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Procedural Fairness to Foreign Litigants as Stressed by Japanese Courts

Introduction

In dealing with transnational litigation, Japanese judges have often tried to "humanize the law court"[1] in that they have interpreted the law (codes and statutes) very liberally so as to always ensure procedural fairness and substantial justice to foreign litigants. Japanese courts have shown no hostility toward the principle of "party autonomy" (freedom of contracting parties to choose the governing law as well as the exclusive forum). They have attached the utmost importance to contractual justice in the face of a "public policy" defense or even statutory prohibitions. For example, a penalty clause in a sales contract was held not to offend Japanese public policy and the Japanese seller was ordered to pay the agreed amount of $15,000 to the Filipino buyer when the amount of actual damages was not more than $4,000.[2]

The Japanese stringent regulations of foreign exchange and foreign trade

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[1]The original manuscript of this article was submitted to the First International Congress on the Law of Civil Procedure as a national report for Japan on the subject of "international law of civil procedure." The Congress was held in Ghent, Belgium, August 27 through September 4, 1977, on the occasion of the Tenth Anniversary of the Belgian Code of Civil Procedure (1967), sponsored by the International Institute for the Law of Procedure. The theme of the Congress was, "Towards a justice with a human face" or "Humanizing the Law Court." The Congress selected twelve topics such as "The fundamental principles of the law of civil procedures," "Legal aid," "Humanizing the procedure," "Speeding up the proceedings," "Jurists and paraprofessionals" and the present topic of "International law of civil procedure," and the twelve general reporters on the respective topics presented at the General Meeting their general reports partly incorporating or referring to national reports (i.e., reports on the condition of law and practice in the respective countries) submitted from as many as 38 countries. The proceedings are expected to be soon published by the Congress together with those general reports. However, the writers of national reports are permitted and rather encouraged to publish theirs in some other fora. The author wishes to extend special thanks to Prof. M. Storme, the secretary-general of the Congress, Prof. Y. Taniguchi of Kyoto University and Prof. W. Grunsky of Bielefeld University for their encouragement of this publication.

[2]Asiatic Consolidated Co. v. Konishi Trading K.K., Hanrei Jiho (No. 339) 36 (Osaka Dist. Ct., Nov. 16, 1962).

have been consistently held not to affect the validity of an international contract entered into in violation thereof. In *Domex International Co. v. Yokohama Trading K.K.*,[3] the defendant Japanese trading company agreed to sell 15,000 transistor radios to the American plaintiff at a unit price of $6.17, despite the $11.68 minimum price set by the Ministry of International Trade and Industry (MITI) pursuant to the Export Control Ordinance. The defendant attempted to ship the radios in installments, under the name of "electric massagers" which were not subject to the restrictions of the minimum-price (or "check-price") system. After two shipments totaling 1,200 radios, however, the authorities discovered the scheme and the defendant could not ship the remaining 13,800 radios. It was established that the plaintiff could have sold those radios in the United States at a net profit of approximately $2 per unit. Therefore, the plaintiff claimed that the total damages amounted to about $28,000. The defendant contended that the sale contract was illegal and therefore void. The Tokyo District Court conceded that the sales contract was violative of the Export Control Ordinance and that such a law-evading practice was indeed undesirable and regrettable from the standpoint of Japanese export policy. But the court concluded that Japanese export policy should give way to international fairness and justice where the enforcement of such national policy in civil litigation would result in a loss of contractual rights to a foreign party. Thus, the American buyer recovered damages.

The Supreme Court has been in agreement with this lower court's approach and, in enforcing an international loan contract violative of the Japanese Foreign Exchange and Foreign Trade Control Law, stated in a more general form:[4]

> The Law should be considered as a regulatory law [as distinguished from a mandatory law] to temporarily restrict foreign transactions which by nature should be left free, with a view to contributing to the rehabilitation and development of the national economy. . . . Transactions such as the loan and the assignment involved in this present case are not acts which are inherently prohibited but are acts which have been just temporarily made to require a permit due to the present need for restrictions. It would be contrary to the good-faith-and-trust principle described in the Civil Code Article 1 to allow anyone to escape his contractual obligations simply because there are such regulatory prohibitive provisions.

In the area of procedural law, too, Japanese judges have paid due consideration to the protection of aliens in court, sometimes even in contradiction to the code and statutory provisions, as will be discussed below.

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[3]16 Kakyu-saibansho Minji-saibanreishu (Lower Court Civil Case Reporter, hereinafter cited as Kaminshu) 1342 (Tokyo Dist. Ct., Aug. 28, 1965).

