

FORUM CLAUSES AND FORUM SHOPPING
JAPANESE PERSPECTIVE

1 Jurisdiction in general

In a case of the bereaved families' action against Malaysia Airlines for loss of life arisen out of an airplane crash, The Supreme Court Judgment dated October 16, 1981 (*Malaysia Airlines* case) held that the court's jurisdiction over international disputes shall be decided in principle based on fairness to the parties and appropriateness and promptness of the proceedings, and it is reasonable if the court considers that it has the jurisdiction based on one of the provisions of the Civil Procedure Code¹ with respect to the jurisdiction, though these provisions are set to be applied to non-international cases. (Please see the translation of Article 4 to 15 of the Civil Procedure Code², attached hereto.) Malaysia Airlines had registered its legal representative in Japan and its office for business in Japan, and Civil Procedure Code Article 4 (4) provides for the court's jurisdiction when the defendant's office for business is located in the court's venue.

Since *Malaysia Airlines* case, Japanese courts have reviewed in many cases the special circumstances, by which the court's acceptance of its jurisdiction based on the jurisdiction provisions of the Civil Procedure Code would harm fairness to the parties or appropriateness/promptness of the proceedings, and in given circumstances, if the court should not accept its jurisdiction. For instance, The Supreme Court Judgment dated November 11, 1997 (*Family vs. Miyahara* case) relates to a case where the plaintiff, a Japanese automobile importer, sued in Japan a Japanese national residing in Germany based on breach of an agency agreement. Civil Procedure Code Article 5(1) provides for the jurisdiction based on a place of performance (in this case, Japan), but the Supreme Court held under the principle laid down in *Malaysia Airlines* case that the Japanese court should not have jurisdiction over the case, taking into account the circumstances that the defendant resided in Germany for 20 years, that the agency agreement did not have the forum selection or governing law clause, that the relevant evidence is mainly in Germany, and that the plaintiff as an importer of German automobiles would not assume unreasonably heavy burden in pursuing the action in Germany.

¹ Civil Procedure Code at present in effect was promulgated in 1996 (Law No. 109 of 1996), but the provisions with respect to the jurisdiction was not significantly changed from the old Civil Procedure Code (Law No. 29 of 1890), which was at the outset strongly influenced by German Code of Civil Procedure 1877. In this paper, the Article number of the revised Civil Procedure Code is used for your easy reference.

² Article 7 provides for jurisdiction over the action against multiple parties, against one of whom the court has jurisdiction over the action if the causes of action against such parties are wholly or partly common. Application of this provision to international cases shall be restricted. The judgment of Tokyo District Court dated Oct. 23, 1990 did not accept its jurisdiction over the insurer's action against an Hong Kong resident agent of a Japanese art buyer, though the court accept the jurisdiction over its action against the buyer. The art seller bought a transit insurance, and the art was stolen during the custody of the said agent, and the insurer covered the loss and the subrogated to the right of the seller.

2 Forum selection clause

a) Validity

Civil Procedure Code Article 11 provides for the parties' agreement with respect to the jurisdiction, which, under the principle laid down by *Malaysia Airlines* case, shall be applied to international cases. The parties' jurisdiction agreement shall be made in writing (Article 11(2)), including digital or electric record (Article 11(3)), to make it effective. Japanese courts have strongly respected the forum selection clause.

The Supreme Court Judgment dated November 28, 1975 (*Tokio Marine & Fire Insurance vs. Royal Inter-Ocean Lines* case) held the bill of lading forum selection clause setting exclusive jurisdiction of the court in Amsterdam to be effective³. To make such forum selection clause effective, the plaintiff asserted, (i) the relevant foreign court shall consider the jurisdiction clause as effective, (ii) the reciprocity shall exist between Japanese and Dutch courts, (iii) such jurisdiction clause shall clearly indicate to include claims in tort, and (iv) such jurisdiction clause shall not put one of the parties into an unreasonably unfavorable position. To respond to these assertions, the Supreme Court held that (i) it is enough if Amsterdam court has jurisdiction in general, (ii) reciprocity only needs for case of recognition and enforcement, (iii) that jurisdiction clause is clear to cover any claim in contract and in tort, and (iv) the place where the defendant is located is a popular factor to accept jurisdiction worldwide and the defendant's policy in pursuing an international business to settle the case in one place should be respected. The court, thus, accepted Amsterdam jurisdiction and dismiss the plaintiff's action.

