Japanese statutory rate (6 percent) "in light of" U.S. conflicts law. n202

[iii] Public Policy. It is a universally recognized conflicts rule that foreign law may not be applied where its application would run counter to the public policy of the forum. *Horei* Article 30 provides:

> In the case where the law of a foreign country is to govern and such law contains provisions contrary to public order and good morals, such provisions shall not apply.

In dealing with a loan made in Hawaii between two Japanese, the Great Court of Judicature stated that a statute of limitation (extinctive prescription) is a matter of Japanese public policy, *Ueda v. Suzuki.* n203 However, the holding was contrary to the apparent legislative intent and practically all commentators were critical of it. Therefore, the value of the *Ueda* case holding was in doubt for many years and it was supplanted by a district court decision in 1969, *Cassel v. Toko Nylon K.K.* n204 where the court sustained a complaint involving a New York attorney's fees in spite of the Japanese two-year limitation. Although the two cases were distinguishable in that both parties were Japanese in the *Ueda* case, the district court ventured to say, "The Great Court of Judicature's decision relied upon by the defendant lacks cogent reasoning."

Horei Article 30 is rarely applied to the transactional law area. n205 In 1964, however, dealing with an American employee's petition for provisional relief against an alleged unfair labor practice, the Tokyo District Court applied Article 30 in *George v. International Air Service Co.* n206 The petitioner, Frank S. George, was one of fifty crewmen dispatched by the respondent California company to work for Japanese airlines. George served as a plane master on Japanese *domestic* flights for more than three years, and he lived with his family in Tokyo. Over a dispute concerning the seniority system, George demanded, on behalf of some other crewmen, a negotiation talk with the local representative of the respondent company. Shortly after the dispute, the company dismissed him, allegedly because the respondent company feared that he was going to organize a labor union. George filed an appeal with the California division of the U.S. Labor Relations Board. Pending the appeal, he then filed a petition with the Japanese court for payment of unpaid salary as a provisional, protective measure. The appeal to the U.S. Labor Relations Board failed, and it was thus clear to the Japanese court that the dismissal did not amount to an unfair labor practice under California law or U.S. federal law. Nevertheless, the court stated that where labor has been exclusively supplied in Japan and where an employee has established *jusho* there, whether a labor practice is unfair must be decided according to Japanese law as a matter of public policy. Applying the Japanese Labor Union Act, the court sustained the petition and ordered the respondent company to pay the unpaid salary as a temporary protective measure. n207

The *George* case was narrowly interpreted in a subsequent case, *Bolonakis v. Singer Sewing Machine Co.* n208 Bolonakis, an American, was sent to Japan as a local manager of Singer, a New Jersey corporation, but he was dismissed in the second year, allegedly without cause. Relying on the *George* case, he filed a similar petition. However, the court did not follow the *George* case because it found that Bolonakis was a "manager" rather than an ordinary employee (worker), and thus unfair labor practices were not involved.

As a result of the amendment in 1989, Horei Articles 29 (*renvoi*) and 30 (public policy) have become Articles 32 and 33, respectively, without any changes being made in the wording. n209

[c] Proof of Foreign Law.

[i] Judicial Notice. Under the Anglo-American legal system, foreign law has been traditionally treated as a "fact" to be pleaded and proved by the party relying on it. However, in Japan, foreign law is considered "law" (*hoki*) rather than "fact," and a court has inherent *power* to take judicial notice of foreign law. n210

In many family law cases, the plaintiffs have failed to plead and prove foreign law applicable under *Horei*, but the courts have investigated the applicable foreign law on an entirely *ex officio* basis and given adequate relief.

Commentators claim that it is not only the power but also the duty of the court to investigate the foreign law which it is to apply. However, judges seem to be reluctant to assume such a heavy responsibility and, in dealing with non-family law cases, they have sometimes given judgments against those who failed to prove foreign law on which they relied. n211

[ii] Evidence of Foreign Law. Whether or not a court has a *duty* as well as *power* to investigate foreign law, there are limitations as to the time, money, and resources a court can use for such investigation. In an adversary system, therefore, it is inevitable that a party relying on foreign law must assume a risk, whether as a matter of law or as a matter of fact, that the court may overlook favorable foreign law unless he proves it. By the same token, unless the other party produces contrary evidence, there is a potential danger that the court may hold the first party's presentation of foreign law true and accurate.

Therefore, parties relying on foreign law naturally produce evidence thereof, and courts also usually encourage or request the parties to do so. As to the means by which the foreign law is to be proved, there are no admissibility restrictions. n212 A Xerox copy of the text of a foreign statute, a case report, or even an excerpt from a legal encyclopedia will suffice, if accompanied by a Japanese translation. American Jurisprudence *(Am. Jur.)* and Corpus Juris Secundum *(C.J.S.)* have been most often referred to in proving U.S. law.

Where there is a dispute in good faith between the parties with regard to foreign law, courts appoint experts, usually law professors, to ascertain the details of the foreign law. n213 In Japan, as in other civil law countries, experts are considered to be assistants of judges. Thus, experts in the civil law system are not "expert witnesses" for the plaintiff or defendant as in the common law system. n214 The parties are not allowed, as of right, to examine them orally: the courts usually request experts to present their opinions "in writing" rather than orally. n215

Since all experts are necessarily court appointed experts, their fees are paid by the court. They must not receive any fees from the parties, although such fees are finally borne by the losing party as part of the litigation costs. The court usually orders the party requesting an expert opinion or relying on foreign law to make an advance payment of such expert's fees. n216

[iii] Where Foreign Law is Unascertainable. In the family law area at least, it seems well-established that where the contents of applicable foreign law are unascertainable, the court will decide the case by *naturalis ratio* (*jori*, natural justice or law of reason). n217 Thus, the court will not adversely dispose of a claim or defense based on foreign law simply because the party relying on the foreign law has failed to prove it or because the court has been unable to ascertain it through its own investigation.

In the non-family law areas, however, the law is not settled. As discussed earlier, some courts have dismissed a claim or defense based on foreign law according to the ordinary rules concerning burden of proof, but the majority, scholarly view advocates application of *naturalis ratio*, irrespective of whether a particular dispute arises out of a family relationship or a commercial transaction.

The apparent drawback of the *naturalis ratio* theory is that it presents another unsolved question: What is *naturalis ratio*? There are obviously certain issues that cannot be decided by natural justice or *law of reason*, *e.g.*, interest rates or extinctive prescription periods. In such a case, the only solution would seem to be to decide the issue according to the

law of the forum. n218

[4] Recognition and Enforcement of Foreign Judgments and Arbitration Awards

[a] In General.

[i] Statutory Provisions. The new CCP Article 118 is a slightly revised version of CCP Article 200 in items 2 and 3. n219 Article 118 reads as follows:

Article 118 (Validity of Foreign Judgment)

A foreign judgment which has become final and binding shall be valid upon the fulfillment of all of the following conditions:

(1) The jurisdiction of the foreign court is recognized by laws and orders or by treaty;

(2) The defeated defendant has received service (other than service by publication or by similar method) of summons or orders necessary to commence the action or has responded in the action without receiving service thereof;

(3) The contents of the judgment and the procedure therefore are not contrary to the public order or good morals of Japan; and

(4) There is mutual guarantee.

Under new CCP Article 118, Item 2, a defeated defendant, whether Japanese or not, must have been served adequately. n220 Even under the prior CCP Article 200, Item 2, it was generally understood that a foreign judgment would not be enforced in Japan if obtained in a proceeding that commenced without adequate service of process, even where the defeated defendant was an alien. Such was considered as being against Japanese public policy (the so-called "procedural public order"). This pre-existing concept of "procedural public order" (as quoted above) has been given an official recognition under new CCP Article 118, Item 3.

[ii] Scope of Recognition: Japanese Concept of *Res judicata.* A foreign judgment is not given more effect in Japan than a Japanese judgment. In this connection, it should be noted that there are quite substantial differences between the Japanese and American rules concerning the scope of *res judicata* (*kihanryoku*). *Res Judicata* of a Japanese judgment is strictly limited to the immediate parties and the matters expressly contained in the formal disposition (*shubun, dispositif*); it does not extend to the issues discussed and decided in the part containing the reasoning (*riyu, motifs*). n221 Consequently, there is no such thing as *collateral estoppel* in Japan.

In *Yamada v. Sakakura*, n222 the defendant acquired a tract of land and registered transfer of title. Alleging forgery, the former owner, Yamada, sued the defendant asking that he be ordered to apply to the Registrar for cancellation of the title transfer registration. The court found forgery and the judgment ordering the defendant to apply for cancellation became final and binding. However, the defendant continued to occupy the land, and the plaintiff again sued him to vacate it. The defendant filed a cross-action seeking a declaratory judgment that he was the real owner of the land. The plaintiff argued that since the earlier judgment for the cancellation of the title transfer registration was rendered on the premise that the plaintiff was the real owner of the land, the defendant was precluded from making an allegation contradictory to that judgment. The lower courts sustained the plaintiff's contention and dismissed the cross-action. The Supreme Court, however, reversed and remanded: the formal disposition (*shubun*) of the earlier judgment merely ordered the defendant to apply for cancellation of the title transfer registration; it did not contain a declaration that the plaintiff was the owner of the land.

[iii] Judgments Entitled to Recognition

[A] Judicial Judgments. Recognition is extended only to decisions rendered by foreign "courts." Decisions made by administrative tribunals are not entitled to recognition. n223

As a result of the territoriality of bankruptcy procedure, a foreign bankruptcy adjudication is not given effect in Japan so far as the property situated in Japan is concerned. n224 Prior to the enactment of the Bankruptcy Act in 1922, the discharging effect was denied to a Hawaiian bankruptcy adjudication, *Kasamatsu v. Chimura.* n225

[B] Final Judgments. For a foreign judgment to be recognized and enforced, it must be a final and binding judgment under the law of the rendering country. A temporary injunction or provisional order issued by a foreign court may not be enforced in Japan. Thus, in *Russ v. Russ*, n226 a Massachusetts decree concerning the protection and custody of the child of a separated couple was denied recognition because the court interpreted it as a provisional order rather than a final and binding judgment. However, a California judgment, *Boswell v. Boswell*, n227 granting separation and ordering monthly maintenance payments subject to future modification by the California court, was enforced as to the amount already due.

[C] Valid Judgments. Even where a foreign judgment has obtained finality in point of procedure, it will not be recognized or enforced in Japan if it is not a valid judgment in the country of rendition. For example, a judgment may be invalid because the foreign court lacked jurisdiction under the law of that country, or because the defendant was not given adequate notice and opportunity to be heard, or because there was abatement of the whole proceeding due to the extinction of the legal entity of the plaintiff, *Petrofina v. Mitsui & Co.* n228

[b] Four Requirements under Old CCP Article 200 and New CCP Article 118.

[i] Jurisdiction of the Foreign Court. Whether a particular foreign judgment fulfills the first jurisdictional requirement of CCP, Article 200 is determined by the *Japanese* standard. Thus, a foreign judgment will not be recognized or enforced if the state of rendition did not have such contact with the particular case as would afford a good basis of jurisdiction under Japanese rules of jurisdiction, such as the defendant's domicile or residence, place of business, place of performance, place of tort, situs of property, general appearance, or consent.

For example, in *S.A. Rougemex v. Hoei Trading K.K.*, n229 a French judgment was denied enforcement because the place of delivery of goods, which was the basis of the French court jurisdiction, did not constitute a basis for international contract jurisdiction under the Japanese rules of jurisdiction. n230

Where the subject matter of a foreign judgment falls under the exclusive jurisdiction of Japan or a third country according to the Japanese rules of jurisdiction (*e.g.*, the validity of a Japanese or third country's patent), n231 the foreign judgment is denied recognition in Japan. The same is true where a foreign judgment was rendered on the merits in spite of a jurisdictional protest based on an arbitration agreement or a choice-of-court clause, which was valid under Japanese rules. n232

In *Anagram International Inc. v. Kiyohara K.K.*, 1408 Hanrei Jiho 100 (Osaka Dist. Ct., March 25, 1991), aff'd, 783 Hanrei Times 248 (Osaka High Ct., Feb. 25, 1992), a judgment made by a Minnesota court was denied recognition and enforcement in Japan. The case concerned the export and sales of nylon products from Osaka to Minnesota under CIF terms. It was agreed that the risk of loss would pass to the buyer upon loading at Kobe Port. The Minnesota buyer found defects in the quality of the delivered products and sued the Japanese seller, Kiyohara, in Minnesota for damages.

Kiyohara had no office or property in the United States. The Minnesota court's jurisdiction was solely based on the alleged breach of contract. Therefore, the question was whether, in the eyes of Japanese rules of jurisdiction, Minnesota was the "place of performance" (CCP Article 5) for this sales transaction. n233 The Osaka court held that under CIF, the seller's obligation to perform its duty was completed in Kobe, Japan, with the risk of loss passing to the buyer at the

time and place of loading. Therefore, Japan was considered the "place of performance" under CCP Article 5. n234 The court additionally noted that this sales agreement contained an arbitration clause that mandated settling all contractual disputes by arbitration in Japan.

In *Barclays Bank PLC v. K.K. Japan Planning Association*, 837 Hanrei Times 300 (Tokyo Dist. Ct., Jan. 31, 1994), the English bank, Barclays, argued that the English court had jurisdiction over the defendant, a Japanese entity (buyer) for the sales price claim of the London seller (the assignor to the bank) because English law was the governing law, and because the "place of performance" by the Japanese buyer (*i.e.*, place of payment) was London (the seller's principal place of business). The Tokyo court, however, held that the governing law and the claimant's place of business did not constitute sufficient bases for English court jurisdiction under the Japanese rules of jurisdiction. Thus, the court refused to enforce the English judgment so far as the assigned sales price claim was concerned.

[ii] Adequate Official Notice or Response. As to the second requirement of CCP, Article 200 (that the defeated Japanese defendant was officially served with process by means other than publication or that he voluntarily responded in the action), it is clear from the wording that where the defeated defendant is not a Japanese national, a foreign default judgment is entitled to recognition even where the suit was commenced by publication.