[4]Tomita v. Inoue, 19 Saikosaibansho Minji-hanreishu (Supreme Court Civil Case Reporter, hereinafter cited as Minshu) 2306, at 2312 (Sup. Ct.; Dec. 23, 1965), adhered to in Ryukyu Bank v. Tokai Denki-Koji K.K., Hanrei Jiho (No. 982) 19 (Sup. Ct., July 15, 1975). *Generally, see* Fujita, *Japanese Regulation of Foreign Transactions and Private-Law Consequences*, 18 NEW YORK LAW FORUM 317 (1972).

Foreign Corporation's Standing to Sue

A foreign corporation may qualify to engage in business on a continuous basis in Japan if it complies with certain provisions set forth in the Commercial Code. Among the most important of the regulations are Articles 479 and 481. Article 479 requires a foreign corporation to register with the government, and Article 481 states that the corporation may not engage in business until it has so registered.

As a matter of fact, Article 481 of the Commercial Code was amended in 1950. Prior thereto, Article 481 had further provided that a foreign corporation's existence would not be recognized where it had failed to enter the required corporate registration. Until recently then, such a noncomplying foreign corporation could not sue and enforce its contractual rights. In *Gustaf Foch GmbH. v. Maruzen K.K.*,[5] for example, the Great Court of Cassation (the pre-war Supreme Court) had to dismiss an action on a promissory note brought by a German corporation because the foreign corporation, doing substantial business through its Japanese branch office, had neglected the registration requirement.

Although this is not peculiar to Japan at all,[6] strong criticism was raised against such harsh treatment, and scholars advanced several theories designed to mitigate or negate the private-law consequences of a registration violation. Courts also tried to favor unqualified foreign corporations wherever possible. One judicial solution was to accord retroactive effect to a registration entered *after* the accrual of the cause of action. In *Far East Superintendence Co. v. Nihon Seifun K.K.*,[7] the plaintiff English corporation demanded that the Japanese defendant pay a bill of exchange. The defendant refused, denying the corporate existence of the plaintiff, whereupon the plaintiff entered the corporate registration and sued the defendant. Both the Tokyo District Court and the Tokyo Appellate Chamber denied retroactive effect to the plaintiff's registration and dismissed the complaint. On appeal, the Great Court of Cassation reversed and remanded the case, stating that once a foreign corporation has entered a registration, its existence may no longer be denied, and it is irrelevant whether the cause of action arose before or after the registration. In *China Traders Insurance Co. v. Tokuda,*[8] the plaintiff Hong Kong corporation, facing the defense of nonqualification, complied with the corporate registration requirement *during the litigation,* and its complaint was sustained.

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[5]22 Minshu 811 (Gr. Ct. Cass., Aug. 24, 1943).

[6]*See e.g.*, the U.S. practice in TODD, DOING BUSINESS IN OTHER STATES (1968 and annually renewed editions thereafter). Such a practice has been explicitly excluded from the scope of national treatment of foreign corporations in the U.S.-Japanese Friendship, Commerce and Navigation Treaty Article 4(1), [1954] 4 U.S.T. & O.I.A. 2063, T.I.A.S. No. 2863.

[7]7 Minshu 302 (Gr. Ct. Cass., Apr. 27, 1928).

[8]Horitsu Shimbun (No. 97) 5 (Osaka App. Ch., June 2, 1902).

Such judicial treatment, supported by scholars, 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 if it fails to register, but the legislature deleted the much-criticized language which denied the existence of an unqualified foreign corporation. It is now settled beyond any doubt that the 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 it may give rise to an administrative law sanction (a fine not exceeding ¥300,000 or $1,000, Article 498).

Jurisdiction over Aliens

The Japanese rules of jurisdiction laid down by the Code of Civil Procedure (CCP) Articles 1 through 29 are almost identical with its mother law, the German Code of Civil Procedure (Zivilprozessordnung). The basic principle is that a suit should be brought before the court sitting at the defendant's domicile—*Actor sequitur forum rei.* Supplemental rules set forth other special fora at the place of business, place of performance, place of tort and place of property.[9]

Japan has not adopted the French approach that a French national can sue any alien in France unless the action involves title to immovables located outside France.[10] Nor is the Anglo-American "transient rule" that service of process while temporarily staying in a state (or even flying over a state in a plane) justifies the state to exercise jurisdiction over aliens[11] known in Japan.

However, the Japanese CCP Article 8 provides that where an alien has no domicile or residence in Japan, but where he has some attachable property in Japan, a court sitting in the locale of the property can exercise general jurisdiction over the alien. This corresponds to the German CCP Article 23 which has been severely criticized by Professor Nadelmann as one of the "jurisdictionally improper fora," for a "Russian may leave his galoshes in a hotel in Berlin and may be sued in Berlin for a debt of 100,000 Marks because of presence of assets within the jurisdiction."[12]

Dismissing a case brought by a salesman against a California corporation, his former employer, the Tokyo District Court in *Rosterott v. Admiral Sales*

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[9]For the details, see Fujita, *Japanese Rules of Jurisdiction,* 4 LAW IN JAPAN, AN ANNUAL, 55 (1970).

