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International Civil Litigation Over Securities-Related Disputes in Japan

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I. INTRODUCTION

There is no Japanese court decision which deals directly with securities-related disputes arising between a Japanese securities firm and a foreign investor, or vice versa. Thus, it is difficult to predict how Japanese courts would handle such international securities disputes under current relevant laws.

Case law concerning Japanese courts' jurisdiction over general international civil disputes has gradually been developed. Based on this case law and the relevant international treaties to which Japan is a signatory, this Paper will make some predictions concerning the substance of the major legal issues to be confronted when securities-related disputes are brought before the Japanese court, either by an American investor against a Japanese securities firm, or vice versa, or between American parties.

II. JURISDICTION OVER SECURITIES-RELATED INTERNATIONAL DISPUTES

In securities transaction disputes between Japanese and American parties, the first and most important issue to be resolved is whether the Japanese or U.S. courts have subject matter jurisdiction. Needless to say, the determination of jurisdiction will have a great influence on the results of the litigation.

No Japanese decisions exist dealing with this jurisdictional issue. However, cumulative case law in other areas of international disputes can be used to predict, to some extent, how Japanese courts would decide the matter.

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A. Criteria to Determine Jurisdiction of the Court

Japanese courts normally employ two criteria in determining whether they have jurisdiction over certain international disputes. The first criterion is that the Japanese courts have territorial jurisdiction over the international dispute in question under the venue provisions of the Code of Civil Procedure (CCP).¹ Once the court finds some basis for territorial jurisdiction in the particular case, the second criterion is employed. This criterion entails deciding whether the court appealed to can decide the particular dispute impartially, fairly, and efficiently. The elements employed in determining this are commonly called the rules of reason test.

The leading case on the jurisdiction issue is *Goto v. Malaysian Air-line System Berhad* (the *Malaysian Airline* case),² where a Japanese citizen, the husband and father of the plaintiffs, was killed in a 1977 air crash of the defendant's plane, which had departed from Penang for Kuala Lumpur, Malaysia. Plaintiffs brought an action in the Nagoya District Court in Aichi Prefecture, Japan, where the plaintiffs resided. The suit was for breach of an air transportation contract and sought forty million yen in damages.

The defendant argued that the Japanese court had no jurisdiction over the matter. The Nagoya District Court decided in the defendant's favor on the grounds that: (1) the accident occurred outside Japan on a domestic flight entirely within Malaysian territory; (2) the transportation contract in question (purchase of the ticket) was made in Kuala Lumpur where Malaysian law is applied; and (3) for purposes of assembling evidence and hearing witnesses, Malaysia would offer the most convenient forum for resolving the dispute.

Plaintiffs appealed from the district court decision to the Nagoya High Court, the equivalent of the U.S. Court of Appeal. That court reversed the district court decision and held that Japanese courts had civil jurisdiction over the case on the grounds that: (1) the defendant had offices in Tokyo, and thus Japanese courts had jurisdiction under article 4, paragraph 3 of the CCP, which provides for jurisdiction over a foreign company which has an office, a business location, or an employee responsible for business in Japan; and (2) the plaintiffs' residence was in Nagoya, where the defendant would thus be obligated to pay damages under article 484 of the Civil Code (place of payment) if the court decided for the plaintiffs.

1. *Minji Soshōhō* (Code of Civil Procedure), Law No. 29 of 1890 [MINSHOHŌ].

2. 35 *Minshū* 1224 (Oct. 16, 1981).

The district court in this case had adopted the rules of reason test. The high court, however, employed the venue-provision test as a direct basis for determining the Japanese court's jurisdiction over the international dispute, rather than using the CCP's venue provisions as a point of reference or as an indirect basis for determining the jurisdiction.

The defendant appealed to the Supreme Court. The Supreme Court rejected the appeal and upheld the Nagoya High Court's decision solely on the ground that the defendant had an office in Tokyo, although that office had no relevance to the air crash or the transportation contract. The Supreme Court stated:

There is no law, treaty or generally recognized principle of international law for determining the court's jurisdiction over the international disputes. Therefore, it is appropriate to determine the jurisdiction in accordance with the rules of reason, that is, the rules for maintaining impartiality, fairness and speediness. The rules of reason are met if the Japanese court has jurisdiction over the foreign party in accordance with the Japanese CCP's venue provisions for determining the court's jurisdiction, such as the defendant's residence (article 2), an office or a place of business of a corporation or other organizations (article 4), a place of performing an obligation (article 5), a place where the defendant's property is located (article 8), a place of tort (article 15) and other venue provisions.

At a glance, the Supreme Court seems to adopt the rules of reason criteria. Actually, it does not. The Court used the venue provision as a direct basis for determining the Japanese court's jurisdiction over the international dispute, and it concluded that the venue provisions were a reflection of the rules of reason.