Where a complaint and summons, unaccompanied by a Japanese translation, were sent to a Japanese defendant by direct mail or personally delivered to him by a private person (*e.g.*, a Japanese attorney) rather than by the competent authorities, a resulting default judgment may be denied enforcement in Japan for lack of adequate official service of process. n235

Commentators claim that *oso* (appearance, response) under CCP, Article 200, item 2, need not be a general one: a special response to protest the jurisdiction of the foreign court will fulfill this requirement. n236

A judgment made by a Hawaii court against a Japanese party was denied recognition and enforcement because the summons and complaint had been mailed directly from Hawaii to the defendant in Japan, without being translated into Japanese. *Hiroko Saeki, Inc. v. Ozaki*, 857 Kinyu Shoji Hanrei 39 (Tokyo Dist. Ct., March 26, 1990), 34 JAIL 174 (1991). The court held that the mode of service of process must be such that an ordinary, average Japanese person can understand the contents of the document sent and realize that a foreign court's summons or order had been officially sent to the addressee. According to the court, the need for uniformity and stability in procedural rules must preclude individual examination as to whether or how well the particular addressee can read English.

The same reasoning was used when a Tokyo High Court denied recognition of an Ohio judgment against a Japanese husband, *X v. Y*, 1630 Hanrei Jiho 62 (Tokyo High Ct., Sept. 18, 1997). In that domestic relations case, the Japanese husband was served with a summons and complaint in English while he was visiting his wife and family in Ohio. The Tokyo High Court considered this service inadequate for lack of translation regardless of the defendant's level of English proficiency. There was doubt that even a Japanese fluent in spoken English could grasp the actual meaning and legal consequences attached to a summons or complaint written in English. *See*, for example, a Washington state's summons: "You are hereby summoned to appear within 20 days after service of this summons, exclusive of service, and defend the above-entitled action by serving a copy of your written appearance or defense upon the undersigned [plaintiff's attorney]," It would be unreasonable to presume that a Japanese can correctly understand such "legalese"--appear, service, exclusive of, written appearance or defense, undersigned, and various other technical terms--as used in a typical U.S. summons.

[iii] Public Policy. A foreign judgment is not given effect if it is repugnant to "public order or morals" (the civil law equivalent of "public policy"). n237 A Nevada divorce decree was denied recognition on the grounds of public policy, *Itoh v. Itoh.* n238 A Japanese doctor went to the United States for study. For more than three years he did not send any money to support his wife and child in Japan, and he rejected his wife's plan to go to the United States. Instead, he filed a petition for divorce in the U.S. District Court for Nevada. Upon the wife's default, divorce without

alimony was granted on the grounds that the couple had not lived together for more than three years, Nevada law being applied. Subsequently, the wife filed a petition for divorce in the Tokyo District Court. The court denied *res judicata* to the Nevada decree, and applying Japanese law (the law of the husband's nationality), granted her divorce anew with alimony. n239

However, where transactional cases are concerned, Japanese courts have never denied recognition to foreign judgments on the grounds of public policy. Some commentators even claim that under the Civil Execution Act, Article 24, paragraph 2, a foreign judgment must be enforced if its formal disposition (*dispositif*, decretal part of the judgment) is not against public policy on its face: a Japanese court is not allowed to look behind the face of the decree and inquire into the nature of the underlying transaction or the original claim. Under this theory, any foreign *money* judgment must be enforced automatically even if the original claim is based on gambling or other immoral transactions.

In *Fields v. K.K. Taiheiyo TV*, n240 the American plaintiff sought enforcement of a California judgment ordering the Japanese defendant to pay about $20,000. The underlying T.V. film licensing agreement violated the Japanese foreign exchange control law in that the parties had not obtained the necessary government approval. The defendant argued that the judgment was against public policy and should not be enforced in Japan. The plaintiff counter-argued that in a suit for execution of a foreign judgment, the court should not look behind the face of the decree: since the California decree simply ordered the defendant to pay a certain amount of money, no public policy issue could be raised. The Tokyo District Court rejected the plaintiff's counter-argument and stated that in dealing with an affirmative defense of public policy, the court must inquire into the nature of the transaction underlying the foreign judgment. However, the court concluded that the foreign exchange control law did not constitute a strong public policy of Japan as to the private law domain. n241 Thus, the California money judgment was enforced.

A Nevada court judgment involving gambling funds, was enforced in *Las Vegas Hilton v. Chin*, 794 Hanrei Times 246 (Tokyo Dist. Ct., Dec. 16, 1991). In that case, the losing gambler did not raise the public policy defense, and the Tokyo District Court apparently did not feel it necessary to raise the issue *ex officio.* Had the defendant raised it, the court would have had to deny recognition or enforcement of the judgment. *See*, Ito v. Shizu, Saibansho Jiho No. 1207, p. 2 (Sup. Ct., Nov. 11, 1997), a Japanese domestic relations case that held that a claim based on gambling funds was unenforceable.

An American judgment ordering payment of punitive damages will not be enforced in Japan as it being against Japanese public policy. Such denial is categorical. In *North Con I v. Mansei Industries, K.K.*, __ Minshu __ (Sup. Ct., July 11, 1997), __ JAIL ( ), a California judgment was enforced in Japan as to the decree for compensatory damages ($425,251.00) and for costs ($40,104.71). The decree for punitive damages ($1,125,000), however, was denied recognition and enforcement.

The dispute in the *Mansei* case arose out of a land-development/factory-construction project. A joint venture agreement was entered into in February 1979, in which Maruman Integrated Circuits, Inc., a California subsidiary of Mansei Industries, K.K., a Japanese IC manufacturer, promised to provide funds sufficient to acquire land in Oregon and construct an IC factory there. A California developer and its Oregon partnerships also promised to obtain the government permits necessary for plant construction and for issuance of the city development bonds. By March 1980, the project became commercially impractical. As a result, Maruman discontinued its monthly payments to the Oregon partnerships and filed an action in the Superior Court for the County of Santa Clara, seeking a declaratory judgment that the project agreement was not valid or enforceable *ab initio.* The California developer and Oregon partnerships filed counterclaims against Maruman and its Japanese parent company, Mansei, and sought not only compensatory damages for breach of contract but also punitive damages for fraud and intentional concealment of material facts in entering into this joint venture agreement. The jury awarded a verdict in favor of the American entities and against Maruman and Mansei (with punitive damages, only against Mansei), and judgment was entered accordingly. The decision became final and conclusive in 1987, when the appellate court affirmed the lower court's judgment.

In dealing with the action for the enforcement of the California judgment against Mansei, the Tokyo District Court took the position that a punitive damages decree should not be categorically denied recognition in Japan, but should be examined on a case-by-case basis. Thus, it reviewed the California court's findings of facts and tried to find the existence of extraordinary circumstances (fraud, intentional concealment of material facts) that would warrant imposition of such severe sanction upon the Japanese parent company "for the sake of example and by way of punishing the defendant," California Civil Code § 3294 C(3).

The attorney for the plaintiffs, however, failed to provide the court with transcripts of witness testimonies and documents produced in the California trial. As a result, the Tokyo District Court was not satisfied with the California court records as presented by the plaintiffs. The court stated that there was no consistent logic or sufficient records to establish the evil nature of Mansei's conduct in this transaction. Thus, the Tokyo District Court refused to enforce the punitive damages portion of the California judgment. 760 Hanrei Times 250 (Tokyo Dist. Ct., Feb. 18, 1991).

It is obvious that the Tokyo District Court did not fully understand the nature of the jury trial. It assumed that any foreign court judgment would clearly state, as in Japan or other civil law country where there is no jury trial, the basis on which (exactly which parts of whose testimonies or which parts of which documents) the court found certain specific facts, and arrived at its conclusion of law, logically consistent with those findings of fact. It is also obvious that in performing a case-by-case analysis, the Tokyo District Court has done the so-called "revision au fond," which is expressly prohibited by Article 24 of the Civil Execution Act (2): "An execution judgment shall be given without inquiring into the merits of the foreign judgment."

Contrary to the district court's case-by-case approach, the Tokyo High Court considered the award of punitive damages as part of a legal system, and categorically found that a punitive damages decree is a type of criminal sanction in nature. Thus, under the Japanese legal system, where a clear distinction has been made between a civil remedy and a criminal sanction, an American punitive damages decree should not be enforced as it being against Japanese public order. 823 Hanrei Times 126 (Tokyo High Ct., Jun. 28, 1993). The Supreme Court affirmed, agreeing in toto to the High Court's categorical approach.

As a by-product of the Mansei case, the Tokyo District Court, Tokyo High Court, and the Supreme Court gave the American plaintiffs post-judgment interest for the first time. Since U.S. court judgments typically do not express in its decree that post-judgment interest is collectible at a specific rate per year, Japanese courts had not allowed such interest. While denying recognition to a major portion of this California judgment ($1,125,000), the Tokyo District Court generously allowed the American plaintiffs to collect post-judgment interest at a rate of ten percent per annum pursuant to *California Code of Civil Procedure § 685.010*. The Kobe District Court followed suit in enforcing a Hong Kong judgment, *Sadwani v. Sadwani*, 826 Hanrei Times 206 (Kobe Dist. Ct., Sep. 22, 1993).

[iv] Reciprocity. The fourth requirement of reciprocal guarantee (CCP, Article 200, item 4) usually poses the most difficult problem in a suit for enforcement of a foreign judgment. However, a 1933 Great Court of Judicature case settled the issue of whether American judgments satisfy the requirement of reciprocity. n242 In that case, the defendants, California judgment debtors, argued that the U.S. requirements for recognition and enforcement of foreign judgments were much stricter than the Japanese, and therefore, between Japan and the United States there was no reciprocal guarantee within the meaning of CCP, Article 200, item 4. The defendants cited *Hilton v. Guyot* n243 (requirements of fair trial, impartiality, no fraud in procuring the judgment, international comity and reciprocity), *Pennoyer v. Neff* n244 (jurisdiction based on service of process while transiently present) and *York v. Texas* n245 (jurisdiction based on a special appearance for the sole purpose of protesting jurisdiction). It was also argued that in the United States a foreign judgment was nothing more in some states than *prima facie* evidence of the underlying claim. The defendants also pointed to the California legislature's discrimination against Japanese people with respect to immigration and trade.

The Great Court of Judicature rejected the defendants' contentions and stated:

> The requirement of mutual guarantee under CCP, Article 200, item 4, is met where the particular country, in accordance with a treaty or domestic law, grants full effect to a Japanese judgment without reexamination of the merits, with such requirements as are similar to or more generous than those provided for in CCP Article 200. The court below examined the case law of several states in the United states and found _____ that there was a mutual guarantee (in accordance with the above definition). There may be such rules of law in the United States as the appellants allege (concerning jurisdiction based on transient presence and special appearance). But such facts do not affect the conclusion that there is a mutual guarantee (in accordance with the above definition).

This 1933 case, which was decided during the time when U.S.-Japanese antagonism was very great, has become a precedent with regard to reciprocity between the two countries, and district courts have since enforced a number of American judgments. In *Western Hardwood Lumber Co. v. W.J. Harman & Co.*, n246 a California consent judgment was enforced against a Panamanian corporation having a place of business in Tokyo. *See also Boswell v. Boswell* n247 and *Fields v. K.K. Taiheiyo TV*, n248 *supra*. A Hawaiian judgment was also enforced, n249 as was a judgment by the U.S. District Court for the District of Columbia. n250

The Supreme Court rendered a major decision in 1983 with regard to this fourth requirement. In affirming Burroughs Corp. v. Chung, 949 Hanrei Jiho 92 (Tokyo Dist. Ct., Sep. 7, 1979, enforcing a Washington, D.C. judgment), aff'd, 1042 Hanrei Jiho 100 (Tokyo High Ct., Mar. 31, 1982), the Supreme Court laid down a new rule. It held that the reciprocity requirement is satisfied if the requirements in a particular country for the recognition and enforcement of foreign judgments are "not substantially different from," or "substantially the same as" those set forth under the Japanese CCP Article 200. n251 1086 Hanrei Jiho 97 (Sup. Ct., June 7, 1983), 27 JAIL 119 (1984). Thus, the Supreme Court found that a Washington, D.C. court judgment satisfied the reciprocity requirement under CCP Article 200, Item 4. n252

The most difficult issue in enforcing American court judgments prior to this 1983 decision was determining whether the U.S. requirements of "fair trial," "impartial court," and "lack of fraud (extrinsic fraud) in procuring the judgment" (see *Hilton v. Guyot, 159 U.S. 113 (1895)* , and the Uniform Foreign Money-Judgments Recognition Act § 4) could pass the "similar to or more generous than" test under the 1933 *Z. Witkowsky* case. Although Japanese courts have somehow managed to let U.S. court judgments pass this test, it had always been a time-consuming and burdensome process for American plaintiffs. This 1983 Supreme Court decision was clearly intended to lower the 1933 hurdle (the *Z. Witkowsky* rule), and make it much easier to enforce U.S. court judgments so far as the reciprocity requirement was concerned.

To date, court judgments from the following states and countries have been held to satisfy the reciprocity requirement:

> California: *See* text (*i.e.*, the text of Chapter 5) and footnotes 25-27; additionally, *North Con I v. Mansei Industries*, as discussed in Supplement to [c], above
>
> Hawaii: *See* text and footnote 28
>
> Minnesota: [Unreported/settled at full face value, but without post-judgment interest]
>
> Nevada: *Las Vegas Hilton v. Chin*, as discussed in Supplement to [c], above
>
> New York: *Concept Generation Inc. v. Design Network K.K.*, 1509 Hanrei Jiho 96 (Tokyo Dist. Ct., Jan. 14, 1994)
>
> Texas: *L. v. I*, 789 Hanrei Times 249 (Tokyo Dist. Ct., Jan. 30, 1993)
>
> Virginia: *Daniels v. Japan AmWay*, K.K., 904 Hanrei Times 202 (Tokyo Dist. Ct., May 29, 1995)

Washington, D.C.: *See* text and footnote 29 (aff'd by the Supreme Court in 1983, as discussed above)

Germany: (Munich) *Lacrzx Brevetti A.G. v. Kitagawa Industries, K.K.* 627 Hanrei Times 244 (Nagoya Dist. Ct., Feb. 6, 1987), 33 JAIL 189 (1990)

Hong Kong: *Sadwani v. Sadwani*, 826 Hanrei Times 206 (Kobe Dist. Ct., Sep. 22, 1993)

Switzerland: *See* text and footnote 30

U.K.: *Barkeleys Bank v. K.K. Japan Planning Association*, 837 Hanrei Times 300 (Tokyo Dist. Ct., Jan. 31, 1995).

[c] Double Litigation and Conflicting Judgments

As discussed earlier, pending litigation in a foreign court, a Japanese defendant may start a counteraction in Japan and obtain a negative declaratory judgment negating the claim of the foreign plaintiff. n253 If such judgment becomes *res judicata* before the foreign court decides the case, a subsequent foreign judgment will not be enforced in Japan. Rather, the question in such a case will be whether the Japanese judgment (*res judicata*) can be produced in the foreign court to prevent further proceedings.

