

Difficulties in deciding jurisdiction

Junichi Tobimatsu and **Kana Manabe** of **Mori Hamada & Matsumoto** explain the processes, factors and controversy involved in allocating jurisdiction over disputes with international elements

Until April 2012, there had been no provisions in the Japanese Code of Civil Procedure (Code) prescribing which cases with international elements the Japanese courts should have jurisdiction over. For many years, it has been left to the court to decide on a case-by-case basis. Proponents of the nationalistic view argued that if the requirements establishing (domestic) territorial jurisdiction in Japan according to the Code were met, the Japanese court should in principle exercise jurisdiction over the case (so-called reverse presumption theory). Proponents of the universalistic view argued that jurisdiction should be determined based on fairness among the parties, with the aim of achieving proper and prompt adjudication (so-called allocation jurisdiction theory).

In the landmark *Malaysian Airlines* case in October 1981, the Supreme Court of Japan adopted the reverse presumption theory. It held that the determination of international jurisdiction should be made in accordance with the principle of reason, which requires fairness among the parties and proper and prompt adjudication. It went on to state that when the requirements establishing the territorial jurisdiction in Japan according to the Code are met, it is in accordance with that principle of reason to adjudicate such cases in Japan. Subsequent lower court cases followed the *Malaysian Airlines* case, but they also added one more test. Even if territorial jurisdiction in Japan is established, if there are exceptional circumstances which would contradict the fairness among the parties and proper and prompt adjudication, then the jurisdiction of the Japanese court should be declined. This additional test has been confirmed by the Supreme Court decision in November 1997. Following these two Supreme Court decisions, the jurisprudence regarding international jurisdiction has been understood as (i) if the requirements are met for the territorial jurisdiction of Japan, then the Japanese court's jurisdiction is established unless (ii) exceptional circumstances exist.

The 2012 amendment

The 2012 amendment to the Code provided articles stipulating which kind of cases with international aspects the Japanese court should have jurisdiction over, with the intention of providing much more predictability and clarity. First, general jurisdiction is exercised by the Japanese courts when the defendant's domicile or, in case of a legal entity, its main office is located in Japan. Second, as to the special jurisdiction, the Code provides various instances where the Japanese court can exercise its jurisdiction. For example, in disputes over contractual obligations, the Japanese court has jurisdiction if the place of performing the contract is in Japan. For claims relating to property rights, if the subject matter of the claim is in Japan or (in a case of a claim demanding payment of money) if any seizable property is located in Japan (unless value of such property is extremely low), the Japanese court has jurisdiction. For claims relating to tort, if the tortious act took place in Japan (this includes when the result of such act occurred in Japan, unless such occurrence is ordinarily unforeseeable), the Japanese court has jurisdiction. On the other hand, the Code also provides exceptions where the Japanese court can decline its jurisdiction. Article 3-9 of the Code provides that even when the court has jurisdiction, it may dismiss the whole or part of the action when it finds that there are special circumstances. Special

circumstances exist if the Japanese court conducts a trial and makes a judicial decision, and would not achieve equity between the parties or would impede the well-organised progress of court proceedings. In this situation, the court must take into consideration: (i) the nature of the case; (ii) the degree of burden that the defendant would bear by making an appearance; (iii) the location of evidence; and (iv) other circumstances. This exception has been drafted taking into consideration precedents; according to the wording, the factors considered by this exception seems quite similar to the court precedents. More than two years have passed since the amendment took effect and there have been some lower court cases where this exception has been considered. Below we examine these cases to see what kinds of specific facts have been considered by the Japanese court, how easily or strictly it has limited its jurisdiction, and whether there have been any changes in attitude after the amendment.

Tokyo District Court February 22 2013

In this case, the plaintiff sued the defendants, demanding the division of an apartment located in China which had been agreed to be co-owned by the plaintiff and the defendants upon their divorce (the plaintiff and one of the defendants used to be spouses and the other defendant was their child). All the parties resided in Japan, and so general jurisdiction of the Japanese court existed. The defendants argued that the Japanese court should dismiss the action under Article 3-9 of the Code.

Since the website could be viewed in Japan, the defamation therefore occurred in Japan

The court accepted the defendants' argument and dismissed the action. It first provided its interpretation of the factors to be considered, which are enumerated in the Article. Namely, (i) the nature of the case means the objective circumstances regarding the dispute such as content of the claim, (ii) the degree of burden that the defendant is to bear means the circumstances regarding the parties such as the burden on the defendant and predictability of the parties, and (iii) the location of the evidence includes the location of the physical evidence and how easily the court can examine evidence. The court then considered these factors in the case in question.

With regard to (i), the court determined that since the real property was located in China, according to the Act on General Rules for Application of Laws, the governing law of the matter would be Chinese law. The court emphasised the difficulty for the Japanese court to interpret and apply Chinese real property law and stated that their capacity to conduct a proper trial and render proper judgment was limited. It also noted that

if they made a decision ordering that the registration of the real property be changed or ordered compulsory auction instead of solving the case by monetary payment, then the recognition and enforcement of the Japanese court's decision in China would be an issue. As there is no international agreement between China and Japan about the recognition of judgments, it was unclear if the Japanese court judgment would be recognised and enforced in China. Therefore, a Japanese court judgment may not resolve the dispute. With regard to (ii), the court found that it was not significant, since the defendants lived in Japan. With regard to (iii), if the court were to order division of the property by way of making monetary payment, the court would need assistance from an expert in assessing the value of the property located in China. The court stated that it was not certain how they could retain a proper expert and if the court could judge whether the appropriateness of the assessment by the expert was reliable. In conclusion, the court found that special circumstances existed, so that if the Japanese court conducted a trial and made a judicial decision on the action, it would harm equity between the parties or impede the well-organised progress of court proceedings, especially considering the difficulty relating to the interpretation and application of the Chinese real property law. It further noted that even if the Japanese court declined jurisdiction, the plaintiff could still find a way to realise its rights, as usually the court where the real property is located would have jurisdiction over the case.