The court further set out the principle: (a) It is enough if the court could clearly find the parties' acceptance to the jurisdiction overseas. It does not need signatures of both parties, and the forum selection clause on the reverse side of the bill of lading is enough⁴. (b) the foreign forum selection clause shall be effective if the case is not subject to Japanese court's exclusive jurisdiction and if that foreign court shall have jurisdiction over the case. (c) the jurisdiction clause shall be effective if it would not be extraordinary unreasonable or contrary to the public policy.

b) Scope of application

³ It is not settled if the governing law to decide validity of foreign jurisdiction clause shall be Japanese law as *lex fori* or that foreign law, while it is considered that an issue for the validity and effect of arbitration clause shall be governed by the law of contract, which is subject to such arbitration clause. Please see the Judgment of Supreme Court dated Jul. 30, 1980; the Judgment of Tokyo District Court dated Mar. 25, 1993

⁴ The consignee's acceptance of the bill of lading was considered sufficient to find his acceptance of the forum selection clause. However, for a case where the court could not find the parties' intention to bind themselves to the forum clause, please see the Judgment of Osaka District Court dated Jan. 24, 1989, where the parties made contract including Osaka forum clause only for tax report purpose and the place of performance shall be Korea rather than Japan.

Often in these days, the cargo packed in a container causes the fire on the vessel, and the damage and loss extends to many other containers and the vessel itself. In such case, it is often useless for the ship owner to take action in the court they choose in the forum selection clause, since the shipper is in most cases located in a country other than the chosen forum. Some of the typical liner container bill of lading forms provides the forum selection clause only as applying to the cargo interests' claim against the carrier, and giving the carrier an option to choose the jurisdiction set out in the forum selection clause or the other jurisdiction. Otherwise, we should review the wordings if the forum selection clause would cover such carrier's claim in tort against the cargo interests.

It seems in our experiences in such cases that the courts of many countries admit their jurisdiction over such claims against the cargo interests in spite of the forum selection clause. There is no precedent in Japan. However, though it depends on the wordings of the forum selection clause, it is submitted that the forum selection clause in the bill of lading does not expect such carrier's claims against the cargo interests. Unless it clearly includes the carrier's claims in tort against the cargo interests, the carrier's intention in providing the forum selection clause may be considered vague in this respect, and the cargo interests would not be harmed so much in defending such claims in his country. As far as the tortuous conduct by the cargo interests was made in their country⁵, if it were in Japan, Japanese court would not have strong objection in admitting the jurisdiction over the carrier's claim against the cargo interests having the general forum in Japan, by virtue of the principle laid down in *Malaysia Airlines* case, in spite of the forum selection clause.

In the Supreme Court Judgment dated June 8, 2001 (*Tsuburaya Production* case), though related to copyright infringement overseas, the court held that it has the jurisdiction over the second action based on Article 7 of Civil Procedure Code, if the first action could give the jurisdiction to the court based on the fact that the tortuous conduct was made in Japan and if the first action and the second action have a close relationship. The other cargo owner's claim in tort against the cargo interests, who are asserted as having committed tortuous conduct, would give Japanese courts the jurisdiction based on Article 5 (9) of Civil Procedure Code, if tortuous conduct was made in Japan. If the carrier, upon having paid for the cargo's loss/damage, is subrogated to the said other cargo owner, and if the carrier sues the shipper of the cargo which caused the fire, the court would not have any strong objection against taking the jurisdiction. The ship owner's claim in tort against the cargo interests has usually a close relationship with the other cargo's claim, and thus, though it still depends largely on the situations in a particular case, there are a good chance for the carrier to sue in Japan the cargo

⁵ In the Judgment of Tokyo District Court dated Sept. 26, 2006 (*Northern Endeavour* case), slot charterer sued a ship owner for loss of containers during the voyage before Tokyo District Court. The Civil Procedure Code provides for jurisdiction for tort claim simply as a place of tort, but the courts has restricted its construction to cover a place of loss or damage widely. In those cases, the court is always looking for the place of tortuous conduct, and *Northern Endeavour* case, loss of containers was found not caused by any conduct in Tokyo where the containers were loaded, and the case dismissed.

interests in tort for its loss/damage to the ship and for its payment to the other cargo owners for their loss/damage.