In *Toho K.K. v. Hachisuka*, n254 Hachisuka first brought an action in a California state court. Pending the action, Toho commenced a counteraction in Tokyo and obtained a judgment declaring that Toho was not liable in tort as claimed by Hachisuka in the California court. Toho then produced the Tokyo judgment in the California court and moved to dismiss Hachisuka's action on the grounds of *res judicata.* The California court was willing to accord *res judicata* to the Tokyo judgment, but only to the extent that Japanese law would recognize, *i.e.*, only with regard to the immediate parties and the claim specifically mentioned in the formal disposition (*shubun dispositif).* In the California action, the plaintiffs were Hachisuka and the company with which she was affiliated, and the defendants were Toho K.K. and its American representative. The complaint was based both on tort and breach of contract. Therefore, the Tokyo judgment could not exert a *res judicata* effect with respect to the contractual claim or *vis-a-vis* Hachisuka's affiliated company or Toho's American representative. Thus, the California court refused to dismiss the entire action. n255

Where a foreign judgment is rendered first, it can be used as *res judicata* in the still pending Japanese action according to CCP Article 200. However, where the winning foreign party fails to start an action to enforce the foreign judgment before the Japanese court renders a conflicting judgment, the later Japanese judgment will prevail over the earlier foreign judgment. A Washington default judgment ordering a Japanese manufacturer to indemnify an American importer was denied enforcement because by the time the enforcement action was filed with the Osaka District Court, a Japanese default judgment denying the liability of the Japanese manufacturer had been rendered and become final and binding. The court stated that it was against the Japanese public order to enforce a foreign judgment in conflict with a Japanese final judgment. n256

It may well be questioned whether it is really wise to sue a Japanese national in the United States where he has no assets, and then bring another court action in Japan to enforce the American judgment. Before filing such an enforcement action, an American plaintiff may find himself already involved in another court action brought by the Japanese in a Japanese court for a negative declaratory judgment denying the existence of the liability for which the Japanese is being sued in the United States. Thus, the simplest and cheapest way may well be to sue the Japanese in Japan where he has ample assets. n257

[d] Enforcement of Foreign Arbitration Awards

As an arbitration clause referring to arbitration in a foreign country is honored in Japan, n258 so is a resulting foreign

arbitration award. Japan was among the original signatories of both the 1927 Geneva Convention and the 1958 New York (United Nations) Convention on the recognition and enforcement of foreign arbitral awards. n259 Furthermore, it is generally accepted that an arbitration award will be enforced in Japan regardless of whether the country in which the award was made is a party to these Conventions or not. Thus, a New York arbitration award was enforced before the United States joined the U.N. Convention. n260

A state may refuse enforcement of foreign awards if they are repugnant to its public policy (public order and morals). n261 In actions for enforcement of foreign awards, Japanese defendants have often cited violation of the foreign exchange and foreign trade control law as an offense against Japanese public policy, but Japanese courts have consistently turned down such a defense and enforced foreign arbitration awards.

In *G.M. Casaregi Compagnia di Navigazione Commercio S.P.A. v. Nishi Shoji K.K.*, n262 the defendant Japanese company agreed to buy a ship owned by the plaintiff Italian company for $162,400, subject to the Japanese Government's (MITI) approval. The agreement stipulated that the Japanese party would use its best efforts to obtain such approval. In September 1954, about eight months after the signing of the agreement, the plaintiff notified the defendant of its rescission based on the fact that there was no indication that MITI would grant approval. Alleging that the Japanese party had breached its duty to exercise its best efforts to obtain the approval, the Italian party demanded that the Japanese company pay damages in the amount of $58,400, apparently the difference between the agreed price and the market value of the ship, and submitted the dispute to arbitration in London as provided by the agreement. The London arbitrator gave an award for 21,000, equivalent to $58,400 plus costs, and the Tokyo District Court allowed its execution despite the public policy defense. n263

A California judgment confirming an arbitration award was enforced in spite of a similar public policy defense, *Fields v. K.K. Taiheiyo T.V.*, *supra*. n264

A New York arbitration award over a charter party dispute was enforced in 1983, *Texaco Overseas Tankship Ltd. v. Okada Ocean Shipping K.K.*, 1090 Hanrei Jiho 146 (Osaka Dist. Ct., Apr. 22, 1983), 27 JAIL 184 (1984). Also, a Hawaii arbitration award in the amount of $263,862.00 in damages for breach of a sole and exclusive distributorship agreement was enforced by the Nagoya District Court. *Komori Web USA Inc. v. K.K. Ito Ironworks*, 1232 Hanrei Jiho 138 (Nagoya Dist. Ct., Feb. 26, 1987).

[5] International Judicial Assistance for Serving Process and Taking Evidence

[a] Preliminary Notes.

[i] Caveat to Foreign Lawyers. In Japan, procedural acts such as service of process and the taking of testimony and other evidence are considered strictly official functions to be performed only by the court or its officers. Lawyers are not considered officers of the court; they cannot effect service of process on their own by way of direct mail or personal delivery. In addition, Japanese lawyers do not possess the discovery powers that lawyers enjoy in the United States. n265 Thus, it is important to note at the outset that certain procedural acts cannot be effected in Japan without the judicial assistance of competent government officials.

[Ii] Conventions for International Judicial Assistance. In 1970, Japan joined the Convention relating to Civil Procedure (the "Civil Procedure Convention"), n266 the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the "Service Abroad Convention"), n267 and the Convention Abolishing the Requirement of Legalization for Foreign Public Documents. n268 However, Japan is not a member of the Convention on the Taking of Evidence Abroad in Civil and Commercial Matters (the "Evidence Convention"). n269

In addition, there are consular conventions with the United States n270 and with the United Kingdom n271 mutually authorizing consular officers to serve judicial documents and to take depositions voluntarily given.

[b] Serving Japanese Process upon Persons Abroad.

[i] Statutory Provisions. Since service of process is considered an exercise of judicial authority in Japan, n272 and since one state's judicial authority may not be exercised in a foreign state, service abroad cannot be validly effected without the assistance or express consent of the competent authorities of that foreign state. Thus, CCP, Article 175 provides:

> Service which is to be made in a foreign country shall be made by the presiding judge entrusting the matter to the competent governmental authorities of that country or to the Japanese ambassador, minister or consul stationed therein.

The first method is service of process by *letters rogatory*. Under the Service Abroad Convention, the "entrusting" (request for service abroad) is made to the "Central Authority" of the state addressed. n273 The second method is by "consular service," which is available only where there is a consular treaty expressly permitting such consular action. The Consular Convention between Japan and the United States permits a consular officer "to serve judicial documents, on behalf of the courts of the sending state, upon any person in the receiving state in accordance with the laws of the sending state and in a manner not inconsistent with the laws of the receiving state." n274 While United States courts have not utilized consular channels for serving process abroad on behalf of private litigants, n275 Japanese courts have been using this consular service wherever permissible.

[ii] Direct Mail Not Allowed. Service of Japanese process abroad may only be effected in the above two ways. Although the Service Abroad Convention recognizes in Article 10(a) "the freedom to send judicial documents, by postal channels, directly to persons abroad," Japanese rules under CCP, Article 175 do not allow direct mailing. Consequently, Japanese courts (not to mention Japanese attorneys) are not allowed to utilize this postal method in effecting service of process upon persons abroad. Significantly, the Japanese legislature did not change CCP, Article 175 when it reviewed and modified the Code of Civil Procedure in 1970 to accommodate the Service Abroad Convention. n276

[c] Serving Foreign Process upon Persons in Japan.

[i] Request for Service under The Hague Conventions. Today, practically all major countries have become members of either the Service Abroad Convention or the Civil Procedure Convention. n277 Therefore, a request by a foreign court (or a competent officer) for service of process upon persons in Japan is made to the Ministry of Foreign Affairs, the Japanese "Central Authority" under the Convention. The Ministry sends the request to the Secretariat of the Supreme Court which in turn forwards it to a district court sitting at the locale of the addressee. (Japan filed an "objection" to a service request directly sent to a Japanese district court or other competent serving officer.) n278

[ii] Translation and Voluntary Acceptance. When the Ministry of Foreign Affairs receives a request for service of foreign process upon a Japanese national, it ordinarily requires translation of the complaint, summons, and any other accompanying documents pursuant to the Conventions. n279 However, the foreign requesting officer may first ask the Japanese Foreign Ministry to find out if the addressee will voluntarily accept the documents without translation. n280 Thus, foreign judicial documents are often forwarded to a district court without the attachment of a translation.

Upon receipt of the request for service through the above channels, the district court sends the addressee a notice entitled *Bunsho-juryo no saikokusho* (a written notice that a foreign judicial document has been received by the court and that the addressee should call for the document). The notice briefly states the nature of the received document (*e.g.*, a summons issued by a foreign court and accompanied by a complaint); and states whether or not a translation is attached thereto. n281 If the addressee voluntarily accepts the foreign document with or without a translation, the service is validly completed under the Conventions.

If the addressee refuses to accept such document voluntarily or fails to respond within three weeks of the notification, the court's reaction differs depending on whether the document is accompanied by a translation or not. Where the

foreign document has been transmitted without a translation, the court returns the request "unexecuted," and where it has been transmitted with a translation, the court effects the service thereof in accordance with the Code of Civil Procedure, as if it were a domestic judicial document. n282 Thus, if service of a foreign judicial document is to be effected in Japan through the official channels under the Conventions, it is crucial that the document be accompanied by a translation.

[iii] Direct Mail: Enforceability of Resulting Default Judgments in Japan. Translation into Japanese of a lengthy complaint will no doubt cost a substantial amount of money, and two or three months will usually pass before the requesting officer can obtain a certificate of service of process from the Japanese authorities. Foreign litigants may naturally prefer a cheaper and quicker method of service, namely, service by direct mail.

As already discussed in detail in the Supplement to § 5.04[2][b], above, a Hawaiian court judgment was denied recognition and enforcement in Japan for inadequacy of service of process (CCP Article 200, Item 2). n283 In that case, the summons and complaint had been sent by direct mail in English to the Japanese defendant. *Hiroko Saeki, Inc. v. Ozaki*, 857 Kinyu Shoji Hanrei 39 (Tokyo Dist. Ct., Mar. 26, 1990), 34 JAIL 174 (1991).

As for the reasoning behind the Japanese government's failure in lodging an objection to The Hague Service Convention Article 10(a) in joining the Convention in 1970, the U.S. Departments of State and Justice "encourage[d] the Government of Japan to clarify its position with regard to the service of process in Japan by mail from another country party to The Hague Service Convention" (30 International Legal Materials 260 (1991)). As a result, in April 1989, Japan presented its official statement to the Special Committee of The Hague Conference on Private International Law (28 International Legal Materials 1561 (1989); Hague Conference on Private International Law, Aug. 1989, p. 11):

> "Japanese position on Article 10(a) of The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters:
>
> Japan has not declared that it objects to the sending of judicial documents, by postal channels, directly to persons abroad. In this connection, Japan has made it clear that no objection to the use of postal channels for sending judicial documents to persons in Japan does not necessary imply that the sending by such a method is considered valid service in Japan; it merely indicates that Japan does not consider it as infringement of its sovereign power."

This official statement of Japan added confusion to, rather than clarified, the meaning of the Japanese government's non-objection to the Service Convention Article 10(a) in 1970. In December 1989, the Special Appellate Court of Maryland first tried to understand this official statement of Japan, but, to the American appellate court judges, the statement was "as best [they could] gauge it, ambiguous." *Nicholson v. Yamaha Motor Co., 80 Md. App. 695, 709, 566 A.2d 135, 142 (1989)* . The court concluded, however, that an American summons and complaint can validly be served upon Japanese nationals through direct mail, "principally" because "[w]hen given the opportunity, Japan does not regard service by mail as an infringement upon its sovereignty, as Messrs. Peterson and Fujita suggest would be the case." n284 Upholding the validity of service by direct mail, the Maryland appellate court then dismissed the plaintiff's action on its merits. Yamaha, therefore, was more than happy with the results, and did not protest to the court's ruling on the validity of service by mail.

The U.S. State Department took the same view as the Maryland appellate court. *See* the 1993 State Department's flyer, "Service of Process in Japan" (CA/OCS/CCS/EAP: 3/93 DOC WWCCSEAP 7559, pp. 1-8); 30 International Legal Materials 260, 261 (1991). However, it seems clear that the official statement by Japan intended to discourage U.S. plaintiff attorneys' use of direct mail as a method of service of American process upon Japanese residents. *See*, Hara (official at the Ministry of Justice, representing Japanese government at the 1989 Hague Conference), "*Shiho no kokusai-teki toitsu-undo (1989-nen no tenkai)* [International Unification of Private Law (Development in 1989)]," 17(12) Kokusai Shoji Homu 1284 (1989), which states that the very purpose of this official statement by the Japanese

government in April, 1989, was to discourage the direct-mail practice and "drastically" reduce the number of direct mailing of judicial documents from foreign countries to Japan. In other words, what the Japanese government actually meant to say in its statement was that Japan does not consider direct mail as a valid method of service abroad. The ambiguity is obviously the result of the Japanese officials' peculiar, and often-criticized, general reluctance to make any clear-cut, yes-or-no statements at any official public meeting.

According to *Honda Motor Co. v. Superior Court, 10 Cal. App. 4th 1043 (1992)* , "clear majority" of American cases have ruled that direct mail overseas is not a valid method of service of process upon Japanese defendants residing in Japan. *See* appellate court decisions such as *Bankston v. Toyota Motor Corp., 889 F.2d 172 (8th Cir. 1989)* ; *Honda, id.; Frankenmuth Mutual Ins.Co. v. ACO, Inc., 193 Mich. App. 389, 484 N.W.2d 718 (1992)* . *Ackermann v. Levine, 788 F.2d 830 (2d Cir. 1986)* , a pre-1989 appellate case, should be ignored in this context. The method of service used in that case was by "consular service" (*i.e.*, international transmitting of judicial documents from a German court to a German consul in New York, and then by "domestic" mail from the German consul to a New York resident) as recognized by The Hague Service Convention Article 8, and was not an international mail directly from Germany to the New York resident as contemplated under the Convention Article 10(a).

When joining The Hague Service Convention, the German Embassy presented its note verbally (dated September 27, 1979) to the U.S. State Department as follows:

> Under German legal interpretation, German sovereignty is violated in cases where foreign judicial documents are served directly by mail within the Federal Republic of Germany. By such direct service, an act of sovereignty is conducted without any control by German authorities on the territory of the Federal Republic of Germany. This is not admissible under German laws. Under these laws, the German authorities must be in a position to examine whether the foreign request for service is in compliance with the legal provisions established for this purpose and whether it is in compliance with the ordre public of the Federal Republic of Germany.

