Global Business & Development Law Journal

Volume 5 | Issue 1 Article 10

1-1-1992

Litigation Involving Damages to U.S. Plaintiffs Caused by Private Corporate Japanese Defendants

Thomas S. Mackey
University of the Pacific; McGeorge School of Law

Litigation Involving Damages to U.S. Plaintiffs Caused by Private Corporate Japanese Defendants

Dr. Thomas S. Mackey*

Table of Contents

---

*President, Key Metals & Minerals Engineering Corporation; Chairman of the Board and President, Neomet Corporation; President, Cox Creek Refining Company; Director, Malaysian Titanium Corporation; President, USA Logistics Services Corporation; President and Director, Airtrust International Corporation; Director, Texas New Mexico Power Company; Director, Danforth Hospital; and Director, United States National Bank. B.S., Manhattan College; Masters of Engineering, Columbia University; Ph.D., Rice University; J.D., South Texas College of Law; LL.M., University of Houston Law Center.

The author gratefully acknowledges the encouragement and review by Professor Kathryn Smyser, University of Houston Law Center, and the assistance of Mrs. Lana Anderson, who typed the manuscript.

I. INTRODUCTION

This article discusses the subject of general litigation involving a Japanese defendant causing damages while doing business in the United States without a United States agent, or subsidiary company. Japan joined the Hague Convention, but did not ratify the proceedings on taking of evidence aboard, requiring the application of the U.S. Federal Rules of Civil Procedure for extraterritorial discovery. Topics reviewed herein include: international treaties and agreements, choice of forum, conflict of laws, service of process, venue, forum non conveniens, extraterritorial discovery, jurisdiction, stream of commerce, the Hague Convention on Evidence, evidence in Japan, the Act of State Doctrine, enforceability of judgments in Japan, arbitration, and conciliation.

Sufficient treaties and agreements exist between the U.S. and Japan so that an American plaintiff can recover from a Japanese defendant in Japan. U.S. law is based on common law, while Japan follows civil law; this is an important distinction. The U.S. Federal Rules of Civil Procedure apply, and one must also be guided by the Japanese Code of Civil Procedure. In order to obtain enforcement of a U.S. judgment in Japan, the U.S. court must have reciprocity with the Japanese court. It is also essential that Japanese procedures not be violated.

The United States and Japanese courts will honor choice of forum clauses and arbitration and conciliation clauses in an agreement. Laws of a third country can be agreed to, and will be accepted as long as some relationship exists between the parties and the chosen forum, and the provision is not against public policy.

Service of process should be made according to the U.S. Federal Rules which allow for three methods of service. It is not recommended that service be done by mail, as some Japanese courts object to service in this manner.

Japan can refuse to honor a judgment based on its internal law. The doctrine of forum non conveniens applies to litigation in the U.S., but is not accepted in Japan.

Extraterritorial discovery in Japan is not easy, and is entirely different from the U.S. methods. An attorney from the U.S. must be careful not to violate Japan's judicial sovereignty. Japan did not sign the Hague Convention on Evidence, and thus the Federal Rules provide the procedures to be followed, and help to avoid problems in attempting to have a judgment enforced in Japan. Sometimes a blocking statute will prevent the collection of evidence. In the United States, the *Asahi Metals Industry Co.* and *World-wide Volkswagen Corp.* cases are the leading cases on jurisdiction and should be followed, as they alter the stream of commerce theory.

The Act of State Doctrine calls for each country to respect the acts of foreign governments in their territory. The latest case in the U.S. discussing this doctrine is the *Kirkpatrick* case involving Nigeria.

The enforcement of a judgment in Japan is very difficult, and the various U.S. government agencies are of little assistance to a private attorney.

The use of arbitration and conciliation clauses are accepted in both the United States and Japan, and are recommended for future agreements.

As noted, Japan did not sign the Hague Evidence Convention, thus the Convention rules do not apply. Emphasis is given to the rules of discovery as they apply to gathering evidence in Japan, along with: the application of forum clauses, means of service of process, and how to enforce a judgment against a Japanese company. Before filing a law suit, the attorney must anticipate how to enforce the judgment. Legal procedures used in the U.S. case must be accepted by the Japanese court in order to enforce the judgment. Since there is no Hague Convention for the enforcement of a U.S. judgment in Japan, alternative means, including attachment of the Japanese assets, are reviewed herein.