Prior to the Supreme Court decision in the *Malaysian Airline* case, there had been a decision by the lower court which followed the same line of reasoning. In *Toho Co. Ltd. v. Hachisuka* (the *Toho Co. case*),³ Toho Co. Ltd. asked the Tokyo District Court for a declaratory decision that Toho had no liability for the damages alleged by Hachisuka in the Superior Court of the State of California on tort grounds. In the California case, Hachisuka alleged that Toho, a Japanese movie company, had told Hachisuka, who arranged a trade premiere of a certain American film for Toho in California, that the film would achieve a great success if imported into Japan. Toho had asked Hachisuka to loan him the money necessary to obtain a license to distribute the film in Japan and to obtain its import license from the Japanese government. Hachisuka further al-

3. 16 Kaminshū 923 (May 27, 1965).

leged that Toho knowingly had no intention to repay the loaned money and knew that there was no possibility of obtaining an import license from the Japanese government. Hachisuka claimed that Toho's acts thus constituted a tort, and that Hachisuka incurred damages amounting to 93,000 dollars, including Hachisuka's representative's expenses for staying in Tokyo while attempting to obtain the import license.

By way of challenge to Hachisuka's lawsuit in California (the California case), Toho brought suit against Hachisuka in the Tokyo District Court (the Tokyo case) asking for a declaratory judgment confirming that Toho owed no obligation to pay the damages alleged by Hachisuka. Toho claimed that the Tokyo District Court had jurisdiction over the case on the grounds that: (1) a part of the tort damage allegedly incurred by Hachisuka, that is, the expenses incurred during her representative's stay in Tokyo and the loss of profit which would have been obtained if the movie had been distributed in Japan, occurred in Tokyo; and (2) under article 15 of the CCP, which dictates that the place of tort is an appropriate venue, Tokyo is one of the places of the alleged tort.

Hachisuka asked the Tokyo District Court to reject Toho's jurisdictional arguments on the ground that both Toho's alleged tort and resultant damages occurred in California. The Tokyo District Court rejected Hachisuka's jurisdictional defense on the ground that a part of the alleged tort damage occurred in Japan and, therefore, that the court had jurisdiction over the Tokyo case based on article 15 of the CCP. The district court rendered a declaratory judgment for Toho, confirming that Toho owed no obligation to pay the tort damages alleged by Hachisuka. The court used the article 15 venue provision as the direct basis for determining its jurisdiction over the case, without referring to the rules of reason.

Other lower court decisions rendered prior or subsequent to the *Malaysian Airline* case, and which involved international disputes over tort damages, have used the venue provisions of the CCP as a point of reference or as an indirect basis for determining the Japanese court's jurisdiction in accordance with the rules of reason. Since the concept of *stare decisis* has not been adopted by the CCP, the lower court may render judgments which conflict with the Supreme Court decision.

The court decisions in this category are: *Kansai Iron Works, Inc. v. Marubeni-Iida (America), Inc.* (negative declaratory interim judgment);⁴ *Yabutani v. Boeing Co.* (negative declaratory interim judgment);⁵

4. 728 HANJI 76 (July 24, 1973).

5. 25 Kaminshū 639 (July 24, 1974).

Yamazaki v. Takenaka Komuten, Inc. (the Japanese court's jurisdiction denied);⁶ *Green Lines Shipping Co., Ltd. v. California First Bank* (the Japanese court's jurisdiction denied);⁷ *Ohkuma v. Boeing Co.* (the interim decision affirming the Japanese court's jurisdiction);⁸ and *Mukoda v. Boeing Co.* (the Japanese court's jurisdiction denied).⁹

Many legal commentators have expressed negative views on the Supreme Court decision in the *Malaysian Airline* case in light of the rules of reason. As the Nagoya District Court stressed in the *Malaysian Airline* case, the airline's Tokyo office had no direct relevance to the air crash or resultant damages, and the most pertinent evidence was available in Malaysia. The Tokyo District Court has also denied Japanese jurisdiction over a lawsuit filed by the survivors of Japanese victims who sought damages caused by an air crash which occurred in Taiwan. The decision was based on the fact that the crash occurred in Taiwan, where the evidence was available, and on the lack of a judicial cooperation agreement between Taiwan and Japan, which rendered the Japanese court incapable of resolving the dispute effectively and efficiently.

Based on the foregoing review of Japanese court decisions, we can reasonably conclude that, when securities related international disputes are brought before Japanese courts, jurisdiction will be determined in the light of the rules of reason, as well as by use of the venue provisions of the CCP as a point of reference or an indirect basis for determining the court's jurisdiction.¹⁰

III. DOUBLE LAWSUITS OVER THE SAME SECURITIES-RELATED INTERNATIONAL DISPUTES

Another problem which is likely to occur in international securities disputes is that, while a lawsuit brought by a U.S. customer who seeks damages caused by a certain securities transaction is pending before a U.S. court, the Japanese securities firm may institute a lawsuit before the Japanese court seeking a declaratory judgment confirming that the Japanese firm owes no obligation to the U.S. customer. Such double lawsuits have occurred a few times in nonsecurities disputes. The *Toho Co.* case and *Marubeni America Corp. v. Kansai Iron Works*¹¹ are both examples.

6. 925 HANJI 78 (Mar. 20, 1979).

7. 1135 HANJI 70 (Feb. 15, 1984).

8. 1113 HANJI 26 (Mar. 27, 1984).