The above German view also represents the Japanese concept of service of process under its CCP, which was modeled upon the German CCP. The Japanese government's official statement in April 1989 that Japan did not regard direct mail as infringement upon its judicial sovereignty can be logically sustained only because Japan does not consider direct mail as legal service of process *(sotatsu)*, but as mere factual notification *(tsuchi)*.

In the past, the major players in these types of service of process cases in the United States were Toyota, Honda, Yamaha, Suzuki and other Japanese auto-makers. After *Volkswagenwerk A.G. v. Schlunk, 486 U.S. 694 (1988)* , however, the names of these companies will gradually disappear from the case reporters. These Japanese companies have one hundred percent ownership in their subsidiaries for the sales of their products in the United States. Thus, direct mail to the Japanese parent companies became unnecessary under the *Schlunk* case. American plaintiffs can now effect "substituted" service of process upon these big Japanese companies by simply delivering the summons and complaint to its U.S. subsidiary as "general manager."

[iv] Other Methods of Service

[A] Personal Delivery. Japanese attorneys often receive requests from abroad to personally deliver a foreign complaint and summons to a Japanese national. Since such a personal delivery of documents by a private person is considered a mere factual notification, it may perhaps be done without encroaching upon the sovereignty of Japan, n285 but it will not be accorded any more *legal* consequence than notification by direct mail in an action for enforcement of a resulting default judgment.

[B] Service by Consuls. As mentioned earlier, the Consular Convention between Japan and the United States allows for U.S. consular officers to serve American process upon any person in Japan. n286 However, the United States Federal Regulations forbid American consuls to make service on behalf of a private litigant. n287 The consuls of the

other Hague Convention member states can effect service of process upon persons in Japan provided that service is not accompanied by any compulsion. n288 But again, if the judicial documents are served by a consul upon a Japanese national without translation into Japanese, the adequacy of service will be questioned in an action for enforcement of a resulting default judgment.

[d] Obtaining Evidence Abroad for Use in Japanese Courts. As affirmatively quoted by the U.S. Supreme Court in *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for Southern Dist., 482 U.S. 522, 107 S. Ct. 2542, 2548, n.13 (1987)* , "In 1964 ... *28 USC § 1782* [was] amended to offer foreign countries and their litigants, without a requirement of reciprocity, wide judicial assistance on a unilateral basis for obtaining evidence in the United States. ... No country in the world has a more open and enlightened policy, ..." Philip W. Amram (U.S. delegate to the 1964 Hague Conference on Private International Law), "The Proposed Convention of the Taking of Evidence Abroad," *55 A.B.A.J. 651 (1969).*

In *In re Nichiren Shoshu's Application for an Order for Judicial Assistance in a Foreign Proceeding Pending in Tokyo (Japan) District Court, 12th Civil Division* (C96-1058WD), the federal District Court in Seattle (W.D. Wash.) provided judicial assistance to a Japanese plaintiff in 1996, upon the plaintiff's own application (*i.e.*, without an ordinary letter rogatory from the Tokyo District Court). It then allowed the Japanese plaintiff's attorney in Washington to take the deposition, on a compulsory basis, from an American witness residing near Seattle, Washington.

In June 1996, the Tokyo District Court decided to take the testimony of an American witness offered by the defendant for voluntary appearance for two days: on one day (2.5 hours) in September 1996, for the direct examination by defendant, and another day (2.5 hours) in October 1996, for plaintiff's cross-examination. Cross-examination of a hostile foreign witness conducted in the Japanese language has always proved to be very ineffective and unproductive, if not destructive. The interpreter generally takes at least half of the allotted time (and much more if the accuracy of the oral translation is questioned by either party). Therefore, the Tokyo plaintiff hired a Seattle law firm and requested them to take the deposition of the American witness in English, prior to his expected cross-examination in the Japanese courtroom.

Thanks to *28 U.S.C. § 1782,* the Tokyo plaintiff was allowed to take the deposition of the American witness for three days: one day, a week before his direct examination, and the other two days, about 10 days before his cross-examination on the Tokyo court witness stand. The American court allowed the Japanese plaintiff to serve the witness with subpoena duces tecum, and certain important documents were produced according to the subpoena.

According to Prof. Smit, the drafter of this most liberal and enlightened statute (1964), "the courts have shown remarkable reluctance in giving full consequence to the legislative intent," that is, to grant judicial assistance to foreign litigants, without any requirement of reciprocity. Hans Smit, "Recent Developments in International Litigation," *35 S. Tex. L. Rev. 215, 232 (1994).* The judge-made requirement of reciprocity is called the "discoverability" rule (that the evidence to be obtained through *28 USC § 1782* must be "discoverable" under foreign law). If the law of the country of the requesting court or litigant permits discovery similar to that which is permitted under the U.S. discovery system, then, and only then, will the U.S. court grant such discovery request or application. Since there is no pretrial discovery system in any country other than the United States, there will be no room for *28 USC § 1782* to function under this "discoverability" rule. n289

Fortunately, however, the Second Circuit has consistently rejected this "discoverability" rule and liberally granted judicial assistance to foreign litigants. *Euromepa S.A. v. R. Esmerian, Inc., 51 F.3d 1095 (2d Cir. 1995)* , a well-written decision by Judge Calabresi, is hoped to eventually prevail in light of the Supreme Court's affirmative quotation of Philip Amram's above-mentioned statement in *Societe Nationale Industrielle Aerospatiale, 482 U.S. 522, 107 S. Ct. 2542, at 2548 (1987)* . In granting the judicial assistance requested by the Japanese plaintiff over the opposition by the Japanese defendant as well as by the American witness, Judge Dwyer of the Western District for the State of Washington followed Judge Calabresi's enlightened view.

[e] Obtaining Evidence in Japan for Use in Foreign Courts.

[i] Taking of Depositions by American Attorneys Prohibited. Until the late 1970's, American attorneys often traveled to Japan, administered oaths, and took depositions from Japanese nationals. They usually brought with them a court order (or claimed that they had inherent power) to compel the deponents to produce documents and other tangible evidence. Even though such deposition takings were usually carried out on a voluntary basis and in a private place like a hotel room, they were greatly criticized by the Japanese Bar, the Ministry of Justice, and the Ministry of Foreign Affairs.

For one thing, Japanese attorneys do not have such discovery power and it was felt that American attorneys in Japan should not be allowed to do what Japanese attorneys cannot do. Moreover, if American attorneys were to be regarded as American court officers (*i.e.*, governmental officers), it seemed clear that they *a fortiori* could not exercise any power in a foreign sovereign country.

Thus, since the late 1970's, the Japanese Embassy, Consulate General's Offices and Legations in the United States have been enforcing the policy of refusing to issue tourist *visas* to American attorneys who intend to go to Japan to take depositions on their own (*i.e.*, rather than attend the taking of voluntary depositions in Japan by a U.S. consular officer; *see* [b] below), and the policy of confirming that they do not perform any judicial functions while in Japan with temporary *visas*. The American Embassy in Tokyo and the State Department seem to be cooperating with the Japanese Ministry of Foreign Affairs in this regard.

[ii] Taking of Voluntary Depositions by Consular Officers. The Consular Convention between Japan and the United States provides that a consular officer "may within his consular district ... take depositions, on behalf of the courts or other judicial tribunals or authorities of the sending state, voluntarily given, or administer oaths to ... any person in the receiving state in accordance with the laws of the sending state and in a manner not inconsistent with the laws of the receiving state." n290

American attorneys who intend to attend the taking of voluntary depositions in Japan by U.S. consular officers (*i.e.*, intend to examine or cross-examine voluntary witnesses, with a consular officer presiding over the procedure) are given a special temporary *visa.* Without this special temporary *visa*, they may not come to Japan to attend a deposition-taking by U.S. consular officers.

The party requesting the taking of depositions by U.S. consular officers in Japan is required to have the U.S. court issue a sealed document commissioning the consular officers to take depositions from specified persons, or an American attorney coming to Japan on the abovementioned special *visa* to attend the deposition-taking must bring with him such a sealed commission. Also, the requesting party is required to deposit in advance an amount of money for consular service fees at the rate of $90 per hour. n291

Under the Consular Convention between Japan and the United Kingdom, English consular officers are similarly authorized to take voluntary depositions in Japan. n292 The Civil Procedure Convention also allows consular officers of a member state to take depositions in other member states unless objected thereto, n293 and Japan takes the position that they can take voluntary depositions in Japan only from their own nationals. n294 In the absence of such conventions, the taking of voluntary depositions by a consular officer residing in Japan is permitted only on a reciprocal agreement basis.

[iii] Examination of Witnesses by Japanese Courts. Where a witness refuses to appear voluntarily, judicial assistance by Japanese courts is indispensable in taking his testimony. Under the Civil Procedure Convention, member states are entitled to receive judicial assistance of Japanese courts in obtaining evidence. One characteristic of the Civil Procedure Convention is that judicial assistance is offered in accordance with the local procedures of the requested state. Thus, Japan is not required to modify her traditional civil law procedures in rendering judicial assistance to

foreign courts. n295

In contrast, The Hague Convention on Taking of Evidence Abroad in Civil and Commercial Matters would require member states to comply with any request for judicial assistance unless the request was "totally incompatible" with the domestic procedures or "impossible of performance." n296 Apparently because of its fear of American-type discovery procedures, Japan did not join this Convention.

The courts in countries which are not parties to the Civil Procedure Convention can still seek the judicial assistance of Japanese courts in accordance with the Judicial Aid Act. n297 The request for such assistance, traditionally called "*letters rogatory*," must satisfy the following requirements which are in fact not much different from the requirements under the Civil Procedure Convention: n298

(1) The request must be sent through diplomatic channels.

(2) The request must be made in writing and must specify the names of the parties to the litigation, the name, nationality, and domicile or residence of the person to be examined, and the questions in detail.

(3) The letter of request and all other documents annexed thereto must be accompanied by Japanese translations.

(4) Reimbursement of expenses must be guaranteed by the requesting state.

(5) Reciprocal assistance must be guaranteed by the requesting state.

Expenses to be reimbursed are mostly *per diem* for witnesses (presently yen4,600 per person per day). n299 If the applying party desires a verbatim record, he will be requested to hire an outside stenographer at his own expense, as well as an interpreter if a witness does not speak Japanese.

Under both the Civil Procedure Convention and the Judicial Aid Act, the judicial assistance will be performed by an appropriate court in accordance with Japanese procedures. As a matter of course, all proceedings are conducted in Japanese. Testimony is recorded by the court clerk usually in a summarized transcript, but where requested, the court will prepare a verbatim transcript. n300 Japanese courts are generally reluctant to allow the parties to tape the testimony. In preparing a verbatim transcript, the court will use a tape recorder, n301 but the recorded tape will not be attached to the transcript. The final transcript will be sent to the requesting foreign court through diplomatic channels. The complete court procedure will probably take well over six months to one year from the time of the receipt of the request by the Japanese Ministry of Foreign Affairs.

In connection with the judicial review of an administrative (anti-dumping) action against a Japanese manufacturer and a trading company, the U.S. government requested the Osaka District Court's judicial assistance in taking testimony concerning manufacturing costs from the executive managing director of a Japanese manufacturer's subcontractor. The director testified as to the total production volume, gross sales and the total costs for raw materials. However, he refused to testify about direct labor costs and sales costs, relying on the Japanese Code of Civil Procedure, Article 281(1), item 3, which provides that one can refuse to testify as to a matter falling under the category of "technological or professional secret." n302 To the U.S. government lawyers' disappointment, the Osaka District Court and also the Osaka High Court sustained this refusal. *U.S. v. Matsumura*, 737 Hanrei Jiho 49 (Osaka High Ct., Jul. 12, 1973), 19 JAIL 196 (1975).

[iv] Order to Produce Documents. It is generally understood that a Japanese court, acting as a commissioned or assigned judge as defined by the Code of Civil Procedure, cannot issue an order to produce documents or other tangible evidence in executing *letters rogatory* from a foreign court. Thus, the only assistance generally given by Japanese courts is the taking of the testimony of witnesses, expert witnesses, and the parties.

A party intending to bring an action in Japan may, under certain extraordinarily urgent circumstances (*e.g.*, seriously ill witness; passage of statutorily required period for keeping certain documents, such as five years for hospital medical records), apply for production or inspection (including taking of photographs) of documents and other tangible evidence by way of "preservation of evidence" as prescribed by the Code of Civil Procedure. n303 However, the power of Japanese courts to order production of documents is very, very limited as compared to U.S. practice, and the applying party must specify the identity of each document. n304 No generalized requests or fishing expeditions are allowed.

[v] Affidavits. For the purpose of summarily proving Japanese law or fact in a foreign court, affidavits or affirmations have often been used. An affiant goes to an appropriate embassy or legation and has a typewritten statement notarized by a consular officer.

[vi] Attorney-Client Privilege. Since the scope of the Japanese court's power to compel production of documents is very limited under CCP Article 312 (new CCP Article 220), and since Japanese witnesses enjoy broad latitude in the right of refusal to testify, the American concept of "attorney-client privilege" has not been of much necessity in Japan. n305 Therefore, the privilege has not been well developed in Japan--or, for that matter, in any other civil law countries in Europe.

In the context of US/Japan litigation, however, the lack of established rules concerning attorney-client privilege in Japan constitutes a serious disadvantage to Japanese companies. For one thing, Japanese companies rarely have licensed attorneys as house counsel. While house counsel in the United States enjoy the protection of "attorney-client privilege" over any internal communication made between them and their company employees, Japanese companies do not. A typical Japanese company has a legal department (sometimes called "general affairs" or "documents" department). Its manager and staff are usually performing the job that would be handled by house counsel in the United States. "Undoubtedly they ('enterprise legal staff') do much of the legal work that would be done by licensed lawyers as 'house counsel' in the United States," Dan F. Henderson, "The Role of Lawyers in Japan," Japan: Economic Success And Legal System (Harold Baum, ed.), Chapter 1, at 35-36 (Walter de Gruyter, Berlin, New York 1997). *See also* Michael Young, "The Japanese Legal System: History and Structure," Volume 2 of this work, Chapter 3, I-3-38, 39 (1986); Richard Miller, "Apples v. Persimmons: The Legal Profession in Japan and the United States," 39 J. of Legal Education 27, 30, 31 (1989).