[10]*See* HERZOG, CIVIL PROCEDURE IN FRANCE, 177 (1967).

[11]Grace v. MacArthur, 170 F. Supp. 442 (E.D. Ark. 1959); Colt Industries Inc. v. Sarlie [1966] 1 W.L.R. 440 (C.A.). *See* RESTATEMENT (SECOND), CONFLICT OF LAWS, § 28; Ehrenzweig, *The Transient Rule of Personal Jurisdiction,* 65 YALE L.J. 289 (1956).

[12]Nadelmann, *Jurisdictionally Improper Fora,* TWENTIETH CENTURY COMPARATIVE AND CONFLICTS LAW 321, 328 (1961).

Co.[13] has held that this Article should not be literally applied to an international case, where the properties found and attached were a few sample goods and a typewriter. The court stated:[14]

> 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 the defendant not present in Japan. . . .If the property involved is a tract of land which belongs to the 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 it 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 in Japan. Such being the case, justice and fairness requires us to rule that the relationship of Japan with the property involved is not sufficient to make the exercise of jurisdiction reasonable in light of the fundamental principle [*Actor sequitur forum rei*].

Behind the court's reasonings lies a view commonly shared by Japanese judges and scholars that the CCP provisions are intended to allocate "territorial competence" among Japanese district courts (venue), not "general competence" (or international jurisdiction) among nations, and therefore they should be applied to foreign defendants not directly but with reasonable modifications.[15]

Article 5 of the CCP provides a special forum at a place of performance, and the courts have paid due respect to the applicable foreign law in determining the place of performance. Thus in one case,[16] the Tokyo District Court ruled that it had no jurisdiction over a suit brought by a Japanese creditor against a French debtor because the place to pay damages was Paris, the debtor's place of business, according to the French Civil Code Article 1247, French law governing the agency contract in question. Note that the general principle under Japanese law (Civil Code Article 484) is, "Debtor must go and pay to Creditor." In the above *Rosterott v. Admiral Sales Co.* case, too, the court rejected plaintiff's contention that Tokyo was the place to pay damages, for the employment contract had been made subject to California law and not Japanese law.

Jurisdictional Clauses (Ousting Japanese Jurisdiction)

The CCP provides in Article 25 that the parties may decide the jurisdictional court by agreement in writing, and Japanese judges have never been upset by

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[13] 10 Kaminshu 1204 (Tokyo Dist. Ct., June 11, 1959).

[14] *Id.*, at 1213.

[15] As to the conceptual distinction between territorial competence and general competence, *see* HERZOG, *supra* note 10, at 187.

[16] X v. Y, Hanrei Times (No. 251) 301 (Tokyo Dist. Ct., Mar. 27, 1970).

the parties' prorogation agreement to "oust," to use the American term, a Japanese court of its jurisdiction otherwise obtaining. Far from it, the postwar Japanese courts have been cavalier enough to abandon the writing (i.e., signature) requirement in order to honor jurisdictional clauses in favor of alien-defendants. In a domestic case where no modification is allowed in the application of CCP provisions, the requirement of writing must strictly be met. Thus, a jurisdictional clause contained in an airplane ticket was held invalid, despite the authorization by the Ministry of Transportation of such general terms and conditions of air transportation contracts, in *Appeal of Japan Domestic Airline.*[17]

In *Tokyo Marine & Fire Ins. K.K. v. Royal Interocean Lines,*[18] however, the court stated that since the writing requirement was not necessarily a universal one, it should not be over-emphasized, but rather be relaxed in international litigation. The plaintiff Japanese underwriter, standing in place of the consignee by way of subrogation, then contended that the jurisdictional clause in the bill of lading compelling a Japanese consignee to journey some several thousand miles to the designated Amsterdam court to sue the carrier would violate § 3 (8) of the 1924 Brussels Convention which prohibits any clause lessening a carrier's liability. The district court heard two experts and concluded that most countries, including the United States, England, Germany and France, usually honored jurisdictional clauses in bills of lading. The expert's opinion which the court adopted relied heavily on *Muller & Co. v. Swedish-American Line,*[19] a U.S. case which was subsequently overruled by *Indussa Corp. v. S.S. Ranborg.*[20] Upon appeal, plaintiff presented the *Indussa* case in its brief, but the Osaka High Court did not think it necessary to change the conclusion concerning the interpretation of the Brussels Convention. Perhaps encouraged by the recent trend in England,[21] Germany[22] and the United States,[23] the Supreme Court affirmed the lower courts' rulings.[24]

There will be certain circumstances, however, under which it would amount to denial of justice to a plaintiff to refuse to take his case because of a jurisdictional clause. In *Uwanthoff v. Glegoa,*[25] the Great Court of Cassation ordered

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[17]16 Kaminshu 1154 (Osaka High Ct., June 27, 1965).