At the same token, in cases of the cargo owner/insurer's claim against the time charterer and the ship owner before Japanese court based on the forum selection clause in the bill of lading, the court would not dismiss the time charterer's third party action against the ship owner for indemnity, only by reason of London or New York arbitration clause in the charter party. The case should be distinguished from the time charterer's third party action against the shipowner.

3 Dismissal/intermediate judgment/stay

In case the court finds the grounds to admit its jurisdiction, it will put the procedure forward, but sometimes occasioned by the defendant's application, the court will issue an intermediate judgment. It is the court's discretion if it would issue an intermediate judgment. The defendant could not appeal against only an intermediate judgment, but could appeal the intermediate and the final judgment together after the final judgment is issued. Once Japanese court accepts jurisdiction, it pursues its procedures on its own, though in practice the defendant party's attitude might slow down the procedure. Once the court denies its jurisdiction, it will not stay the action but dismiss it as a final judgment. There is no system or procedure to stay the procedure for a case of the court's denial of jurisdiction.

4 Action pending before foreign court

Japanese Civil Procedure Code Article 142 provides that the party shall not take any action as to a case already pending before the court, and the word, "court" is considered only the court in Japan. Therefore, if strictly being led by this Article 142, the fact that the foreign court admitted its jurisdiction and has advanced its procedure would not affect Japanese court's review on the forum selection clause and its jurisdiction over the claim. There may be some unavoidable circumstances for the plaintiff to take actions in more than one country, in the situations where the courts or procedural systems of two countries are not collaborating each other. Also, there are conditions for the court to recognize and enforce foreign judgment, and it is asserted that the court could deny recognition or enforcement of the foreign judgment if such is contradictory to any judgment in Japan. In practice, the plaintiff's action to seek recognition and/or enforcement of the foreign judgment would be merged to the plaintiff's other action in Japan.

It is submitted however that the action in Japan should not be admitted if the action in foreign country has already been progressed and is assumed to reach to a judgment, enforceable in Japan in

the future, satisfying the requirements therefor. In the Judgment of Tokyo District Court dated May 30, 1989, the plaintiff, a Japanese corporation, took action to seek declaratory judgment to negate its liability in tort for infringing know-how asserted as owned by the defendant, a US corporation, who already took action in Ohio to claim for damage arisen out of the plaintiff's conduct. Tokyo District Court adopted the theory, though the court found that the Ohio court did not yet started the hearing and could not be considered as having high potential to reach to a judgment enforceable in Japan, and held that the plaintiff's action in Japan should not be dismissed. In recent cases, the courts have taken into account the action already pending before foreign court, but it seems there are not so many cases, which deny its jurisdiction mainly due to the existence of the foreign court procedure. On the other hand, in the Judgment of Tokyo District Court dated Jan. 29, 1991, the court denied its jurisdiction over the noodle machine manufacturer's action to seek a declaratory judgment to negate its liability to a Californian noodle machine seller. This Californian seller sold the noodle machine to a Californian noodle seller, and in its factory, an employee was injured by the noodle machine. In California, the employee sued the Californian noodle machine seller and the Japanese manufacturer for the product liability. The Tokyo District Court said, California is not only a place of tortuous conduct but also a place where most evidence and witnesses are available. Though Japan is also a place of a part of tortuous conducts by Japanese manufacturer and they have reasonable interests in seeking declaratory judgment in Japan in order to defend the claims in various countries with different liability scheme, non-restrictive admission of such action to seek declaratory judgment in Japan would deteriorate the system of foreign judgment recognition and enforcement in Japan and would affect the foreign courts' admission for recognition and enforcement of Japanese courts on the principle of reciprocity. In addition, in this case, the case in the US was already progressed and reached to the judgment. On these reasons, the court denied its jurisdiction⁶.