Tokyo District Court October 21 2013

Here, the plaintiffs were Japan-based corporations, and the chairman of one of the corporations sued the defendants, a corporation established under the laws of Nevada in the US and its directors and general counsel. The corporate plaintiffs held some of the corporate defendant's shares. The corporate defendant was engaged in the gaming industry and as such, if it had a relationship with inappropriate persons, it could be deprived of its licence. The corporate defendant conducted an investigation on the corporate plaintiffs and concluded that the plaintiffs had violated the United States Foreign Corrupt Practices Act. With such result, the defendant bought back the shares from the plaintiffs and it also posted the result of its investigation on their website. The plaintiffs claimed that such posting constituted defamation and sought damages.

The consideration of exceptional circumstances became the norm rather than exception

In terms of certain claims against the corporate defendant, the court concluded that the Japanese court had jurisdiction, since the website could be viewed in Japan and the defamation therefore occurred in Japan. However, the court dismissed the action because it found that special circumstances under Article 3-9 existed. With regard to the (i) nature of the case, the court stated that the plaintiffs must have foreseen that the dispute arising from the business of the defendant would be negotiated or tried in the United States, considering that the various agreements (such as the shareholders agreement) with one of the individual defendants were drafted in English, with the governing law being the law of the State of Nevada and exclusive jurisdiction granted to the Nevada state court. With regard to (ii) the degree of burden that the defendant is to bear, the court found it to be substantial, considering that most of the documentary evidence was located and many witnesses resided in the United States. With regard to (iii) location of evidence, since most of it was in the United States, documentary evidence needed to be translated and interpretation would be required for witness examination. In addition, with regard to (iv) other circumstances, the court considered

the prejudice to the plaintiffs if the Japanese court declined jurisdiction. The court concluded that because some plaintiffs had been dealing with the litigation in the United States in the relevant case, declining the Japanese court's jurisdiction would not deprive the right of the plaintiff for trial. It also took into account that the plaintiffs must commence a litigation against the individual defendants in a US court, because the Japanese court does not in any event have general or special jurisdiction over the plaintiffs' claims against those individuals.

The court also made general remarks about the application of Article 3-9, stating that all the factors stipulated in the Article should be considered in their entirety, and that it should refrain from dismissing the action easily, because that may deprive the right of the plaintiff to the trial. On the other hand, it stated that the court does not take the view that the special circumstances should only be found in very limited circumstances.

Criticism of exceptional circumstances requirement

Before the 2012 amendment, the Japanese courts considered various factors in determining exceptional circumstances, such as location of the evidence, how easily the court could examine the evidence, whether the defendant predicted the possibility of a lawsuit in Japan, the primary business operations of the defendant, and if the foreign court had jurisdiction and governing law.

However, there was some criticism of the abusive use of exceptional circumstances as a means to decline jurisdiction. Some criticised the fact that it depended too much on the discretion of the court and thus lacked predictability. In fact, there have been court cases where the court did not consider whether the requirements for the territorial jurisdiction were met, but first considered if exceptional circumstances existed. In that sense, one could argue that the consideration of exceptional circumstances became the norm rather than exception. Other opponents also pointed out that since such jurisprudence allowed too much discretion to the court, the court analysed factors which should not have been considered. In research published in 2009, among the 42 cases which mentioned exceptional circumstances, 22 cases approved the Japanese court's jurisdiction whereas 20 cases denied it. Eighteen cases mentioned governing law and nine out of 10 cases where Japanese law was found to be the governing law, approved jurisdiction. In contrast, five out of eight cases where the foreign law was found to be the governing law, denied jurisdiction (the other three cases approved the Japanese court's jurisdiction; however, they were cases where the jurisdiction had been agreed upon by parties or by the defendant's appearance). This shows the high correlation between the governing law and the determination of the jurisdiction, although in theory, it has been said that governing law and jurisdiction are two separate matters and governing law should not play a big role in determining jurisdiction. However, such an ambiguous requirement as exceptional circumstances allowed the court to consider a factor which should not have been considered.

Changes in the 2012 amendment

Looking at the application of the special circumstances requirement under the 2012 amendment, it seems that the same criticism may apply. It seems that the factors established for determining exceptional circumstances have also been similarly considered when determining the existence of special circumstances under Article 9-3 after the amendment. If the court easily declines its jurisdiction under the special circumstances requirement, it may similarly result in unpredictability and allow the court to consider factors which should not be considered. The February 22 2013 case would be subject to this criticism, as it placed much emphasis on the governing law. The October 21 2013 case is mindful of this issue when stating that it should refrain from dismissing the action easily because that may deprive the right of the plaintiff to the trial. However, to what extent the court will find special circumstances is yet to be seen.

Historically, the exceptional circumstances requirement was established to deal with situations where the determination according to the so-called reverse presumption theory resulted in an inappropriate conclusion. However, the 2012 amendment adopted the allocation jurisdiction theory and stipulated allocated jurisdiction in each case. Considering this fundamental difference, it seems inappropriate to find special

circumstances as easily as exceptional circumstances. It is, however, yet to be seen to what extent that the Japanese court will find special circumstances and we need to wait for more cases to accumulate. Until they do, predicting whether a Japanese court will accept international jurisdiction is difficult. It is therefore important to consult with experienced Japanese lawyers when the potential for dispute arises.



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