In view of the well-known scarcity of lawyers *(bengoshi)* in Japan and the above-mentioned peculiar situation in Japanese corporate management, it can be argued that in fairness, Japanese corporate legal staff, at least management level staff, should be accorded attorney-client privilege that is enjoyed by all U.S. house counsel. For example, in *Renfield Corp. v. E. Remy Martin & Co., S.A., 98 F.R.D. 442 (D. Del. 1982)* , the Delaware court accorded attorney-client privilege to communications between the French parent company's legal staff and (a) its officials (executive personnel) in France as well as (b) the employees of its U.S. subsidiary in New York. The court took a "functional" approach and found that a French legal staff served the same function as house counsel in the United States. A California magistrate gave the same ruling on facsimile transmissions between a Japanese parent company's legal manager and an employee (a Japanese expatriate) of its California subsidiary. *Zilog, Inc. v. NEC,* Case No. C89-20532 RPA (discovery ruling, 1988).

[Caveat] As to a Japanese patent attorney's privilege, however, there have been rulings against use of the attorney-client privilege in the United States. *Burroughs Wellcome Co. v. Barr Laboratories, Inc., 143 F.R.D. 611 (E.D.N.Y. 1992)* ; *Alpex Computer Corp. v. Nintendo Co., 1992 U.S. Dist. LEXIS 3129 (S.D.N.Y. 1992)* ; *Santrade Ltd. v. General Electric Co., 150 F.R.D. 539 (E.D.N.C. 1993)* . These courts warned that the right to refuse to testify under the Japanese CCP Article 281(2) (secret of a doctor, nurse, patent attorney, priest) does not provide a basis for invoking the privilege equivalent to the level of the American "attorney-client privilege." n306 Therefore, under the circumstances, it may be advisable to place a Japanese patent attorney's research and investigation under the supervision of a lawyer *(bengoshi)* so that the results and communications can be protected under either the "attorney-client privilege" or the

"work-product" doctrine.

From DBJEC

Recent development including legislative updates and court cases is listed as follows:

◆ [law] International Private Law Reform: Summary Concerning Modernization of International Private Law Submitted/Legislative Council (*See* Ch. 1, § 1.05[14]; Ch. 14, § 14.07 *supra*)

FOOTNOTES:

(n1)Footnote 1. *Minji Soshoho* (Law No. 29, 1890, as amended). As to Japanese civil procedure, *see generally* Hattori & Henderson, *Civil Procedure in Japan* (in press).

(n2)Footnote 2. *Horei* (Law No. 10, 1898). As to Japanese conflict of laws, *see generally* Ehrenzeig, Ikehara & Jensen, *American-Japanese Private International Law* (1964).

(n3)Footnote 3. Also relevant are the Civil Code (*Minpo*, Law No. 89, 1896) and the Commercial Code (*Shoho*, Law No. 48, 1899).

(n4)Footnote 4. Among others, Japan has joined the following multilateral conventions: the Convention for the Unification of Certain Rules relating to Bills of Lading for the Carriage of Goods by Sea (Brussels, 1924), *51 Stat. 233;* the Convention for the Unification of Certain Rules relating to International Transportation by Air (Warsaw, 1929), *49 Stat. 3000;* the Conventions for the Unification of Laws and Conflicts Rules of Bills of Exchange, Promissory Notes and Cheques (Geneva, 1930, 1932); the Convention on the Execution of Foreign Arbitral Awards (Geneva, 1927); the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (United Nations, New York, 1958, (1970), *3 UST 2517*, TIAS No. 6997, 330 UNTS 38; the Convention relating to Civil Procedure (The Hague, 1954), 286 UNTS 267; the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (The Hague, 1965), *20 UST 361*, TIAS No. 6638, 658 UNTS 163.

(n5)Footnote 5. All footnotes herein refer to Part VI (Judicial), Appendix 6A (Code of Civil Procedure) of the Statutory Index in Volume ◆◆ of this work, Statutory Volumes Index (1998).

(n6)Footnote 6. CCP Arts. 32 and 33.

(n7)Footnote 7. *See* CCP Art. 1, 2, and 4(3).

(n8)Footnote 8. *See* CCP Art. 5, 8, and 15.

(n9)Footnote 9. *See* CCP Art. 21, 25, and 26.

(n10)Footnote 10. CCP, Art. 29: "The jurisdiction of a court shall be determined according to conditions existing at the time of institution of the suit." *But see* note 48 and accompanying text *infra*.

(n11)Footnote 11. *See* Civil Code, Art. 21.

(n12)Footnote 12. As to divorce, where the plaintiff has been maliciously deserted by the defendant or where the defendant is missing, Japanese courts will exercise jurisdiction if the plaintiff has *jusho* in Japan. Chung v. Chung, Supreme Court, 18 Minshu 486, March 25, 1964, English translation, 8 Jap. Ann. Int'l Law 195 (1964); Hallman v. Hallman, Supreme Court, 16 Kasai Geppo 78, April 9, 1964, English translation, 10 Jap. Ann. Int'l Law 148 (1966). In LeGare v. LeGare, Tokyo District Court, 7 Kaminshu 1366, May 26, 1956, a Filipino wife came to Japan, evidently with the sole purpose of obtaining a decree of divorce from her American husband, who had deserted her and their four children. In her petition for divorce she alleged that she intended to live in Japan "permanently," apparently thinking

that Japan required such intention for the establishment of *jusho.* Although the court was not satisfied that she had such intention, it found that she had lived in Japan "for a considerable period of time"--five months by the time of the decree--and that she would stay there "for some more time." Under the circumstances, the court concluded that she had acquired *jusho* in Japan.

(n13)Footnote 13. Fukuoka District Court, 6 Kaminshu 45, Jan. 19, 1955. *See also* Coleman v. Coleman, Tokyo Family Court, 12 Kasai Geppo 121, Aug. 22, 1968.

(n14)Footnote 14. *Horei* Arts. 16 and 29, § 5.03[2][b] *infra.*

(n15)Footnote 15. If Japanese law had been applied, divorce would have been granted since the principle of *recrimination* is not prevailing in Japan. Civil Code, Art. 770, para. 1, item 5; Watanabe v. Watanabe, Supreme Court, 10 Minshu 1537, Dec. 11, 1956.

(n16)Footnote 16. *See* the LeGare case in note 10 *supra*, where stay in Japan for six months was held sufficient to establish *jusho.*

(n17)Footnote 17. It should be kept in mind that in civil law countries, as will be discussed in § 5.02[3][a] *infra*, service of process does not of itself create a basis of jurisdiction. The place of one's presence (*genzaichi* or *shozaichi*), however, constitutes a basis of criminal jurisdiction. Code of Criminal Procedure (*Keiji-shosho-ho*), Law No. 131, 1948, Art. 2.

(n18)Footnote 18. The old CCP, Art. 13, the predecessor of the present CCP, Art. 2, para. 2, had a *proviso:* "Provided that if the defendant has a domicile in a foreign country, the (last domicile) jurisdiction shall extend only to those legal relationships which were created in Japan."

(n19)Footnote 19. Family Case Procedure Act (*Jinji-sosho Tetsuzukiho*), Law No. 13, 1898, Art. 1, para. 3; Supreme Court Rules (*Saikosaibansho-kisoku*) No. 30, 1948.

(n20)Footnote 20. *See* CCP Art. 4(3).

(n21)Footnote 21. *See* the old CCP Art. 18 (the predecessor of the present CCP Art. 5) and its model, the German Code of Civil Procedure (*Zivilprozessordnung*), Art. 29.

(n22)Footnote 22. In the Loustalot case, note 24 *supra*, the court boldly stated that the universally recognized *forum contractus* (forum at the place of contract-making) could perhaps stand in Japan despite lack of a statutory basis, but that since the employment contract in question had been made in San Diego, and was thus subject to California law, the court could not take the case on the basis of *forum contractus.* However, the court's statement was merely *dictum.*

(n23)Footnote 23. Vacuum Oil Co. v. Dampffschiffsladerei Union A.G., Great Court of Judicature, 14 Minroku 786, June 26, 1908.

(n24)Footnote 24. Civil Code, Art. 484.

(n25)Footnote 25. *See* Dicey & Morris, The Conflict of Laws 197 (8th ed., 1967).

(n26)Footnote 26. German Civil Code, Art. 269.

(n27)Footnote 27. French Civil Code, Art. 2347.

(n28)Footnote 28. Tokyo District Court, 18 Kaminshu 1002, Oct. 17, 1967, English translation, 13 Jap. Ann. Int'l Law 136 (1969).

(n29)Footnote 29. Tokyo District Court, 598 Hanrei Jiho 75, March 27, 1970, English translation, 16 Jap. Ann. Int'l Law 160 (1972).

(n30)Footnote 30. *See* note 24 *supra.*

(n31)Footnote 31. *See*, *e.g.*, Cress v. Home Insurance Co., Tokyo High Court, 17 Kaminshu 719, Aug. 29, 1966, English translation, 12 Jap. Ann. Int'l Law 130 (1968), discussed in note 153 and accompanying text *infra.*

(n32)Footnote 32. Yabutani v. The Boeing Co., Tokyo District Court, 754 Hanrei Jio 58, July 24, 1974, 19 Jap. Ann. Int'l Law 225 (1975).

(n33)Footnote 33. Osaka District Court, 728 Hanrei Jiho 76, Oct. 9, 1973.

(n34)Footnote 34. As to the background of this case, *see Deutsch v. West Coast Machinery, 80 Wash. 2d 707, 497 P.2d 1311 (1972)* ; Fujita, *U.S. Japanese Transactions and Litigation; The Kansai Iron Works Case,* in ABA, *Current Legal Aspects of Doing Business in Japan and East Asia* 196 (ed. Haley, 1978). *See also* § 5.04[3] *infra*.

(n35)Footnote 35. *See* also special provisions concerning arrest and compulsory sale of a ship in CCP Art. 753; Civil Execution Act, (*Minji Shikko Ho*, Law No. 4, 1979) Articles 112, 176, 189; Commercial Code, Article 689. *See* Yasutomi v. United Netherland Nav. Co., Yokohama District Court, 17 Kaminshu 874, Sept. 29, 1966, English translation, 13 Jap. Ann. Int'l Law 159 (1969); Caltex & Texaco v. National Bulk Carrier, Yamaguchi District Court, 18 Kaminshu 711, June 26, 1967, English translation, 13 Jap. Ann. Int'l Law 181 (1969).

(n36)Footnote 36. See § 5.02[1][d] *supra.*

(n37)Footnote 37. Patent Act, (*Tokkyo Ho*), Law No. 121, 1959 as amended, Arts. 8 and 15; Trademark Act (*Shohyo Ho*) Law No. 127, 1959 as amended, Art. 77; Utility Models Act (Jitsuyo Shinan Ho) Law No. 123, 1959, as amended, Art. 55.

(n38)Footnote 38. Civil Execution Act, Art. 144.

(n39)Footnote 39. *See* Civil Code, Art. 86, para. 3; Civil Execution Act, Art. 122.

(n40)Footnote 40. *See* notes 24 and 36 *supra.*

(n41)Footnote 41. Interestingly enough, the parties, both American, were strongly influenced by *Pennoyer v. Neff. 95 U.S. 714 (1878)* , the holding of which required actual attachment of property prior to the commencement of a *quasi in rem* proceeding.

(n42)Footnote 42. It is unanimously so accepted in Japan notwithstanding CCP, Art. 29 (see note 8 *supra*). *See also* Cappelletti & Perillo, Civil Procedure in Italy 98 (1965).

(n43)Footnote 43. *Cf.*, Yasutomi v. United Netherland Nav. Co., Yokohama District Court, 17 Kaminshu 874, Sept. 29, 1966, in which the court stated that Article 8 does not require defendant's assets to be closely connected with Japan, but rather plaintiff can take full advantage of defendant's assets which are present in Japan "by mere chance."

(n44)Footnote 44. *See* CCP Art. 4(3).

(n45)Footnote 45. *In re Matsuyama supra*, note 1. In this particular case, the court paid due respect to the opinion of the Ministry of Foreign Affairs on whether the foreign minister had waived immunity.

(n46)Footnote 46. *See* note 2 *supra*.

(n47)Footnote 47. *See* Art. VI of the 1960 Treaty of Mutual Cooperation and Security *(11 U.S.T. 1632;* TIAS No. 4509) and the Agreement under Art. VI of the Treaty regarding Facilities and Areas and the Status of the United States Armed Forces in Japan *(11 U.S.T. 1952;* TIAS No. 4510). Japanese courts will not take cases brought by Japanese employed by the U.S. armed forces against their employer. *See e.g., In re Hoover*, 2 Jap. Ann. Int'l Law 140 (1958) (Aomori District Court, Feb. 14, 1956); Suzuki v. Tokyo Civilian Open Mess, 2 Jap. Ann. Int'l Law 144 (1958) (Tokyo District Court, March 16, 1957).

(n48)Footnote 48. *See, e.g.*, Republic of China v. K.K. Chinese Int'l Times, Tokyo High Court, 8 Kaminshu 1282, July 18, 1957, aff'g, Tokyo District Court, 6 Kaminshu 2679, Dec. 23, 1955, English translation, 2 Jap. Ann. Int'l Law 138 (1958); U.S. v. K.K. Meiji Gomu Seisakujo, Tokyo District Court, 13 Kaminshu 1267, Oct. 31, 1962; U.S. v. Matsumura, Osaka High Court, 737 Hanrei Jio 49, July 12, 1973, English translation, 19 Jap. Ann. Int'l Law 196 (1975).

(n49)Footnote 49. *Kokka Baisho Ho*, Law No. 125, 1947.

(n50)Footnote 50. *See* Art. 4(2) of the Treaty of Friendship, Commerce and Navigation between the United States and Japan, *(1954) 4 U.S.T. 2063,* TIAS No. 2863 (national treatment with respect to access to the court); *28 U.S.C. § 2502; Nippon Hodo Co., Ltd. v. United States, 285 F.2d 766 (Ct. Cl. 1961).*

(n51)Footnote 51. Honda v. Japan, Supreme Court, 3 Minshu 507, Dec. 20, 1949; but *see* Okuda v. Japan, Supreme Court, 1 Minshu 1314, July 20, 1959, English translation, 3 Jap. Ann. Int'l Law 140 (1959).

(n52)Footnote 52. As to a domestic corporation, the Commercial Code provides for the exclusive jurisdiction of the court sitting at the corporation's principal place of business over intra-corporate issues such as nullification of resolutions of shareholders' meetings (Arts. 247, 252, 253), dismissal of directors (Art. 257) appointment of acting directors (Arts. 258, 261, 270), injunction orders enjoining directors' illegal acts (Art. 272) including the illegal issuance of new shares (Art. 280-10), and enforcement of directors' liability for breach of fiduciary duties (Art. 268).