In order to understand the laws of Japan, one should start with the Japanese Code of Civil Procedure (CCP), including Law No. 29, passed in 1890, with many amendments through Law Nos. 82

and 83, which were passed in 1982.[1] Reference should be made to these articles in order to insure the support of the Japanese court in collecting on a U.S. court judgment.

Special emphasis is placed on the United States and Japanese legal systems to be applied in any case, instead of the general subject of international law.

II. INTERNATIONAL TREATIES AND AGREEMENTS SIGNED AND RATIFIED BY JAPAN[2]

Japan has signed numerous treaties with the U.S., like the Treaty on Friendship, Commerce and Navigation dated October 30, 1953. This treaty guarantees entry for the purpose of carrying on trade activities with the U.S., as well as investment activities. It allows for favored-nation status on the rights of access to the courts. Property rights are guaranteed and protected. For example, the property of a foreigner shall not be taken or used except for a public purpose. The Treaty on Friendship covers business activities, grants, favored-nation treatment for establishing and maintaining branches, agencies, offices, and factories; as well as the establishment of domestic juridical activities. It guarantees a foreigner acquisition of property rights. A treaty also exists for the avoidance of double taxation between the United States and Japan, which became effective July 9, 1972.

Japan has signed many multilateral treaties such as the IMF Agreement, the GATT, and a treaty on the delivery and notification in foreign countries of court and noncourt documents relating to civil and commercial affairs. The Hague Convention of November 15, 1965, which became effective July 27, 1970, facilitates delivery abroad of court documents such as bills of complaint, summons, and noncourt documents prepared by a court representative or an official attached to the court.

---

1. Japanese Code of Civil Procedure (CCP) MINSOHŌ § app. 6a 1-126, art. 1-805, *translated in Doing Business in Japan*, STATUTORY MATERIAL INDEX (Matthew Bender) (Zentaro Kitagawa ed. 1987).

2. 6 *Id.* pt. 2 (Administrative Regulations).

Japan signed a treaty to recognize the validity of arbitration awards rendered in foreign countries and to enforce their execution. The Treaty was adopted in New York in 1958, and Japan joined in September 1961. The United States joined in October 1968. This treaty applies even to foreign arbitration awards which are rendered outside the signatory countries.

A bilateral treaty was concluded by Japan on January 1, 1980, and is classified by subject matter covering: peace treaties, joint declarations, protocol, restoration of diplomatic relations, arrangements concerning claims, commerce, and navigation treaties. Japan signed the basic treaty with the U.S. relating to bilateral commerce and navigation, and a trade payment agreement covering trade arrangements, mutual tax exemption arrangements for marine transportation, and navigation income.

An income tax treaty was signed with the United States along with other treaties on commercial fishing, nuclear power, and judicial affairs. Japan signed other multilateral treaties on international laws and regulations, settlements of international disputes, cooperative organizations, tax, international commercial goods, fisheries, transportation, industrial property rights, copyrights, civil and commercial affairs, cultural and society, hygiene, and many others.

As another example, an agreement was reached between the United States and Japan to regulate consular affairs of one country in the territories of the other, and it applies to all areas of land and water, except the Panama Canal Zone.[3] It prevents entrance by police into the consulates, except with the consent of the responsible consular officer. The consular officer is exempt from arrest or prosecution in the receiving state, with certain exceptions for criminal acts calling for imprisonment for over one year. A consular officer or employee can refuse a request to produce any documents from the consular archives, or give evidence relating to matters falling within the scope of his official duties. There are many other privileges listed in the agreement, such as no taxes or customs duties, with certain defined limitations.

---

3. Consular Convention, Mar. 23, 1963, U.S.-Japan, 15 U.S.T. 763, T.I.A.S. No. 5602.

A consular officer under article 17 can serve judicial documents, take depositions, administer oaths, obtain copies of documents of public registry, represent the interests of a national, and fulfill many other duties.

If a Japan-U.S. dispute involves any of the above topics, one needs to identify the treaty, as well as the business procedures to cover such matters. A good reference is in the ten volume treatise written by law professor, Zentaro Kitagawa.