9. 1196 HANJI 88 (June 20, 1986).

10. *Id.*

11. 361 HANTA 128 (Dec. 22, 1977).

In both cases, the Japanese defendant in a U.S. lawsuit brought another suit in Japan against the U.S. plaintiff seeking a negative declaratory judgment on the same facts. Article 231 of the CCP prohibits bringing double lawsuits on the same facts in Japanese courts. It provides that neither party shall institute another lawsuit regarding a case pending before the court.

In the *Toho Co.* case, where the international double lawsuit situation occurred, the defendant in the Japanese lawsuit (the plaintiff in the California lawsuit) did not raise the double lawsuit issue. The Tokyo District Court rendered for the plaintiff, Toho, and declared that Toho owed no obligation to pay for the tort damages alleged by Hachisuka as plaintiff in the California lawsuit. In rendering the negative declaratory judgment, the court did not mention the double lawsuit issue at all.

In the *Kansai Iron Works* case, the defendant in the Japanese lawsuit (the plaintiff in the U.S. case) argued that the institution of the instant suit before the Japanese court while another lawsuit based on the same facts was pending before a U.S. court was illegal under article 231 of the CCP. The Osaka District Court rejected the defendant's argument and stated that the prohibition of lawsuits over the same facts is applicable only when both suits are brought before Japanese courts, and that the term "court" in article 231 applies only to Japanese courts.

The same position was taken by the Tokyo High Court in *China International Newspaper, Inc. v. Republic of China*.¹² As in *Kansei Iron Works*, the court flatly took the position that the prohibition of double lawsuits under article 231 of the CCP cannot be applied where one lawsuit is pending before a foreign court and another lawsuit on the same facts is brought before a Japanese court without scrutinizing whether such international double lawsuits will result in the negative effects which article 231 intends to eliminate. In recent years, however, some legal commentators have examined the international double lawsuit situation in greater depth in light of article 231 of the CCP. They have developed the position that, when the foreign court's final decision on the merits in the preceding lawsuit is foreseeable with a considerable degree of certainty, and when the possibility of recognition of the foreign court's decision by the Japanese courts is foreseeable, then the institution of the second lawsuit before the Japanese court must be adequately restricted to avoid a conflict of two decisions and to maintain impartiality, fairness,

12. 8 Kaminshū 1283 (July 18, 1957).

speediness, and efficiency.¹³

This restrictive view has been adopted by the Tokyo District Court in *Miyakoshi Kiko, Inc. v. Gould, Inc.*,¹⁴ where the initial lawsuit was brought before the U.S. District Court for the Northeastern District of Ohio against the defendant (plaintiff in the Tokyo case) and other Japanese companies on the ground that the plaintiff and two others stole the defendant's trade secrets. The defendant in turn brought suit against the U.S. plaintiff before the Tokyo District Court and sought a negative declaratory judgment. The court concluded that the conditions necessary to apply the restrictive view were not met in this case, and therefore the institution of the second lawsuit before the Tokyo District Court was justified.

The international double lawsuit was created by Japanese lawyers as part of their litigation strategies to achieve two objectives. The first objective of this strategy is to discourage the foreign party from proceeding with its lawsuit, or at least to try to delay the proceedings before the foreign court. The second objective is to stop the enforcement of the foreign decision in Japan. Under article 200 of the CCP, a foreign judgment which has become final may be recognized and enforced by the Japanese courts only when four conditions are met. One such condition is that the foreign court's judgment is not contrary to public order or good morals in Japan. The enforcement of a foreign judgment was denied under this provision in *Kansai Iron Works*. In that case, Marubeni America asked the Osaka District Court to issue an execution judgment for the final judgment rendered by the U.S. court ordering Kansai Iron Works to pay Marubeni 86,000 dollars. Prior to the institution of this lawsuit, Kansai Iron Works had brought a lawsuit in the same Japanese court against Marubeni America and others, seeking a declaratory judgment that Kansai Iron Works owed no such obligation. In this negative declaratory judgment case, the Osaka District Court rendered its decision for Kansai Iron Works, which became final on December 5, 1974, while the U.S. court decision became final on October 17, 1974. The Osaka District Court rejected the plaintiff's request for the execution judgment on the ground that, when the Japanese court's final decision and the foreign court's final decision have been rendered over the same set of facts, and the foreign judgment contradicts the Japanese final judgment, the enforcement of the foreign decision is against Japanese public policy.

13. Dogauchi, *Concurrent International Litigations*, 100 U. TOKYO J. JURISPRUDENCE A. 715 (1983).

14. 1348 HANJI 92 (May 30, 1989).

Japanese parties try to take advantage of this holding by creating international double lawsuit situations. In some cases this strategy is successful. Under the restrictive view, however, the effectiveness of this strategy may be lessened to some extent.

IV. CONCLUSION

This paper has largely concentrated on jurisdictional issues in Japan relating to international litigation. The analysis has shown that the jurisdictional issue can be a considerable barrier to the globalization of securities markets. To promote securities market globalization, efforts to harmonize world legal systems, especially in the major securities trading nations, must be made in order to minimize or lessen such barriers.