(n53)Footnote 53. Tokyo District Court, 5 Kaminshu 836, June 9, 1954, but *see* Iinuma v. Japan, Tokyo District Court, 11 Kaminshu 1931, Sept. 19, 1960.

(n54)Footnote 54. *See* text accompanying note 49, *supra.*

(n55)Footnote 55. Nihon Musen K.K. v. Matsushita Denki K.K., Tokyo District Court, 4 Kaminshu 847, June 12, 1953.

(n56)Footnote 56. *See* § 5.02[1] *supra.*

(n57)Footnote 57. The text of the Convention is found in International Trade Arbitration 285 (Domke ed. 1958).

(n58)Footnote 58. *(1970) 3 U.S.T. 2517,* TIAS No. 6997, 330 UNTS 38.

(n59)Footnote 59. Tokyo District Court, 4 Kaminshu 502, April 10, 1953.

(n60)Footnote 60. Osaka District Court, 10 Kaminshu 970, May 11, 1959.

(n61)Footnote 61. *See* note 77 *supra.*

(n62)Footnote 62. Minpo (Law No. 89, 1896). These Article 1 provisions were inserted in 1947 as an embodiment of the fundamental principles of private law and civil procedure.

(n63)Footnote 63. *See* CCP Art. 15.

(n64)Footnote 64. *See* note 5 and accompanying text *supra.*

(n65)Footnote 65. Nussbaum, Principles of Private International Law 193 (1943); Fujita, *supra*, note 7, at 56-57.

(n66)Footnote 66. *See* notes 1 and 83, *supra.*

(n67)Footnote 67. *See* § 5.05[2] and [3] *infra.* For further details, *see* Fujita, *Service of American Process Upon Japanese Nationals by Registered Airmail and Enforceability of Resulting American Judgments in Japan*, 12 Law in Japan 69, 72-75 (1979).

(n68)Footnote 68. CCP, Art. 162, para. 2; Postal Act (*Yubin Ho*), Law No. 165, 1947, Art. 66. Where service is effected by a mailman (*i.e.*, by mail), the court clerk must have the mail bear the stamp "*tokubetsu sotatsu*" (special service) as prescribed by law. Postal Act, Article 66; Postal Regulation (*Yubin Kisoku*), Postal Ministry Ordinance No. 34, 1947, Art. 120. Therefore, only a court clerk can effect service of process by mail.

(n69)Footnote 69. CCP, Arts. 164-171.

(n70)Footnote 70. CCP, Art. 169, para. 2.

(n71)Footnote 71. CCP, Art. 163.

(n72)Footnote 72. CCP, Art. 175.

(n73)Footnote 73. CCP, Art. 178-180.

(n74)Footnote 74. CCP, Art. 140, para. 3, *proviso.*

(n75)Footnote 75. CCP, Art. 28.

(n76)Footnote 76. For this time limitation, *see* CPP, Art. 159.

(n77)Footnote 77. Supreme Court, 15 Minshu 1425, May 26, 1961.

(n78)Footnote 78. CCP Art. 107.

(n79)Footnote 79. CCP Art. 109.

(n80)Footnote 80. CCP Art. 114.

(n81)Footnote 81. The member states of The Hague Convention relating to Civil Procedure (286 UNTS 267) as of 1980 are listed in § 5.05[3], note 13 *infra.*

(n82)Footnote 82. Heal v. Heal, Osaka High Court, 11 Kaminshu 2702, Dec. 20, 1960.

(n83)Footnote 83. Tokyo High Court, 185 Hanrei Times 139, Oct. 18, 1965 (party names not reported).

(n84)Footnote 84. The Public Deposit Ordinance (*Kyotaku-kisoku*), Ministry of Justice Ordinance No. 2, 1959, Art. 33.

(n85)Footnote 85. Great Court of Judicature, 22 Minshu 811, Aug. 24, 1943.

(n86)Footnote 86. Great Court of Judicature, 7 Minshu 302, April 27, 1928.

(n87)Footnote 87. Osaka Appellate Court, 97 Shinbun 5, June 2, 1902.

(n88)Footnote 88. Commercial Code, Art. 498-3, which imposes a fine equivalent to the amount of registration tax.

(n89)Footnote 89. *See, e.g.*, Mutual Trust Co. v. Montalt, Tokyo District Court, 6 Kaminshu 1583, Aug. 9, 1955; Banguaji & Co. v. Larner, Tokyo District Court, 11 Kaminshu 1647, Aug. 9, 1960, English translation, 8 Jap. Ann. Int'l Law 181 (1964), rev'd on other grounds, Tokyo High Court, 21 Kosai Minshu 353, June 28, 1968, English translation, 14 Jap. Ann. Int'l Law 94 (1970).

(n90)Footnote 90. CCP, Arts. 46 and 47.

(n91)Footnote 91. *See* notes 20 and 21 and accompanying texts *supra.*

(n92)Footnote 92. Civil Code, Art. 416 (recovery allowed only for ordinary and foreseeable damages for breach of contract); *The Fuki-Maru*, Great Court of Judicature, 5 Minshu 386, May 22, 1926 (Art. 416 held also applicable to a tort case). However, a penalty clause in a contract will be honored in court on the assumption that it was meant to be a liquidated damages clause. Civil Code, Art. 420, paragraph 3; Asiatic Consolidated Co. v. Konishi Trading K.K., Osaka District Court, 339 Hanrei Jiho 36, Nov. 16, 1962 (the agreed amount of $15,000 was awarded although the amount of actual damages was not more than $4,000).

(n93)Footnote 93. *See* the Antimonopoly and Fair Trade Maintenance Act (*Shiteki Dokusen no Kinshi Oyobi Kosei Torihiki no Kakuho ni kansuru Horitsu*), Law No. 54, 1947, Art. 25.

(n94)Footnote 94. Patent Act, Art. 100; Trademark Act, Art. 36; Utility Models Act, Art. 27; Copyright Act, Art. 112; Design Act, Art. 37.

(n95)Footnote 95. Civil Code, Art. 199.

(n96)Footnote 96. Unfair Competition Prevention Act, (*Fusei Kyoso Boshi Ho*), Law No. 14, 1934, Article 1; Commercial Code, Arts. 20, para. 1; and 21, para. 2.

(n97)Footnote 97. Commercial Code, Arts. 272, 275-2, 280-10.

(n98)Footnote 98. Tokyo High Court, 17 Kaminshu 769, Sept. 5, 1966.

(n99)Footnote 99. As to piercing the corporate veil, *see* note 26 and accompanying text *supra.*

(n100)Footnote 100. Commercial Code, Art. 270.

(n101)Footnote 101. CCP, Art. 737 *et seq.*

(n102)Footnote 102. CCP, Art. 760 *et seq.*

(n103)Footnote 103. *See* notes 62 and 63 and accompanying texts *supra.*

(n104)Footnote 104. CCP, Art. 758.

(n105)Footnote 105. Tokyo High Court, 8 Kaminshu 1282, July 18, 1957, aff'g Tokyo District Court, 6 Kaminshu 2679, Dec. 23, 1955, English translation, 2 Jap. Ann. Int'l Law 138 (1958).

(n106)Footnote 106. Tokyo District Court, 16 Kaminshu 923, May 27, 1965, English translation, 11 Jap. Ann. Int'l Law 197 (1956).

(n107)Footnote 107. As to the aftermath of this case, *see* § 5.04[3], notes 34 and 35 *infra.*

(n108)Footnote 108. Osaka District Court, 728 Hanrei Jiho 76, Oct. 9, 1973.

(n109)Footnote 109. *See* § 5.04[3], note 36 *infra.*

(n110)Footnote 110. *See* Civil Code, Arts. 167 through 174-2.

(n111)Footnote 111. Commercial Code, Art. 522.

(n112)Footnote 112. Civil Code, Art. 724.

(n113)Footnote 113. Tokushima District Court, 254 Hanrei Times 209, Dec. 16, 1969.

(n114)Footnote 114. *See also* § 5.03[2][a] and [c] *infra*.

(n115)Footnote 115. Tokyo District Court, 7 Kaminshu 2906, Oct. 15, 1956, aff'd Tokyo High Court, 11 Kaminshu 765, April 9, 1960, rev'd on other grounds, Supreme Court, 18 Minshu 1637, Oct. 15, 1964.

(n116)Footnote 116. Tokyo District Court, 16 Kaminshu 739, April 26, 1965, English translation, 11 Jap. Ann. Int'l Law 183 (1967), aff'd Tokyo High Court, 17 Kaminshu 719, Aug. 29, 1966, English translation, 12 Jap. Ann. Int'l Law 130 (1968).

(n117)Footnote 117. Automobile Accident Indemnification Guarantee Act (*Jidosha Songai Baishohosho Ho*, Law No. 97, 1955), Art. 5; the Implementing Order (Cabinet Order No. 286, 1955, as amended), Art. 2.

(n118)Footnote 118. *See* notes 37 and 110 and the accompanying texts *supra*.

(n119)Footnote 119. *Horei* (Act Concerning Applications of Laws, Law No. 10, 1898). Its translation is found in Volume ✦, Appendix 3B. Another translation is found in Ehrenzweig, Ikehara & Jensen, *American-Japanese Private International Law*, Appendix A at 115 (1964).

(n120)Footnote 120. *See* Ch. 11, §§ 11.03 and 11.04. *See generally* Fujita, *Japanese Regulation of Foreign Transactions and Private-Law Consequences*, 18 New York Law Forum 317 (1972).

(n121)Footnote 121. As to the concept of juristic acts, *see* Volume 1, Notes on Basic Legal Terms.

(n122)Footnote 122. *See generally* Yamada, *The Law Applicable to Contracts--the So-called Principle of Party Autonomy*, 1 Law in Japan 60 (1967).

(n123)Footnote 123. Compare *U.C.C. § 1-105(1)*; *Restatement, Conflict of Laws 2d* § 187(2)(a).

(n124)Footnote 124. Osaka High Court, 13 Kaminshu 2094, Oct. 18, 1962.

(n125)Footnote 125. Tokyo District Court, 18 Rodo Reishu 872, Aug. 8, 1967, English translation, 12 *Jap. Ann. Int'l Law* 147 (1968), affirmed Tokyo High Court, 240 Hanrei Times 156, Dec. 19, 1968. *See also* Singer Sewing Machine Co. v. Bolonakis, Tokyo District Court, 20 Kaminshu 342, May 14, 1969.

(n126)Footnote 126. *Restatement, Conflict of Laws* 2d § 188.

(n127)Footnote 127. *See e.g.*, K.K. Angel Shokai v. Richmond K.K., Osaka District Court, 395 Hanrei Jiho 44, Nov. 11, 1964. This rule is the opposite of the traditional "deposited acceptance rule" in the common law countries. *Restatement, Conflict of Laws* 1st § 64, 67 (1932); Evans, *The Anglo-American Mailing Rule, 15 Int'l & Comp. L.Q. 553 (1961).*

(n128)Footnote 128. Kambata v. Terada Bank, Osaka District Court, 10 Hyoron (Shoho) 98, Mar. 11, 1922.

(n129)Footnote 129. Tokyo Trading K.K. v. Bank of Elba, Tokyo District Court, 598 Hanrei Jiho 75, Mar. 27, 1970; English translation, 16 Jap. Ann. Int'l. Law 160 (1972).

(n130)Footnote 130. Books IV and V of the Civil Code.

(n131)Footnote 131. Arts. 4 and 5.

(n132)Footnote 132. Article 3, para. 3.

(n133)Footnote 133. *Horei* Art. 29.

(n134)Footnote 134. As to *renvoi*, *see* § 5.03[2][b], *infra.*

(n135)Footnote 135. Tokyo District Court, 10 Kaminshu 594, Mar. 26, 1959. *See also*, Tokyo District Court, 8 Kaminshu 1366, July 31, 1957.

(n136)Footnote 136. Tokyo District Court, 7 Kaminshu 3431, Nov. 27, 1956.

(n137)Footnote 137. Nakagawa v. Max Parlan, Nagano District Court, 3024 Shinbun 19, Aug. 29, 1922.

(n138)Footnote 138. Supreme Court, 62 Saikosai Minsaishu 751, Oct. 9, 1962. *See also* Allied Industrial Corp. v. Great American Insurance Co., Supreme Court, 18 Minshu 1637, Oct. 15, 1964.

(n139)Footnote 139. For an interesting case involving assignment of a hotel management contract, *see* Tokyo Hilton K.K. v. J.A. Gregg, Tokyo District Court, 481 Hanrei Jiho 104, May 12, 1967.

(n140)Footnote 140. *Kanyo Shipping K.K. v. Homare International Trading K.K.*, Kobe District Court, 10 Kaminshu 1849, Sept. 2, 1959.

(n141)Footnote 141. *Gilbert J. McCole & Co. v. Chuo Kigyo K.K.*, Tokyo District Court, 7 Kaminshu 429, Feb. 25, 1956.

(n142)Footnote 142. *Kanyo Shipping*, *supra*, note 22.

(n143)Footnote 143. *See* § 5.03[1][c] *infra.*

(n144)Footnote 144. The official French and English texts of these Geneva Conventions are found in 143 League of Nations Treaty Series 317, 332, 409 and 424 (1934). *See* Huddson & Feller, *The International Unification of Laws Concerning Bills of Exchange*, *44 Harv. L. Rev. 333, 370 (1931);* Huddson & Feller, *The International Unification of Laws Concerning Checks*, *45 Harv. L. Rev. 669, 692 (1932).*

(n145)Footnote 145. *Tegata Ho*, Law No. 20, 1932.

(n146)Footnote 146. *Kogitte Ho*, Law No. 57, 1933.

(n147)Footnote 147. *Tegata Ho*, Art. 88; *Kogitte Ho*, Art. 76.

(n148)Footnote 148. *Tegata Ho*, Art. 89; *Kogitte Ho*, Art. 78.

(n149)Footnote 149. *Tegata Ho*, Art. 90, para. 1.

(n150)Footnote 150. *Tegata Ho*, Art. 90, para. 2.

(n151)Footnote 151. *Kogitte Ho*, Art. 79.

(n152)Footnote 152. *Tegata Ho*, Art. 92; *Kogitte Ho*, Art. 80.

(n153)Footnote 153. *Tegata Ho*, Art. 94; *Kogitte Ho*, Art. 80.