III. CHOICE OF FORUM

Forum selection clauses have historically not been favored by American courts on the grounds that they were "contrary to public policy." The courts' view was that the effect was to "oust the jurisdiction of the court."[4] More recently, the courts have looked favorably on forum selection clauses, as long as no fraud, undue influence, or overweening bargaining power was involved, as was demonstrated by the Fifth Circuit Court of Appeals in *Zapata Off-Shore Co. v. M/S Bremen.*[5]

From the Fifth Circuit, certiorari was granted, and this leading case regarding a choice of forum clause, *M/S Bremen v. Zapata Off-Shore Co.*,[6] was decided in 1972 by the U.S. Supreme Court. The Court determined that the language "any dispute arising must be treated before the London Court of Justice" provides for an exclusive forum.[7] This was an action for limitation of liability by a tug owner who was contracted to tow a barge from Louisiana to Italy. The United States district Court in Florida denied a motion to stay the limitation action, and to enjoin the tug owner from proceeding further in the London Court of Justice. On appeal by

4. Annotation, *Validity of Contractual Provision Limiting Place or Court in Which Action May Be Brought*, 56 A.L.R.2d 300, 306-320 (1957), and later case service, 56-61 A.L.R.2d Supp. (1984).

5. *In re* Complaint of Unterweser Reederei, GmbH. Zapata Off-Shore Co. v. M/S Bremen, 428 F.2d 888, 907 (5th Cir. 1970), *vacated*, M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972).

6. M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 20 (1972).

7. *Id.*

the tug owner, the court of appeals affirmed,[8] and certiorari was granted. The Supreme Court held that, where an American company, with special expertise, contracted with a foreign company pursuant to arms length negotiations by experienced and sophisticated business men, for the towing of a complex machine across seas and oceans, with clauses providing for the pleading of any disputes before the London Court of Justice, the clauses were part of the contract in this admiralty case. The forum clause was held valid and, according to the Court, the parties were required to honor it in the absence of some compelling and countervailing reason making enforcement unreasonable. The key issue in this case was the proper forum, and the Court held that the London court was the proper forum.

The London courts took the position that the forum clause gave them jurisdiction, stating the London courts were picked as a neutral third party. The disputing party then has the burden to show inconvenience or fraud. The courts are reluctant to move the forum that is designated in the contract. The Supreme Court held that the parties to a contract may agree in advance to submit to the jurisdiction of a given court with notice to be served by the opposing party or, in some cases, the parties can even waive notice altogether. This is an approach that is substantially followed in civil law countries, including Japan.

In considering forum clauses, most scholars adopt the Restatement on Conflict of Laws. There is a Model Choice of Forum Act which was promulgated at the National Conference of Commissioners on Uniform State Laws in 1968. Once a contract is signed willingly, it is difficult to see how one can claim the inconvenience necessary to render the forum clause unenforceable. In *Zapata*, the choice of forum was upheld since the parties were sophisticated entities, and had agreed to the choice in advance.

The U.S. District Court for the Central District of Illinois found in *Hoes of America Inc. v. Hoes*,[9] that the words, "any court

8. *See Zapata*, 428 F.2d 888 (5th Cir. 1970), *adhered to in* Zapata Off-Shore Co. v. M/S Bremen, 446 F.2d 907 (5th Cir. 1971).

9. Hoes of America, Inc. v. Hoes, 493 F. Supp. 1205, 1207 (C.D. Ill. 1979).

procedures shall be held in Bremen," are sufficient to establish an exclusive forum to hear the parties dispute.[10] The District Court for the Southern District of Florida held in *Norsul Oil & Mining Co. v. Texaco, Inc.*,[11] the clause "All differences shall be discussed" in Ecuador, to be exclusive.

The modern rule holds forum selection clauses to be prima facie valid, and places the burden of proof on the party resisting enforcement of the clause. According to R. Doak Bishop,[12] the basic grounds for refusing to enforce a forum clause can be grouped into three broad categories. They are: (1) the invalidity test, (2) the reasonableness test, and (3) the public policy test.[13]

The forum clause will be held invalid if there is: (1) fraud in the inducement,[14] and (2) overreaching, which is sometimes referred to as overweening bargaining power, an abuse of economic power, or a disparity in the bargaining power.[15]

In the *M/S Bremen* case,[16] the Supreme court's opinion indicates that a choice of forum clause may be set aside if it is unreasonable, unfair, or unjust.[17] The public policy test generally refers to a statute which defines the public policy relative to the validity of forum clauses. These statutes include: (1) the Carriage of Goods by Sea Act; (2) the Securities Exchange Act; (3) the Bankruptcy Act; and (4) the Real Property Act.