[18]14 Kaminshu 1477 (Kobe Dist. Ct., July 18, 1963).

[19]224 F.2d 806 (2d Cir. 1955).

[20]377 F.2d 200 (2d Cir. 1967).

[21]*The Eleftheria,* [1969] 2 All E.R. 641. *Cf. The Fehmarn,* [1958] 1 All E.R. 333 (C.A.).

[22]X v. Y, BGH Urt. v. 3.12.1973-II 2R 91/72-Ver SR74, 470.

[23]M/S Bremen v. Zapata Off-Shore Co., 407 U.S.1 (1972), but see *id,* at 10 note 11, pointing out that COGSA or the Brussels Convention was not relevant therein.

[24]29 Minshu 1554 (Sup. Ct., Nov. 28, 1975), *aff'g* Hanrei Jiho (No. 586) 29 (Osaka High Ct., Dec. 15, 1969).

[25]22 Minroku 1916 (Gr. Ct. Cass., Oct. 28, 1916), *aff'g,* Shimbun (No. 1116) 28 (Osaka App. Ch., April 15, 1916).

the court of first instance to take the case in spite of such a jurisdictional agreement. There, a Belgian brought an action for unpaid salary in the district court sitting at Kobe where the defendant employer, also a Belgian, had his residence. It appeared that the plaintiff was a geological technician and the defendant had brought him from Belgium for some mining projects in Japan. The employment contract contained a prorogation clause selecting a Belgian court in Liege as the court of exclusive jurisdiction over any dispute arising therefrom. Relying on the CCP Article 25, the Kobe District Court refused to take the case. Upon appeal to the Osaka Appellate Court, plaintiff argued that Article 25 was not applicable to an international prorogation agreement, and alleged further that plaintiff would otherwise be left remediless since such a jurisdictional agreement was invalid under Belgian law. The Appellate Court ruled that Article 25 was equally applicable to an international prorogation agreement, provided that such agreement would be recognized as valid under the law of the designated country. Accordingly, the court advised both parties to post an equal sum of money for taking expert testimony on Belgian law. They did not post the money but insisted on lack of necessity to take expert testimony. Eventually, the court closed the hearing and cast the burden of proving foreign law on the defendant who was moving for dismissal of a case over which the Kobe District Court had the original jurisdiction by reason of defendant's residence. The Great Court of Cassation upheld the Osaka Appellate Court's ruling *in toto,* and the case was remanded to the district court.

As a matter of pure logic, however, it would seem to be more reasonable to assume that any country, particularly a civil law country in the Continent, would take a case where both parties, its own citizens, have agreed to submit the case to one of its own courts. Moreover, where one party has established that there was an agreement, it is the other party denying its validity who must show the reason why it is invalid and unenforceable; lack of mutual assent, fraud, illegality and so forth. Thus, it is quite evident that the real policy underlying this case was to protect, at all costs, the poor employee suing for unpaid salary; indeed, the Kobe District Court was not only the most convenient forum but also the *only* accessible court for him.

Arbitral Clauses

The enforceability of an arbitration agreement, domestic or international, has never been doubted in Japan. It was among the first to ratify the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards as well as the 1958 New York (United Nations) Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The basic attitude toward arbitration here is not hostility but assistance and encouragement.

Arbitral clauses contained in transnational contracts will be upheld in Japanese courts regardless of whether the country to which the other party

belongs, or in which the place for arbitration is designated, is or is not a contracting party to the above Conventions. Thus, in *Compania de Transportes del Mar S.A. v. Mataichi K.K.*,[26] 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 first made the following general statement:[27]

> 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.
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> For, what is the reason our Code recognizes an arbitral agreement as a bar to a suit? The parties have agreed that they do not have recourse to litigation but refer their dispute to arbitrators, private persons, to whose judgment they submit themselves. Such self-settlement of dispute would function 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.

Plaintiff contended that it would be left remediless because an award given in the United States would not be enforced in Japan since the United States was not a contracting party to the 1927 Geneva Convention.[28] But the court held that the provisions in the Code of Civil Procedure for the enforcement of arbitral awards were equally available to both domestic and foreign awards, and therefore it was irrelevant whether the United States was or was not a party to the Geneva Convention.

No-Action Clauses

An American insurance policy usually contains a no-action clause as a built-in defense mechanism. In *Cress v. Home Insurance Co.*,[29] there was the following no-action clause in the automobile insurance policy:

> No action shall lie against the company until the amount of the insured's obligation 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.

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[26] 4 Kaminshu 502 (Tokyo Dist. Ct., April 10, 1953).

[27] *Id.* at 507.