5 Arrest of ship, attachment of asset/right to claim, and injunction.

Arrest of ship/asset is often a method to obtain the jurisdiction over the case. Article 5 (4) provides for such jurisdiction. Even in case there is forum selection clause, a party whose ship is arrested might prefer to agree to Japanese jurisdiction. When the ship/asset is arrested, the shipowner could submit to the court the guarantee by the bank/insurance company in order to release the ship. However, Japanese court, in accordance with the laws, could accept only the guarantee issued by those listed in the laws, mostly the bank/insurer licensed to do business in Japan. When the claim is not covered by the insurance, it would be hard for the shipowner to prepare such guarantee, and it

⁶ In this case, Japanese manufacturer originally sued the injured employee with the noodle machine seller in Japan to seek a declaratory judgment to negate the liability, and the court's jurisdiction over the action against the injured employee was accepted due to his unattendance at the first hearing, and the action against the latter was separated from the former. As the court issued the default judgment on the action against the injured employee, he could not be entitled to seek the enforcement of the judgment in California.

might be better to accept the jurisdiction and get an arrestor's agreement for the security issued by foreign financial entity.

a) Types of arrest/attachment

For details, please see my paper submitted for this seminar in 2007, last year. There are two types of arrest in Japan, i.e. arresting ship/asset for enforced auction sales and arresting ship/asset in way of provisional attachment to preserve the debtor's asset for a judgment in the future. Arresting ship/asset for enforced auction sales are made mostly to enforce mortgage and lien, which is attached to most of popular maritime claims such as claims for cargo damage/loss, personal injury, third party claims, claims arisen out of collision, salvage, oil pollution, excluding notably many of charter party claims.

If your claim is not of the above kind, you have to apply for provisional attachment. Provisional attachment will be ordered by the court if without preserving the debtor's asset (including ships) your monetary claim would become impossible or very difficult to enforce against the debtor's assets in the future. This requirement of impossibility or difficulty to enforce your claim on ships in the future could be satisfied easily in most of maritime claims, since ships will move at various risk at sea and be easy to sell. If provisional attachment of a ship would not satisfy your claim amount, you can attach another ship, or ships. For provisional attachment, you need to submit the bank guarantee.

b) Forum

The forum for attachment of ship/asset is naturally the place where the ship/asset is located. Even if the forum for the claim is subject to the jurisdiction other than Japan, the plaintiff could attach ship/asset in Japan. However, in a provisional attachment case, the court requires that the case would satisfy Article 118 of the Civil Procedure Code, providing for the recognition of foreign judgment. The court, when reviewing the application for provisional attachment, considers if the chosen forum has jurisdiction over the claim and if the judgment in that jurisdiction has reciprocity with the one in Japan. If not, even if the case goes to a final and conclusive judgment in foreign country, Japanese court could not recognize and therefore could not enforce such judgment, and thus the provisional attachment could not be ordered. The Judgment of Asahikawa District Court dated Feb. 9, 1996, thus reviewed such requirements before issuing the provisional attachment order in case the claimant repairer and the defendant ship owner agreed Busan court jurisdiction, the judgment of which would not be enforceable in Japan.

c) Subrogation to the debtor's right to claim

In case the ship is lost before the claimant with maritime lien arrests her, and the ship owner will obtain the right to claim against the hull underwriter for total loss, the claimant will have the right to

attach the ship owner's right to claim against the underwriter. In case the ship was sold to the buyer, and the buyer sold her to a third buyer, and if the buyer would not make payment for the ship's sale, the seller is entitled to attach the buyer's right to claim the payment against the third buyer. In these attachment of the debtor's right to claim against a third party, the forum shall be the place of the debtor in accordance with Article 144 of Civil Enforcement Law. Upon having the attachment order, the third debtor is obligated not to make payment to the debtor, shall report to the court its position with respect to the payment, and is entitled to make deposit to discharge its duty to make payment. If the debtor is residing in Japan and if the third debtor is residing in a foreign country and does not have a close connection with Japan, the third debtor might be placed in an unfair position. Thus, the court, in the Order of Osaka High Court dated Jun. 10, 1998, held that the jurisdiction over the said attachment shall be denied if only a connection of a third debtor to Japan is residence of his creditor. In that case, the third debtor was an affiliate of a Japanese corporation and did not have any objection to make payment to his creditor. Responding to the debtor's assertion that such attachment be futile because of long period of services overseas, the court held it depends on the case and in any event the services overseas are possible.

d) Anti-suit injunction

In common law countries, anti-suit injunction is sometimes issued to require a person not to bring proceedings before the foreign court or to discontinue any proceedings where such has already been commenced before foreign court. In case the person, to whom the injunction is addressed, does not follow the order, there could be a judgment by default or punishment based on contempt of court. When the person has assets in a country where an anti-suit injunction is issued, the injunction will be effective.