(n154)Footnote 154. *Tegata Ho*, Art. 90, para. 2, *proviso*; *Kogitte Ho*, Art. 79, *proviso.*

(n155)Footnote 155. *See*, *e.g.*, Tokyo Marine & Fire Ins. K.K. v. Maersk Line, Ltd., Osaka High Court, 13 Kaminshu 653, April 6, 1962, English translation, 9 Jap. Ann. Int'l. Law 191 (1965); Dalio Brach v. Sumitani, Osaka District Court, 11 Kaminshu 817, April 12, 1962.

(n156)Footnote 156. Royal National Bank of New York v. Osaka Prefecture, Hiroshima District Court (Kure Branch), 21 Kaminshu 607, April 27, 1970, English translation, 17 Jap. Ann. Int'l Law 201 (1973). Japan and the United States are both signatories to the 1910 Brussels Convention for the Unification of Certain Rules relating to the Salvage of Vessels at Sea, *37 Stat. 1658, 1667; 46 U.S.C. § 723*-731. This Convention has eliminated most, if not all, conflicts of substantive law among the main shipping countries.

(n157)Footnote 157. *See* Dawson, *Negotiorum Gestio: The Altruistic Intermeddler*, *74 Harv. L. Rev. 817, 1073 (1961);* Dicey and Morris, *Conflict of Laws* 908 (8th ed., 1967).

(n158)Footnote 158. Hawley v. Hawley, Kyoto District Court, 8 Kaminshu 1940, Oct. 17, 1957.

(n159)Footnote 159. Osaka District Court, 12 Kaminshu 1522, June 30, 1961, aff'd., Osaka High Court, 416 Hanrei Jiho 78, May 13, 1965. This case is discussed in detail in *Fujita supra*, note 2, at 323-324.

(n160)Footnote 160. *See* Dicey and Morris *supra*, note 39, at 920, 943.

(n161)Footnote 161. *See* § 5.02[1][e].

(n162)Footnote 162. Tokyo District Court, 16 Kaminshu 923, May 27, 1965, English translation, 11 Jap. Ann. Int'l. Law 197 (1967). For more facts, *see* § 5.02[3][e], note 143 *supra*. and § 5.04[3], notes 34 and 35 *infra*.

(n163)Footnote 163. Patent Act (*Tokkyo Ho*), Law No. 121 (1959), Arts. 100-106; Utility Models Act (*Jitsuyo-Shin'an Ho*), Law No. 123 (1959), Arts. 27-30; Trademark Act (*Shohyo Ho*), Law No. 127 (1959), Arts. 36-39; Design Act (*Isho Ho*), Law No. 125 (1959), Arts. 37-41; and Copyright Act (*Chosakuken Ho*), Law No. 49 (1970), Arts. 112-118.

(n164)Footnote 164. Law concerning Liability for Fire by Negligence (*Shikka no Sekinin ni Kansuru Horitsu*), Law No. 40 (1899), which provides exemption from liability for fires in the absence of gross negligence.

(n165)Footnote 165. Automobile Accident Indemnification Guarantee Act (*Jidosha Songaibaiso Hosho Ho*), Law No. 97 (1955), Articles 3 and 4, imposing practically no-fault liability upon car owners by shifting the burden of proof to them.

(n166)Footnote 166. Mining Act (*Kogyo Ho*), Law No. 289 (1950), Articles 109 through 116, imposing no-fault liability upon mining entrepreneurs.

(n167)Footnote 167. Compensation for Nuclear Damage Act (*Genshiryoku Songai no Baisho ni Kansuru Horitsu*), Law No. 147 (1961), imposing no-fault liability upon nuclear entrepreneurs.

(n168)Footnote 168. *See generally* Kato, *The Concerns of Japanese Tort Law Today--in Comparison with American Law*, 1 Law In Japan 79 (1967).

(n169)Footnote 169. *See generally* Fujita, *Japanese Product Liability Law*, 1 Jap. Bus. Law J. 160 (Nov. 1980); Niibori and Cosway, *Products Liability in Sales Transactions*, *42 Wash. L. Rev. 483 (1967);* and Z. Kitagawa, Ch. 13, § 13.04.

(n170)Footnote 170. Civil Code, Arts. 710 through 722.

(n171)Footnote 171. See § 5.02[3][d] *supra.*

(n172)Footnote 172. Civil Code, Article 723. *See, e.g.*, L.T. Piebert S.A. v. Kanazawa, Tokyo App. Court, 206 Shinbun 17, Aug. 9, 1922. The compulsion of a public apology was held not to violate the constitutional freedom of conscience. *See* Ouchi, *Defamation and Constitutional Freedoms in Japan*, 11 Am. J. Comp. Law 73 (1962).

(n173)Footnote 173. Hubert Victor Gieren v. Suya, Tokyo App. Court, 254 Shinbun 7, Dec. 10, 1904, aff'd. Great Court of Judicature, 11 Minroku 647, May 10, 1905. For an interesting case involving compulsory transfer of ownership of crude oil from the Anglo-Iranian Oil Company to the National Iranian Oil Company by virtue of the 1951 Iranian Oil Nationalization Act, *see* Anglo-Iranian Oil v. Idemitsu Kosan K.K., Tokyo High Court, 4 Kosai Minshu 702, Sept. 11, 1953, English translation, 1 Jap. Ann. Int'l. Law 55 (1957).

(n174)Footnote 174. Civil Code, Art. 177; Immovables Registration Act (*Fudosan Toki Ho*), Law No. 24 (1899).

(n175)Footnote 175. *Jidosha Teito Ho*, Law No. 187 (1951), Art. 5.

(n176)Footnote 176. Horei, Art. 7.

(n177)Footnote 177. Civil Code, Art. 176.

(n178)Footnote 178. Civil Code, Art. 534. *See generally* Tanigawa, *Risk of Loss in Japanese Sales Transactions, 42 Wash. L. Rev. 463 (1967);* Z. Kitagawa, *2 Doing Business in Japan*, Ch. 2, § 2.01[13][d]; Hirota *et al., ibid.*, Ch. 2, § 2.01[13][d]

(n179)Footnote 179. To the same effect, *see* the 1955 Hague Convention on the Law Applicable to the International Sales of Goods Article 5 (iii), 510 UNTS 147. The text of the Convention is found in 1 Am. J. Comp. Law 275 (1952).

(n180)Footnote 180. Yokohama District Court, 8 Hyoron (Shoho) 4, Oct. 29, 1918.

(n181)Footnote 181. Great Court of Judicature, 26 Minroku 1522, Oct. 16, 1920.

(n182)Footnote 182. Yamaguchi District Court, 18 Kaminshu 711, June 26, 1967, English translation, 13 Jap. Ann. Int'l Law 151 (1969).

(n183)Footnote 183. *In re Koga*, Nagasaki App. Court, 550 Shinbun 12, Dec. 28, 1908.

(n184)Footnote 184. Sakurai v. Bangkok Bank, Ltd., Tokyo District Court, 23 Kaminshu 180, April 15, 1972, English translation, 18 Jap. Ann. Int'l Law 195 (1974), aff'd Tokyo High Court, 25 Kaminshu 1042, Dec. 17, 1974, English translation, 21 Jap. Ann. Int'l Law 154 (1977), aff'd. Supreme Court, 32 Minshu 616, April 20, 1978.

(n185)Footnote 185. *Horei*, Art. 29. As to *renvoi*, see § 5.03 [2][b] *infra.*

(n186)Footnote 186. Yamada v. Denimson, Osaka High Court, 18(7) Kasai Geppo 45, Nov. 30, 1965.

(n187)Footnote 187. Civil Code, Art. 1028.

(n188)Footnote 188. *Chinchilla v. Foreign Tankship Corp., 195 Misc. 895, 91 N.Y.S.2d 213, 218 (1948)* .

(n189)Footnote 189. *See* Ehrenzweig, *Conflict of Laws* 326 (1962); Ehrenzweig, *The Lex Fori--Basic Rule in the Conflict of Laws, 58 Mich. L. Rev. 637, 669 (1960).*

(n190)Footnote 190. Cassel v. Toko Nylon K.K., Tokushima District Court, 254 Hanrei Times 209, Dec. 16, 1966. *See* § 5.02[3][f] *supra.*

(n191)Footnote 191. Yokohama District Court, 573 Shinbun 12, Oct. 2, 1908.

(n192)Footnote 192. Cassaregi Compagnia di Nav. & Comm. S.P.A. v. Nishi Shoji K.K., Tokyo District Court, 10 Kaminshu 1711, Aug. 20, 1959, English translation, 5 Jap. Ann. Int'l. Law 112 (1961).

(n193)Footnote 193. Sogo Koeki K.K. v. Maersk Line, Ltd., Tokyo District Court, 18 Kaminshu 1002, Oct. 17, 1967, English translation, 13 Jap. Ann. Int'l. Law 136 (1969). *See also Meiji Gomu, infra.* note 82.

(n194)Footnote 194. George v. International Air Service Co., Tokyo District Court, 16 Rodo Reishu 308, April 26, 1965, English translation, 10 Jap. Ann. Int'l. Law 189 (1966).

(n195)Footnote 195. Tokyo District Court, 19 Rodo Reishu 1610, Dec. 20, 1968, English translation, 14 Jap. Ann. Int'l. Law 127 (1970).

(n196)Footnote 196. This decision may seem very stringent regarding the New York bank, but in fact, it was just the opposite. At an advanced stage of oral arguments, the bank wanted to withdraw the suit, but the intervening party (the union of the bank's employees) objected (CCP, Art. 236, para. 2). Fortunately for the bank, the filing of the suit was defective in that it had not been proved by way of power of attorney (CCP, Art. 80) that a lawful representative of the bank had authorized such court action. The court advised the bank's attorneys a few times to cure the procedural defect by submitting a new power of attorney duly issued by the bank's president or registered Japanese representative. However, the bank's attorneys refused to do so, and the court had to dismiss the suit on that particular procedural ground, without prejudice to the merits, which was exactly what the bank wanted.

(n197)Footnote 197. *Horei* Art. 3 to 5, 13 through 26. *See generally* Sato, *Japanese Conflict of Laws in Marriage, Divorce and Parental Relations, 8 Wayne L. Rev. 319 (1962).*

(n198)Footnote 198. Cases cited in Ehrenzweig, Ikehara and Jensen, *supra* note 1, at 64-71. *See generally,* Egawa and Ikehara, *Divorce in Japanese Private International Law,* 1 Jap. Ann. Int'l. Law 6 (1957).

(n199)Footnote 199. Hawley v. Hawley, Kyoto District Court, 8 Kaminshu 1940, Oct. 17, 1957.

(n200)Footnote 200. Tokyo District Court, 13 Kaminshu 2169, Oct. 31, 1962.

(n201)Footnote 201. *See* the text accompanying note 75 *supra.*

(n202)Footnote 202. Civil Code, Arts. 404 and 419; Commercial Code, Art. 514. The legal interest rate in Washington, D.C., was also 6 percent U.S.C.A. It appears that the U.S. Air Force had not furnished the Japanese attorneys with sufficient information on the U.S. law of government contracts. All that the Japanese attorneys could produce before the court were copies of excerpts from Am. Jur.

(n203)Footnote 203. Great Court of Judicature, 23 Minroku 378, Mar. 17, 1917.

(n204)Footnote 204. *See* note 72 and accompanying text *supra.*

(n205)Footnote 205. In the family law area, particularly in divorce, *Horei* Art. 30 (public policy) has often been invoked where Art. 29 (*renvoi*) does not work. *See supra,* note 80.

(n206)Footnote 206. Tokyo District Court, 16 Rodo Reishu 308, April 26, 1965, English translation, 10 Jap. Ann. Int'l. Law 189 (1966).

(n207)Footnote 207. The court also used the technique of procedural characterization. *See* note 76 and accompanying text *supra*.

(n208)Footnote 208. Tokyo District Court, 18 Rodo Reishu 872, Aug. 9, 1967, English translation, 12 Jap. Ann. Int'l. Law 147 (1968). *See* note 7 and accompanying text *supra*.

(n209)Footnote 209. *See* 7.

(n210)Footnote 210. The old CCP Art. 219 provided that a court could *ex officio* make necessary investigations as to applicable foreign law regardless of the parties' submissions of proof. However, it is now agreed that the rule is so self-evident that there is no need to have such an enabling provision in CCP.

(n211)Footnote 211. Tokyo Marine & Fire Ins. K.K. v. Maersk Line, Ltd., Osaka High Court, 13 Kaminshu 653, April 6, 1960, English translation, 9 Jap. Ann. Int'l. Law 191 (1965); Dalio Brach v. Sumitani, Osaka District Court, 11 Kaminshu 817, April 12, 1960. *See also* Uwanthoff v. Glegoa, Osaka App. Court, 1116 Shinbun 28, April 15, 1916, aff'd. Great Court of Judicature, 22 Minroku 1916, Oct. 18, 1916, discussed in § 5.02[1]*supra*.

(n212)Footnote 212. Since Japan does not have a jury system, it does not need complicated rules of evidence; therefore, any document may be submitted to the court.

(n213)Footnote 213. CCP, Art. 304.

(n214)Footnote 214. Such an "expert witness" (*kantei-shonin*), as distinguished from an "expert" (*kanteinin*), must be examined and cross-examined according to the ordinary rules concerning witnesses. CCP, Art. 309.

(n215)Footnote 215. CCP, Art. 308. For criticism from a common law jurist, *see* Schoch, *Book Review: Nussbaum, American-Swiss Private International Law*, 1 Am. J. Comp. Law 245, 297-298 (1952), stating, "Opinions of renowned experts, submitted in writing, which are customary in Switzerland as in other civil law countries, seem a poor substitute for the *viva-voce* probings of an expert on the witness stand."

(n216)Footnote 216. Civil Procedure Costs Act (*Minji Sosho Hiyo To Ni Kansuru Horitsu*), Law No. 40, 1971, Art. 12.

(n217)Footnote 217. *See*, *e.g.*, Iwamoto v. Iwamoto, Nagoya District Court, 5 Kaminshu 788, May 29, 1954; Ogawa v. Richard Husjey, Nagoya District Court, 7 Kaminshu 3416, Nov. 28, 1956; Early v. Sahosky, Kobe District Court, 10 Kaminshu 2099, Oct. 6, 1959. Other cases cited in Ehrenzweig, Ikehara and Jensen *supra* note 1, at 39, notes 168, 170.

(n218)Footnote 218. *See* the English solution in Dicey and Morris *supra*, note 39, at 1110 (Rule 185[2]: "In the absence of satisfactory evidence of foreign law, the court will apply English law"); Morris, *The Conflict of Laws* 40 (2d ed., 1980).

(n219)Footnote 219. *See* CCP Art. 118.

(n220)Footnote 220. *Id.*

(n221)Footnote 221. CCP, Art. 199. *See also* CCP, Art. 191.