[28] Note this decision was rendered on April 10, 1953, long before the United States joined the New York Convention in 1970.

[29] 17 Kaminshu 719 (Tokyo High Ct., Aug. 29, 1966), *aff'g*, 16 Kaminshu 739 (Tokyo Dist. Ct., April 26, 1965).

The plaintiffs, the automobile accident victim's heirs, nevertheless sued the American insurance company directly and argued that the no-action clause is a "procedural" agreement designed to restrict the injured individual's (or his heirs') "right to sue" and, as such, violative of Japanese public policy concerning civil procedure. But, the Tokyo District Court interpreted the clause to be a "substantive" agreement providing for a condition precedent to the coming into existence of the insurance company's obligation to indemnify the insured. At the present stage where an automobile owner is not legally required to insure himself for more than a certain amount (now ¥5,500,00, then ¥500,000), the court stated, such a no-action clause in an insurance policy cannot be regarded as violative of public policy so far as the amount in excess of that compulsory insurance money is concerned.

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

Another illustrative case is *Allied Industrial Corp. v. Great American Insurance Co.*[30] 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 employees stole and embezzled corporate money, and this suit was brought on the employee fidelity insurance policy. The defendant pleaded that there was a clause in the policy that no action should lie unless brought within six months after the filing of the claim. This suit was brought a few months after the stipulated time limitation had run. The plaintiff argued that such a limitation on commencement of suit should not be upheld under the rules of Japanese civil procedure. However, the Tokyo District Court flatly rejected this argument stating as follows:

> 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 as against public policy. The stipulated period of time does not seem to amount to an unreasonable restriction on the right to sue.

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[30]7 Kaminshu 2906 (Tokyo Dist. Ct., Oct. 15, 1956), *aff'd*, 11 Kaminshu 765 (Tokyo High Ct., April 9, 1960), *rev'd on other grounds*, 18 Minshu 1637 (Sup. Ct., Oct. 15, 1964).

The plaintiff then alleged that the period had been extended by the vice-manager of the defendant's Tokyo branch and this suit was brought timely. After extensive examination of witnesses and evidence, the district court found that the period had been extended and that the vice-manager had the authority to extend it. The insurance company appealed the adverse decision to the Tokyo High Court. The high court conducted further examination of evidence and affirmed the district court's finding of fact. By doing so, the court impliedly agreed with the lower court's opinion that the time-limitation clause itself was valid—for, if invalid, the court did not have to conduct any examination of evidence on this point because the suit had been commenced timely so far as the statutory limitation was concerned.[31]

Foreign Statutes of Limitation

A New York lawyer was permitted to collect legal fees from a Japanese client after the Japanese statute of two-year limitation had expired, *Cassel v. Toko Nylon K.K.*[32] The plaintiff New York lawyer worked for the defendant Japanese company in connection with some joint-venture negotiation with an American business. The defendant had 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 the present suit before a Japanese court sitting at the defendant's place of business. According to Japanese law, 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.[33] But, 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.[34]

The defendant argued that the Japanese Civil Code prescription was applicable as the *lex fori,* since the issue was concerned with *procedure.* But, the court stated that inasmuch as the issue affects the life of an obligation, it must be decided by the law which governs the *substance* of the particular obligation. Since the obligation arose under the legal service contract entered into in New York, it was governed by New York law in absence of the parties' intention to choose other law. Thus, the court applied New York law and sustained the New York lawyer's complaint despite the Japanese two year limitation.

Generally, the Anglo-American technique of substance/procedure characterization of conflict issues is not prevalent in Japan. The so-called

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[31]The period of statutory limitation for action on insurance policy is two years. The Commercial Code Article 663.

[32]Hanrei Times (No. 254) 209 (Tokushima Dist. Ct., Dec. 16, 1969).

[33]The Civil Code Article 172.

[34]N.Y.C.R.L.R. § 213.

homeward trend[35] on "The Basic Rule: Lex Fori"[36] is hardly noticeable in Japan in the field of commercial transactions.

Enforcement of Foreign Judgments

A foreign judgment which has become final and conclusive in the country of rendition will be given conclusive effect in Japan if it meets the four requirements enumerated in the CCP Article 200.

Article 200. A final and conclusive judgment rendered by a foreign court shall have its effect if it fulfills the following requirements:
(i) that laws or treaties do not deny the jurisdiction of the foreign court;
(ii) that, where the defeated defendant is a Japanese national, he received service of summons or other orders necessary for the commencement of the action by other than publication or he entered an appearance without receiving service thereof;
(iii) that the judgment of the foreign court is not contrary to public order or good morals of Japan; and
(iv) that there is reciprocal guarantee.

A foreign judgment which is entitled to recognition under CCP Article 200 is also entitled to enforcement. To be enforced, however, it must be approved by a Japanese court by way of *exequatur* or execution judgment. The CCP Articles 514 and 515 provide for such enforcement procedure.