The anti-suit injunction in a foreign country could not be enforced in Japan. To enforce the injunction in Japan, the person, if he is granted the remedy of anti-suit injunction, shall apply for the enforcement of the foreign judgment before the court where the addressee of the injunction is located (Article 24 of Civil Execution Law) and shall satisfy the court that the injunction has met the requirements to enforce the foreign "judgment" (Article 118 of Civil Procedure Code). However, the "judgment" in that Article 118 does not include the preliminary injunction, and thus it is impossible to enforce the anti-suit injunction.

The issue then would be whether the sanction as a result of the violation of the anti-suit injunction could be enforced. The "judgment" under Article 118 is only the judgment in civil matter, and the sanction arisen out of the violation of anti-suit injunction has a different nature. The sanction due to contempt of court is of disciplinary nature, and the judgment by default, though it is in style of the civil judgment, is obtained by a process which Japanese civil procedure does not recognize, and thus

would be considered as against the public policy.

Neither would it very difficult to imagine that Japanese court issues the anti-suit injunction to stop proceeding in foreign countries.

6 Jurisdiction of Limitation Procedure

Japan has ratified 76LLMC and 1996 Protocol.⁷ Japan adopted the way, first to set forth the factors to give several courts the exclusive jurisdiction, by which the persons liable has some flexibility in choice of the limitation court, and then to give the limitation court flexibility to transfer the case to the other court in case of potential or actual significant damage/loss or undue delay. The limitation court for Japanese ships is the court at the port of registry, which may sometimes be inconvenient to victims or even to the ship owner. The limitation courts for foreign flagged vessel are those having the venue where the incident occurred, where the vessel called first after the incident or where the arrest is made. This rule has followed Article 13 of LLMC. A certain limitation court's jurisdiction might lead significant inconvenience to the parties even if it has the above connecting factors, and in such case, the court has discretion to transfer the case to the other court having the jurisdiction or even not having jurisdiction, in most cases upon having the parties' application for transfer.

However, these provisions are applied only to the domestic transfer of the case, not to the foreign court. Establishment of the limitation fund has effect to stop any arrest or attachment of the assets of the persons liable, but such will not be applied to the foreign procedure, especially in a country which has not ratified 1996 Protocol. Having followed 1996 Protocol, Japanese Limitation Law provides for restriction of the claimant's action against the assets of the persons liable in case of the establishment of the limitation fund in the other 1996 Protocol country.

Whether the other court's proceedings out of the limitation court regarding the claims subject to limitation shall be stayed or transferred depends on that case's nature, progress and other various factors, and should largely depend on the plaintiff's intention. If such other procedures advanced well and took considerable review of arguments and evidence, such as in the cargo claims against the carrier due to the issue of due diligence to make the ship seaworthy, the transfer would not necessarily have to be done. However, it would not be applied to foreign proceedings.

⁷ Japanese law, the Law concerning Limitation of Liability of Shipowners (Law No. 94 of 1975) has been revised to introduce 1996 protocol. The revised LLLS came into effect on August 1, 2006.

PROVISIONS OF CIVIL PROCEDURE CODE WITH RESPECT TO JURISDICTION

Article 4 (General forum)

1 The court having the venue where the general forum of the defendant locates has jurisdiction over an action against the said defendant.

2 A general forum of a person is determined by his address, and by his residence in case he does not have address in Japan or his address is not detected, and by his last address in case he does not have residence in Japan or his residence is not detected.

3 In case a general forum of an ambassador, a minister or other Japanese nationals, who stay in a foreign country and who are exempted from its jurisdiction, cannot be determined by the preceding paragraph, his general forum shall be determined by the Rules of Supreme Court.