(n222)Footnote 222. Supreme Court, 9 Minshu 1903, Dec. 1, 1955.

(n223)Footnote 223. *See* George v. International Air Service Co., Tokyo District Court, 16 Rodo Reishu 308, April 26, 1965, English translation, 10 Jap. Ann. Int'l. Law 189 (1966). Also, *see* § 5.02, notes 20, 63, 128; § 5.03, notes 76, 88.

(n224)Footnote 224. Bankruptcy Act (*Hasan Ho*) (Law No. 71, 1922), Art. 3, paragraph 2. *See also* Corporate Reorganization Act (*Kaisha Kosei Ho*) (Law No. 172, 1952), Art. 4.

(n225)Footnote 225. Great Court of Judicature, 8 Minroku 85, June 17, 1902. For a post-enactment case, *see* Sanyo Salvage Kogyo K.K. v. Ohara Sangyo K.K., Tokyo High Court, 10 Kaminshu 1, Jan. 12, 1959.

(n226)Footnote 226. Great Court of Judicature, 23 Minroku 793, May 28, 1917.

(n227)Footnote 227. Tokyo District Court, 16 Kaminshu 1560, Oct. 13, 1917.

(n228)Footnote 228. Tokyo District Court, 11 Kaminshu 1535, July 21, 1960.

(n229)Footnote 229. Tokyo District Court, 667 Hanrei Jiho 47, May 2, 1972, English translation, 18 Jap. Ann. Int'l. Law 209 (1974).

(n230)Footnote 230. The court's reasoning regarding jurisdiction may be wrong: *See* § 5.02[1]. In any case, French judgments seem unenforceable in Japan for lack of reciprocity. *See* Sarma Co., *infra* note 31.

(n231)Footnote 231. *See* § 5.02[2][b] *supra.*

(n232)Footnote 232. *See* § 5.02[1]; § 5.02[2][c] *supra.*

(n233)Footnote 233. *See* CCP Art. 5.

(n234)Footnote 234. *Id.*

(n235)Footnote 235. Daiei K.K. v. Blagojevic, Tokyo District Court, 344 Hanrei Times 102, Dec. 21, 1976, English translation, 22 Jap. Ann. Int'l. Law 160 (1978). For details, *see* Fujita, *infra.* § 5.05, note 8.

(n236)Footnote 236. Compare § 5.02[1].

(n237)Footnote 237. CCP, Art. 200, item 3.

(n238)Footnote 238. Tokyo District Court, 12 Kaminshu 486, Mar. 15, 1961, English translation, 9 Jap. Ann. Int'l. Law 233 (1965).

(n239)Footnote 239. One of the reasons for this ruling was that the Nevada court did not apply the law of the country of the husband's nationality, namely Japanese law, which would have been applicable under the Japanese rules of private international law (orei, Art. 16). It is generally agreed in Japan that in deciding a public policy issue under CCP, Article 200, item 3, the court is not allowed to take into consideration whether the foreign court applied the law which would have been applicable under the Japanese choice of law rules. But, following the German rule [German CCP, Art. 328(1)(iii); 2 *Manual of German Law* 115 (Cohn, 2d ed. 1971)], some writers take exception to a foreign judgment concerning family matters, particularly divorce, and the Tokyo District Court apparently concurred with this view.

(n240)Footnote 240. Tokyo District Court, 586 Hanrei Jiho 73, Sept. 6, 1969, English translation, 15 Jap. Ann. Int'l. Law 181 (1971), aff'd., K.K. Taiheiyo TV v. Fields, Tokyo High Court, 3 *Kokusai-torihiki-hanreishu* (Doi's ed.) 538, May 28, 1970.

(n241)Footnote 241. *See* Tomita v. Inoue, Supreme Court, 19 Minshu 2306, Dec. 23, 1965, English translation, 11 Jap. Ann. Int'l. Law 122 (1967); Ryukyu Bank v. Tokai Denki-Koji K.K., Supreme Court, 29 Minshu 1061, July 15, 1975, English translation, 20 Jap. Ann. Int'l. Law 88 (1976). *See generally* Fujita, *Japanese Regulation of Foreign Transactions and Private-Law Consequences*, 18 New York Law Forum 317 (1972); Kitagawa, *3 Doing Business in*

Japan, Ch. 2, § 2.01[7][d][iv].

(n242)Footnote 242. The Z. Witkosky & Co. Case, Great Court of Judicature, 3670 Shinbun 16, Dec. 5, 1933.

(n243)Footnote 243. *159 U.S. 113 (1895)* .

(n244)Footnote 244. *95 U.S. 714 (1878)* .

(n245)Footnote 245. *137 U.S. 15 (1890)* .

(n246)Footnote 246. Tokyo District Court, 8 Kaminshu 525, Mar. 19, 1957.

(n247)Footnote 247. Note 8, *supra.*

(n248)Footnote 248. Note 19, *supra.*

(n249)Footnote 249. P.F. Collier Inc. v. Gate, Tokyo District Court, 625 Hanrei Jio 66, Oct. 24, 1970.

(n250)Footnote 250. Barros Corporation v. Chung, Tokyo District Court, 949 Hanrei Jio 92, Sept. 7, 1979.

(n251)Footnote 251. *See* CCP Art. 200, Item 4.

(n252)Footnote 252. *Id.*

(n253)Footnote 253. See § 5.02[3][e].

(n254)Footnote 254. *See* § 5.03, note 44 *supra.*

(n255)Footnote 255. Farm Land Development Co. v. Toho Co., Ltd., Superior Court for L.A., Civil Case Docket No. 692762 (1957). For an interesting comment by the expert witness on Japanese law in the California court, *see* Henderson, *Japanese Law in English: Reflections on Translation*, 6 J. of Jap. Studies 117, 133-137 (1980).

(n256)Footnote 256. Marubeni-America v. K.K. Kansai Tekko-sho, Osaka District Court, 361 Hanrei Times 127, Dec. 22, 1977, English translation, 23 Jap. Ann. Int'l. Law 200 (1979-1980). As to the background of this case, *see Deutsch v. West Coast Machinery Co., 80 Wn. 2d 707, 497 P.2d 1311 (1972)* ; K.K. Kansai Tekko-sho v. Marubeni-America, Osaka District Court, 728 Hanrei Jiho 76, Oct. 9, 1973; Fujita, *U.S.-Japanese Transactions and Litigation: The Kansai Iron Works Case*, in ABA, *Current Legal Aspects of Doing Business in Japan and East Asia* (ed. John O. Haley), 196 ff. (1978).

(n257)Footnote 257. *See* Fujita *supra* note 36, at 200.

(n258)Footnote 258. *See* § 5.02[2][c].

(n259)Footnote 259. *(1970) 3 U.S.T. 2517*, TIAS No. 6997, 330 UNTS 38. The text of the 1927 Geneva Convention is found in *International. Trade Arbitration* 285 (Domke, ed., 1958).

(n260)Footnote 260. American President Lines v. Soubra K.K., Tokyo District Court, 10 Kaminshu 2232, Jan. 25, 1959. *See also* Compagnia de Transportes del Mar S.A. v. Mataichi K.K., Tokyo District Court, 4 Kaminshu 502, April 10, 1953.

(n261)Footnote 261. *See* CCP, Arts. 801, para. 1, item 2, and 802, para. 2; New York Convention Art. V(2)(b).

(n262)Footnote 262. Tokyo District Court, 10 Kaminshu 1711, Aug. 20, 1959.

(n263)Footnote 263. It appeared that the Japanese party had not filed a formal application for the approval. But, it is well-known, although the court did not discuss it, that MITI does not allow an applicant to file a formal application until it internally decides that the application is acceptable, thus avoiding the need for official rejection. This is a typical example of the world-famous "administrative guidance" in Japan. As to Japanese administrative guidance, *see generally* Narita, *Administrative Guidance*, 2 *Law In Japan*, 45 (1968).

(n264)Footnote 264. *See* note 19, *supra*.

(n265)Footnote 265. American judges and lawyers do not seem to fully understand this point, and such misunderstanding often gives rise to some friction in international litigation. *See, e.g.*, Merhige, *The Westinghouse Uranium Case: Problems Encountered in Seeking Foreign Discovery and Evidence*, 13 Int'l. Lawyer 19 (1979); note, *Taking Evidence Outside of the United States, 55 B.U. L. Rev. 368 (1975).*

(n266)Footnote 266. 286 UNTS 267.

(n267)Footnote 267. *20 U.S.T. 361*, TIAS No. 6638, 658 UNTS 163. The text is found in the cumulative Pocket Part of 28 U.S.C.A., FRCP Rules 1 to 11, pp. 97-98.

(n268)Footnote 268. 527 UNTS 190.

(n269)Footnote 269. *23 U.S.T. 2555*, TIAS No. 7444.

(n270)Footnote 270. *15 U.S.T. 768.*

(n271)Footnote 271. 561 UNTS 25.

(n272)Footnote 272. *In re Matsuyama*, Great Court of Judicature, 7 Minshu 1128, Dec. 28, 1928. *See* § 5.02[3][a]. As to Japanese theory and practice concerning service of process, *see* Fujita, *Service of American Process upon Japanese Nationals by Registered Airmail and Enforceability of Resulting American Judgments in Japan*, 12 Law In Japan 69, 72-75 (1979).

(n273)Footnote 273. Service Abroad Convention Art. 2.

(n274)Footnote 274. The U.S.-Japan Consular Convention, *15 U.S.T. 768*, Art. 17(1)(e)(i).

(n275)Footnote 275. *See* note 27 and accompanying text *infra.*

(n276)Footnote 276. For details, *see* Fujita *supra* note 8, at 78, note 39.

(n277)Footnote 277. As of 1980, members of the Civil Procedure Convention were: Australia, Belgium, Czechoslovakia, Denmark, Finland, France, West Germany, Hungary, Israel, Italy, Japan, Lebanon, Luxembourg, Monaco, the Netherlands, Norway, Poland, Portugal, Romania, Spain, Sweden, Switzerland, Turkey, the U.S.S.R., and Yugoslavia; and members of the Service Abroad Convention were: Barbados, Belgium, Botswana, Denmark, Egypt, Fiji, Finland, France, Israel, Japan, Luxembourg, Malawi, the Netherlands, Norway, Portugal, Sweden, Turkey, the United Kingdom of Great Britain and Northern Ireland, and the U.S.A.

(n278)Footnote 278. Each member's lodged objections and reservations to the Convention are found in the cumulative Pocket Part of 28 U.S.C.A. *supra* note 3.

(n279)Footnote 279. Service Abroad Convention Article 5(3). *See* Horlick, *A Practical Guide to Service of United States Process Abroad*, 14 Int'l. Lawyer 637, 649 (1980); Ristau, *Report to Secretary of State, Feb. 1978, 72 Am. J. Int'l. Law 633, 634 (1978).*

(n280)Footnote 280. Service Abroad Convention, Art. 5(2).

(n281)Footnote 281. *Hosokai, Minji-Jiken Ni Kansuru Kokusai-Shiho-Kyojo-Tetsuzuki No Gaiyo--Sotatsu To Shoko-Shirabe* (Outline of International Judicial Assistance Procedures--Service of Process and Taking of Evidence) 9 (1976).

(n282)Footnote 282. Special Rules Implementing the Civil Procedure and Service Abroad Conventions Articles 4 and 13 (Minjisoso-tetsuzuki ni kansuru Joyaku-to no Jisshi ni tomono Minjisoso-tetsuzuki no Tokurei-to ni kansuru Kisoku, Supreme Court Rule No. 6, 1979).

(n283)Footnote 283. *See* 48.

(n284)Footnote 284. *Id.*

(n285)Footnote 285. If a foreign requesting officer remits judicial documents to Japanese attorneys, treating them as competent serving officers in Japan, such remittance runs counter to the Japanese express objection to the Service Abroad Convention Art. 10(b) and (c). *See* note 14 and accompanying text, *supra.* In this connection, *see* an interesting American case, *Kadota v. Hosogai, 125 Ariz. 131, 608 P.2d 68 (1980)* .

(n286)Footnote 286. *See* note 10 *supra.*

(n287)Footnote 287. *22 C.F.R. § 92.85*.

(n288)Footnote 288. Service Abroad Convention, Article 8; Civil Procedure Convention, Art. 15.

(n289)Footnote 289. *See In re Letter Rogatory from First Court, Caracas, 42 F.3d 308 (5th Cir. 1995)* ; *In re Application of Asta Medica, S.A., 981 F.2d 1 (1st Cir. 1992)* ; *In re Letter of Request from Crown Prosecution Service, 870 F.2d 686 (D.C. Cir. 1989)* ; *Lo Ka Chun v. Lo To, 858 F.2d 1564 (11th Cir. 1988)* ; *see also United States v. Morris (In re Letter of Request from the Amtsgericht Ingolstadt), 82 F.3d 590 (4th Cir. 1996)* ; *In re Application for an Order for Judicial Assistance in Foreign Proceeding in the High Court of Justice, Chancery Division, England, 147 F.R.D. 223 (C.D. Cal. 1993)* .

(n290)Footnote 290. *See* note 30 *supra.*

(n291)Footnote 291. This rate came into effect in February, 1981. As to the details of consular deposition procedures, *see 22 C.F.R. § 92.49- 92.71*.

(n292)Footnote 292. *See* note 30 *supra.*

(n293)Footnote 293. Civil Procedure Convention, Article 15.

(n294)Footnote 294. Hosokai *supra* note 17, at 14.

(n295)Footnote 295. Civil Procedure Convention, Arts. 8 and 14.

(n296)Footnote 296. Evidence Convention, Article 9. *See* Bridgman, *Proof of Foreign Law and Facts*, 45 J. Air Law & Commerce 845, at 873 (1980).

(n297)Footnote 297. *Gaikoku Saibansho no Shokutaku ni yoru Kyojo Ho* (Law No. 63, 1905).

(n298)Footnote 298. *Ibid.*, Art. 1-2.

(n299)Footnote 299. Civil Procedure Costs Rules (*Minji-sosho-Hiyo-to ni kansuru Kisoku*, Supreme Court Rule No. 5, 1971), Art. 7.

(n300)Footnote 300. CCP, Arts. 144 and 148; Civil Procedure Rule, Art. 9-2 to 9-7.

(n301)Footnote 301. Civil Procedure Rule, Art. 10.

(n302)Footnote 302. *See* 66.

(n303)Footnote 303. CCP, Arts. 343 through 351.

(n304)Footnote 304. CCP, Arts. 312 and 313.

(n305)Footnote 305. *See* Art. 220.

(n306)Footnote 306. *See* 66.