Article 514
(1) The execution of a foreign judgment shall be allowed when its validity is pronounced by a Japanese court by way of an execution judgment.
(2) A district court sitting at the locale of the general forum of the judgment debtor shall have jurisdiction over the suit for an execution judgment. Where there is no general forum, a court which has jurisdiction over the judgment debtor in accordance with Article 8 [place of attachable property] shall have jurisdiction over the suit.

Article 515
(1) An execution judgment shall be given without inquiring into the merits of the foreign judgment.
(2) The suit for an execution judgment shall be dismissed when:
(i) it is not proved that the foreign judgment has become final and conclusive; or
(ii) the foreign judgment does not fulfill the requirements of Article 200.

As is clear from the above provisions, a foreign judgment may not be given effect if it is repugnant to the public order or good morals of Japan. A Nevada divorce decree was denied recognition on the ground of public policy in *Ito v. Ito.*[37] There the husband, a Japanese medical doctor, went to the United States for study in 1954. He extended his stay over three years remitting no money to support his wife and child in Japan. He rejected her plan to go to the United States but instead filed a petition for divorce in the federal District Court for

[35] NUSSBAUM, PRINCIPLES OF PRIVATE INTERNATIONAL LAW 37ff (1943).
[36] EHRENZWEIG, CONFLICT OF LAWS 309ff (1962).
[37] 12 Kaminshu 486 (Tokyo Dist. Ct., Mar. 15, 1961).

Nevada. Divorce was granted by default on the grounds that the couple had not lived together for more than three years, and Nevada law being applied, the husband was left free of any obligation for alimony to the wife or support to the child. Subsequently the wife filed a petition for divorce in the Tokyo District Court. The court denied *res judicata* to the Nevada decree and granted her divorce anew with alimony and support orders.

One of the reasons for this ruling was that the Nevada court did not apply the law of the country of husband's nationality, namely Japanese law, which would have been applicable under the Japanese rules of private international law.[38] It has been generally agreed in Japan that in deciding a public policy issue under the CCP Article 200 (iii), the court is not allowed to take into consideration whether the foreign court had applied the law which would have been applicable under the Japanese choice of law rules. But, following the German rule,[39] some writers take exception to a foreign judgment concerning family matters, particularly divorce, and the Tokyo District Court apparently took sides with this view.

However, so far as transactional cases (i.e., nonfamily cases) are concerned, Japanese courts have never denied recognition to foreign judgments on the ground of public policy. Some scholars even claim that a foreign judgment must be enforced if its Decree (Dispositif, the conclusive 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 of the original claim even in dealing with the issue of public order and good morals.[40] It follows then that any foreign *money* judgment must be enforced in Japan, be it based on gamblings or other immoral transactions.

The requirement of a reciprocal guarantee [CCP Article 200 (iv)] poses the most difficult problem in a suit for enforcement of a foreign judgment. It seems well settled, however, that American judgments, particularly Californian judgments, satisfy the requirement of reciprocity. The *Z. Witkosky & Co.* case[41] paved the way to overcome the deadlock. There the defendant, a Californian judgment debtor, contended before the Great Court of Cassation 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 (iv). It appears from the record that they cited *Hilton v. Guyot*[42] (requirements of fair trial, impartiality, no fraud in procur-

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[38]Horei (Law concerning General Rules of Applicable Law) Article 16.

[39]*See* the German CCP Article 328(1)(iii); 2 MANUAL OF GERMAN LAW 115 (Cohn, 2d Ed. 1971).

[40]1 KANEKO, COMENTARY ON CCP 523 (1955). *But see* KIKUI & MURAMATSU, COMENTARY ON CCP 671 (1957).

[41]Shimbun (No. 3670) 16 (Gr. Ct. Cass., Dec. 5, 1933).

[42]159 U.S. 113 (1895).

ing the judgment, international comity and reciprocity), *Pennoyer v. Neff*[43] (that the mere transient presence of a defendant in the state affords a sufficient basis of jurisdiction) and *York v. Texas*[44] (that a special appearance for the sole purpose of protesting to jurisdiction subjects a defendant to the jurisdiction of the court). It was also argued that in the United States a foreign judgment was only *prima facie* evidence of the underlying claim, and consequently a court could reexamine a foreign judgment on the merits where the defeated defendant denied the original claim by submitting an affidavit. The defendants concluded their argument by pointing to the Californian legislature in the 1930's discriminating against Japanese people with respect to immigration and trade.