4 A general forum of a legal entity or association or foundation is determined by its principal office or place of business, and in case it has no office or place of business, by the address of the representative in Japan or a leading person in charge of the matter in question.

5 Notwithstanding the preceding paragraph, a general forum of a foreign association or foundation is determined by the principal office or place of business in Japan, and if there is no such office or place of business in Japan, by the address of the representative or a leading person in charge of the matter in question.

6 A general forum of Japanese government is determined by the location of the governmental office representing Japanese government for an action in question.

Article 5 (Forum for proprietary claim)

The following action may be taken before the court having a venue of the following respective place.

1) action for proprietary claim: place of performance

2) action for payment of promissory note or cheque: place of payment indicated on promissory note or cheque

3) action for proprietary claim against seaman: place of ship's registry

4) action for proprietary claim against a person who does not have address (in case of a legal entity, office or place of business; hereinafter the same in this paragraph) in Japan or whose address is not known: place where is a subject of claim or its security or an asset of defendant which may be attached

5) action against a person who has an office or place of business and involving business at such an office or place of business: place of such an office or place of business

6) action against a shipowner or a person utilizing a ship in connection with her or her voyage: place of ship's registry

7) action for claim with ship as a security: place where ship exists

8) the following action in connection with corporation, association or foundation: place of general forum of association or foundation

(i) action by a corporation or other association against an employee or ex-employee, action by an employee against another employee or an ex-employee or action by an ex-employee against an employee, based on a party's position as such.

(ii) action by an association or foundation against an officer or ex-officer, based on a party's position as such.

(iii) action by a corporation against an incorporator, ex-incorporator, inspector or ex-inspector, based on a

party's position as such.

(iv) action by a creditor of a corporation or other association against an employee or ex-employee, based on a party's position as such.

9) action for claim in tort: place where tort occurred

10) action for claim arising out of maritime accident such as a collision of ships: place where a ship first reached to after maritime accident.

11) action with respect to marine salvage: place where marine salvage was made or where a salvaged ship first reached to

12) action with respect to real property: place where real property locates

13) action with respect to registration or recordation: place where such registration or recordation shall be made

14) action with respect to succession, legal portion or testation or other conduct having effect due to death: place of general forum of the ancestor at the time of commencement of succession

15) action with respect to inheritance or its incumbrance, which does not fall into the preceding paragraph, provided that any part or all of inheritance locates in a place where the court has the jurisdiction pursuant to the preceding paragraph: place as provided in the preceding paragraph

Article 6 (Forum for action relating to patent, etc.)

Article 6 *bis* (Forum for action relating to design, etc.)

[translation omitted]

Article 7 (Forum for joint claim)

In case of an action for more than one claims, one may bring the action before a court having a jurisdiction over any one of those claims in accordance with Articles 4 to 6 (excluding Article 6 (3)), provided however that the former part of Article 38 shall be followed for an action by more than one plaintiffs or against more than one defendants.

Article 8 (Calculating value of subject of action)

Article 9 (Calculating value of subject of joint suit)

Article 10 (Designation of court for jurisdiction)

[translation omitted]

Article 11 (Jurisdiction agreement)

1. Parties concerned may agree to a court of first instance as having the jurisdiction over the matters concerned.
2. The jurisdiction agreement in the preceding paragraph shall become valid only if it is made in writing with respect to an action for certain legal relationship.
3. In case the agreement provided in paragraph 1 is made on the electric media recording of its contents, the agreement shall be deemed as having made in writing and the preceding paragraph shall be applied.

Article 12 (Jurisdiction by defendant's answer)

1. In case a defendant pleads at the court of first instance or at its preliminary hearing without making any defence against its jurisdiction, the court has the valid jurisdiction over the case.

Article 13 (Exception of exclusive jurisdiction)

1. In case there is a provision for exclusive jurisdiction in laws or regulations, Article 4(1), Articles 5, Article 6 (2), Article 6 bis, Article 7 and the preceding two Articles shall not be applied.

2. [translation omitted]

Article 14 (Discretionary review)

The court on its own may examine the evidences with respect to the matters for its jurisdiction.

Article 15 (Time to determine jurisdiction)

The jurisdiction of a court shall be determined based on the situations at the time when an action is taken.