TASUKU MATSUO*

Jurisdiction in Transnational Cases in Japan

I would like to focus my remarks on the theory of jurisdiction in transnational cases that has been developed by Japanese courts. (By the way, I will use the term "competence," not "jurisdiction," when discussing Japanese law, to emphasize the distinction between the Japanese and U.S. views on my topic. From the viewpoint of a sovereign state, there are two types of the so-called "general competence" of the judiciary, which is equivalent to "jurisdiction" in the U.S. legal system. Direct general competence relates to the question whether a Japanese court should recognize a foreign court's adjudicatory authority over a transnational case decided there. I will concentrate on the first type of general competence.

The first thing one notes when one discusses this subject is that Japan's Code of Civil Procedure (CCP) does not contain any provision that deals directly with the Japanese judiciary's general competence. How, then, should a Japanese court decide whether it has the adjudicatory authority over a transnational case? Among Japan's legal scholars, there are two opposing schools of thought on this question. One argues that a court should analogize from the application of the CCP in domestic cases (provided that no treaty or established rule of international law dictates otherwise). Under this reasoning, one would first ask: Would any of the rules of territorial competence set forth in the CCP and other laws apply if the transnational case were a domestic one? (I might add here that, under Japanese law, once a court's territorial competence is established, its in personam competence is implied therein.) If the answer is affirmative, then, this school would say that the court should, as a rule, recognize its adjudicatory authority. Let us call this school the "Nationalist School."

*Partner, Matsuo & Kosugi

On the other hand, the second school emphasizes the need to give due respect to international comity, due process, fairness among the parties concerned, and speediness and efficiency of the litigation. In particular, these scholars argue that a court should decide a transnational case according to *jori*. This term, which is usually translated as "reason," has a very vague meaning, and the courts have not been helpful in clarifying it.

At any rate, this school—let us call it the "Internationalist School"—criticizes the Nationalist School for putting the cart before the horse. The Internationalists point out that the Japanese judiciary must first have general competence as to a transnational case before a Japanese court can entertain the question of its specific competence (i.e., subject matter competence, territorial competence, etc.). So, they ask, why must the judiciary's general competence be dependent on the analysis that uses an analogy to a court's territorial competence in a domestic case?

But the Internationalists are not free from criticism, either. Their theory is too vague to be implemented, their critics say. *Jori* (reason) cannot provide a set of criteria that courts need in deciding cases because that concept itself is open to varying interpretations. Moreover, while the Internationalists call for fairness among the parties concerned, their theory is in fact prejudicial to the plaintiff, who may not have enough resources to bring an action in a forum outside Japan. (Of course, it is also possible to argue that the Nationalists' view is prejudicial to the defendant, who may not be able to come to Japan to defend his or her interests.)

Just as with many other things in life, this debate has produced a middle ground—a compromise view. And, in fact, this is the view that the Japanese courts have come to espouse. How does it work? First, this theory presents a proposition that a court should decide according to *jori*, giving due respect to fairness among the parties concerned, due process, etc. Next, as a general rule, if the transnational case were a domestic one and the court's territorial competence is established, then, unless superseded by a treaty or established rule of international law, it is in accordance with *jori* to recognize Japan's general competence over the case. Furthermore, the theory provides an exception to the general rule that, if in the light of the particular circumstances of the case, such recognition would offend the notions of fairness, due process, speediness of the litigation, etc., then the court should decline to follow the general rule.

Since the Supreme Court's landmark decision in 1981, the Japanese courts (especially the Tokyo District Court, to which many transnational cases have been brought) have more or less upheld the theory as just described. That Supreme Court case[1] involved Malaysia Airlines as the

1. 35 Minshū 1224 (Oct. 16, 1981).

defendant, a plane of which had crashed in Malaysia as a result of hijack, and heirs of a Japanese victim as the plaintiffs. The defendant's argument that Japan lacked general competence over this case was supported by the Nagoya District Court, which dismissed the case, but both the Nagoya High Court and the Supreme Court disagreed with that judgment. The Supreme Court (as did the Nagoya High Court) based its recognition of general competence on the fact that the defendant had a business office in Japan, which, if this had been a domestic case, would have given a Japanese court specific competence under the CCP (article 4, paragraph 3).

Although I cannot go into the details of this interesting case here, there are two points that I would like to make. First, the Supreme Court phrased what I described earlier as the general rule of the compromise theory as an exception to yet another general rule that Japan lacks general competence over a foreign corporation with its main office outside Japan unless that corporation voluntarily submits to a Japanese court's adjudicatory authority. What I described earlier as the proposition was phrased as the standard to be used to determine whether that exception applies. In subsequent lower court opinions I think it is fair to say that this "general rule" of the Supreme Court has been subsumed under the compromise theory's proposition.

The second point is that the Supreme Court's opinion itself did not mention what I described earlier as an exception to the compromise theory. This exception arose in subsequent lower court opinions, and its absence in the Supreme Court opinion can be explained by saying, first, that the facts in the Malaysia Airlines case did not require the Court to take that extra step (and therefore to mention it), and, second, that having this exception is implied by, and consistent with, the proposition of the compromise theory.

Some recent cases suggest that the significance of this exception is growing, whereas the nuance of the Supreme Court's opinion in the Malaysia Airlines case suggested that the exception was quite limited in scope. But the compromise theory as it exists today has not yet followed the familiar path that many legal theories have taken in the past—the exception engulfing the general rule. Rather, the exception in the compromising theory has come to play an important role as the counterweight to the general rule, which is derived from the Nationalists' theory.

Of course, no legal theory is perfect, and there are theoretical and practical problems with the compromise theory. I will raise one of them here, which is theoretical but based on an actual case.[2] Suppose that *X*, a Japanese, is temporarily visiting *Y*, also a Japanese but a New York

2. Hanrei Jihō, No. 925 (July 1, 1979), at 78 (Tokyo Dist. Ct., Mar. 20, 1979).

resident. Suppose further that *X* is in the car driven by *Y* when *Y* negligently drives it into a tree, injuring *X*. *X*, after returning to Japan, brings an action there against *Y*, seeking damages caused by *Y's* negligence. What should the Japanese court do?

According to article 15 of the CCP, "a suit relating to a tort may be brought before the court of the place where the act was committed." According to the general rule of the compromise theory, the court would have to dismiss *X's* suit because Japan lacks general competence over this case. But must *X* really bear the burden of returning to New York (or of staying there long after the accident) if he is to seek justice in a court of law? Should the Japanese judiciary not protect the interest of the victim in this party resulting from the selection of each forum? In short, should there not be enough room in the compromise theory to allow the Japanese judiciary to recognize general competence of emergency nature, as the West German judiciary does?

This is just one problem with the compromise theory, and there are also other court decisions that do not fit neatly within it. Let me say in conclusion that the state of the Japanese law in this area is still fluid, but that the Japanese courts will probably continue to adhere to a middle ground between the Nationalists' and Internationalists' respective positions.