However, the Great Court of Cassation rejected the defendant's contention simply stating as follows:[45]

> The requirement of mutual guarantee under the CCP Article 200 (iv) 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 the CCP Article 200. The decision below examined the case law of several states in the United States, and found, relying on the Exhibit A No. 4 that there was mutual guarantee in the above meaning. When we look into the Exhibit, it is not unreasonable or impossible to find so. There may be such circumstances in California as the appellants contend [concerning political and economical discrimination against Japanese people]. Again, 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 mutual guarantee in the above meaning. Accordingly, the appellant's contentions are all groundless.

It would not seem that the Great Court of Cassation followed the defendant's elaborate arguments, one by one face to face. It is not clear from the record whether the plaintiff presented the then extant Section 1915 of the California Code of Civil Procedure providing that a final judgment of a foreign country shall have the same effect as in the country of rendition, which sounds far more liberal than the Japanese Code (too much to be real, according to Professor Ehrenzweig).[46] In any event, this 1933 case which was decided during the time when U.S.-Japanese antagonism was raging high 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.*,[47] a Californian consent judgment of $11,000 was enforced against a Panamanian corporation having a

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[43]95 U.S. 714 (1878).

[44]137 U.S. 15 (1900).

[45]Shimbun (No. 3670) 16, at 17 (1933).

[46]EHRENZWEIG, CONFLICT OF LAWS 163, n.25, 196 n.4; EHRENZWEIG, IKEHARA AND JENSEN, AMERICAN-JAPANESE PRIVATE INTERNATIONAL LAW 31, n.124.

[47]8 Kaminshu 525 (Tokyo Dist. Ct., Mar. 19, 1957).

place of business in Tokyo. A Hawaiian judgment was also enforced, *P. F. Collier Inc. v. Gate.*[48]

As for European countries, a Swiss judgment was enforced, *Losi & Winenberger v. K.K. Maruman.*[49] However, a Belgian judgment was denied enforcement for lack of reciprocity, *Sarma Co., Ltd. v. K.K. Nozawa-gumi.*[50] The court found that under the Belgian Code of Civil Procedure Article 10 (then in force), a Belgian court will decide whether to grant or refuse recognition and enforcement to a particular foreign judgment only after reexamination of the merits (*revision au fond*), if there is no treaty between Belgium and the country of rendition concerning reciprocal recognition and enforcement of judgments of each other. This amounts to saying that "where there is no treaty, there is no recognition." As there is no relevant treaty between Japan and Belgium, the Tokyo District Court denied enforcement of the Belgian judgment. A French judgment was also denied enforcement, but on the grounds that the French court had no jurisdiction over the Japanese defendant in terms of the Japanese rules of jurisdiction, *S. A. Rougimex v. Hoei Trading K.K.*[51]

Enforcement of Foreign Arbitral Awards

As an arbitral clause referring to arbitration in a foreign country is honored, so is a foreign arbitral award. To repeat, Japan was among the first to ratify the 1927 Geneva Convention and the 1958 New York (United Nations) Convention on the Recognition and Enforcement of Foreign Arbitral Award. Moreover, an arbitral award will be enforced regardless of whether the country in which the award was given is or is not a party to these Conventions. Thus, a New York arbitration award was enforced in 1959. *American President Lines v. Soubra K.K.*[52]

It is universally accepted that a state may refuse enforcement of foreign awards if they are repugnant to her public policy or public order and good morals.[53] 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 arbitral awards.

In *G. M. Casaregi Compagnia di Navigazione e Commercio S.P.A. v. Nishi Shoji K.K.*,[54] the defendant Japanese company agreed to buy an old ship

[48]Hanrei Jiho (No. 625) 66 (Tokyo Dist. Ct., Oct. 24, 1970).
[49]18 Kaminshu 1093 (Tokyo Dist. Ct., Nov. 13, 1967).
[50]11 Kaminshu 1522 (Tokyo Dist. Ct., July 20, 1960).
[51]Hanrei Jiho (No. 667)47 (Tokyo Dist. Ct., May 2, 1962).
[52]10 Kaminshu 2232 (Tokyo Dist. Ct., Jan. 25, 1958).
[53]*See, e.g.*, the 1958 New York Convention Article V(2)(b), [1970] 3 U.S.T. 2517, 2520 T.I.A.S. No. 6997, 330 U.N.T.S. 38, 42.
[54]10 Kaminshu 1711 (Tokyo Dist. Ct., Aug. 20, 1959).

owned by the plaintiff Italian company for $162,400, subject to the Japanese Government's (MITI) approval. The agreement stipulated that the Japanese party should use its best efforts to obtain such approval. In September 1954, about eight months after the signing of the agreement, the Italian party notified plaintiff of its cancellation based upon 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.

It appeared that the Japanese party had not filed a formal application for the approval. But, the well-known fact is that, although the court did not discuss it, MITI will not allow an applicant to file a formal application until it has internally decided that the application is acceptable, thus avoiding the need for official rejection. This is a typical example of the so-called administrative guidance in Japan.[55] The London arbitrator, however, gave an award for £21,000, equivalent to $58,400 plus costs, and the Tokyo District Court allowed its execution overruling the public policy defense.

A Californian judgment confirming an arbitration award was enforced in spite of a similar public policy defense, *Fields v. K.K. Taiheiyo T.V.*[56] In March 1963, the defendant, a Japanese telefilm dealer, and the National Telefilm Associates, Inc. (N.T.A.), a Californian corporation, entered into a telefilm licensing agreement under which the Japanese party agreed to pay a $13,350 royalty to the California corporation by February, 1964. The Japanese dealer then sold the right to telecast the film to Fuji T.V. Under the Foreign Exchange and Foreign Trade Control Law, such an agreement requires a license from the Ministry of Finance and royalty payments must be made according to the terms of the license. At that time, to secure "the most efficient and beneficial use of foreign currency funds," the Ministry of Finance made it a rule to grant such a license directly to a television broadcasting company, and not to a broker like the defendant dealer in this case. In filing an official application for the license, the defendant represented the transaction as if the licensing agreement had been negotiated between Fuji T.V. and N.T.A. The defendant, in the name of Fuji T.V., paid the full amount of the royalty to N.T.A. But, before payment, the contract had been duly assigned from N.T.A. to the plaintiff, and the royalty should have been paid to the latter. Apparently unsuccessful in recovering the royalty from

[55]As to this rather notorious practice of "administrative guidance," *see* Narita, *Administrative Guidance*, 2 LAW IN JAPAN, AN ANNUAL 45 (1968).

[56]3 Int'l Trans. Case Rptr (Doi's ed.) 583 Tokyo Dist. Ct., May 28, 1970).

N.T.A., the plaintiff demanded that the defendant pay the royalty anew, and the claim was submitted to the American Arbitration Association in accordance with the arbitral clause in the licensing agreement. The plaintiff won a favorable award and brought an action for its enforcement in Japan.

In the enforcement action, the defendant asserted that since the film licensing agreement was illegal under the Control Law, the California judgment which confirmed the award based on the illegal contract was repugnant to Japanese public policy and should not, therefore, be entitled to recognition and enforcement in Japan. The Tokyo District Court admitted that the licensing agreement was violative of the Control Law but, nevertheless enforced the Californian judgment. The court stated that although the foreign exchange restrictions may subject a party to administrative law sanctions, they do not constitute a strong public policy of Japan in the domain of private law, since they are merely intended to temporarily regulate foreign transactions which, by nature, should be left free.[57]

Conclusion

The above case survey would seem to warrant a conclusion that Japanese judges are very fair in their procedural treatment of foreign litigants, particularly defendants, sometimes even at the sacrifice of the language of Japanese codes and statutes. However, it still remains to be questioned whether such fair treatment of foreign defendants can be called an effort for "humanizing the law court."

For example, in dealing with the validity of a jurisdictional clause in an ocean bill of lading, should not the Japanese court pay more serious consideration to the cold fact that, to use Judge Friendly's famous words, "requiring an American consignee claiming damages in the modest sum of $2,600 to journey some 4,200 miles to a court having a different legal system and employing another language" is, "from a practical standpoint," nothing but denial of justice to him.[58]

Vis-á-vis large international entrepreneurs, on the other hand, it can properly be said that the inconvenience to be sued in a foreign country "is a part of the price which may properly be demanded of those who extensively engage in international trade. . . . They receive considerable benefits from such foreign business and may not be heard to complain about burdens," *Frummer v. Hilton Hotels International.*[59] Japanese courts need not be so hesitant in exercising jurisdiction over foreign corporations doing extensive international business.

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[57] *See* Tomita v. Inoue, *supra* note 4.
[58] Indussa Corp. v. S.S. Ranborg, 377 F.2d 200, at 201 (2d Cir. 1967).
[59] 227 N.E.2d 851, at 854 (N.Y.C.A. 1967), per C. J. Fuld.

In this context, it will deserve mentioning here that Japanese courts are very reluctant to police a contract: generally speaking, they have no suspicion or hostility toward the so-called adhesion contracts, to "boiler-plate" or to "fine-print" contracts. Illustrations explored in this short survey include governing law clauses, jurisdiction clauses, arbitral clauses, no-action clauses, liquidated damages (or even penalty) clauses, exemption clauses, limitation of liability clauses and the like in standardizing contracts has been routinely enforced in Japan without much difficulty mostly in favor of foreign parties. The Courts justified their decisions in the name of "protection of the parties' expectation" or "securite dynamique," but the end results have been merely protection of stronger parties' expectations or drafting technique.

Japanese judges should be more encouraged to do "particularized justice" by paying more attention to the surrounding circumstances and setting of each individual case. This requires not only for the fairness but also individual justice to obtain the high objective of "humanizing the law court."