In summary, the choice of forum clauses will normally be upheld unless they are unreasonable, unfair, or unjust. Once the forum is adopted, the law of the forum will apply. For example, one can have a Japanese company agree to a dispute clause listing a forum such as England, and to apply English law. This would be

---

10. *Id.*

11. Norsul Oil & Mining Co. v. Texaco, Inc., 641 F. Supp. 1502, 1510 (S.D. Fla. 1986).

12. R. Doak Bishop, State Bar of Texas, *International Litigation; Considerations in the Initiation of Suit* (Apr. 1991) (prepared for Advanced International Litigation and Arbitration Course).

13. *Id.*

14. Environlite Enterprises, Inc. v. Glastechnische Industrie Peter Lisec Gesellschaft M.B.H., 53 B.R. 1007 (S.D.N.Y. 1985).

15. *See* Sun World Lines v. March Shipping Corp., 801 F.2d 1066, 1067-68 (9th Cir. 1986); North River Ins. Co. v. Fed. Sea/Fed. Pac. Line, 647 F.2d, 985 (9th Cir. 1981).

16. *See supra* note 6.

17. *Id.; see generally* McDonnell Douglas Corp. v. Islamic Republic, 758 F.2d 341, 346 (8th Cir. 1985), *cert. denied*, 474 U.S. 948 (1985).

preferential for a U.S. company over a dispute clause listing Japan as the location of the forum. It would be better if the Japanese company will agree to specify a U.S. court as the forum in the event of a dispute between the U.S. and Japanese corporations.

IV. CONFLICT OF LAWS

In section 187 of the Restatement (Second) on Conflict of Laws, it is permitted for the parties to include contract language that can be utilized in the event of litigation. The parties can agree to the law of a chosen state, and it will govern their contractual rights and duties unless either (a) the chosen state has no substantial relationship to the parties or the transaction, or (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a material interest in the determination of a particular issue. Companies in the United States and Japan can agree to apply the law of a third country and, assuming there was a reasonable basis for the parties choice, and where the application of the chosen law would not be contrary to the fundamental policy of the state, the courts will uphold the application of this contract provision.

It should be noted that several conventions exist which Japan has not signed and, consequently, they do not apply in transactions between the U.S. and Japan. The United States approved the United Nations Convention on Contracts for the International Sale of Goods in December 1986, and it became enforceable January 1988, yet, it was not signed by Japan so it does not apply to any transaction between U.S. and Japanese corporations.

V. SERVICE OF PROCESS

Service of process is a key consideration in any action brought against a Japanese defendant. It is important to the validity of any judgment later rendered by the forum state, and to the enforceability of the judgment in the foreign defendant's country. Such is the case with Japan.

The United States ratified the Hague Service Convention in 1969.[18] The text of this Service Convention is set out in the U.S. Federal Rules of Civil Procedure (FRCP).[19] The Convention applies to the service of judicial process in all civil or commercial matters. All three permitted methods of service require service through the central authority of the nation addressed.

Service under the Convention can be made by mail in Japan, by the central authority, or an appropriate agency specified by the central authority.[20]

Under the FRCP, rule 4(i) provides for service of the summons and complaint in a foreign country:

A. In a manner prescribed by the law of a foreign country for service in that country in an action in a court of jurisdiction or;
B. As directed by the foreign authority in response to a letter rogatory when service in either case is reasonably calculated to give actual notice or;
C. Upon an individual by delivering to the individual personally and upon a corporation or partnership or association by delivery to an officer, a manager, or general agent, or;
D. Any form of mail requiring a signed receipt to be addressed and dispatched by the clerk of the court to the party to be served or;
E. As directed by order of the court.

Service under C or E above may be made by any person who is not a party, is not less than eighteen years of age, or who is designated by order of the district court or by the foreign court. On request, the clerk shall deliver the summons to the plaintiff for transmission to the person, the foreign court, or officer who will make the service.

---

18. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 16 (completed in 1965 and ratified by the U.S. in 1969, and entered into U.S. Agreement in February 1989).

19. FED. R. CIV. P. 4.

20. Shoei Kako Co. v. Superior Court, 33 Cal. App. 3d 808 (1973).

Proof of service shall include a receipt signed by the addressee, or other evidence of delivery to the addressee satisfactory to the court.

Under FRCP 4(j), service of the complaint summons should be made upon a defendant within 120 days after the filing of the complaint by the party on whose behalf such service is required, unless one can show good cause why such service was not made within that period. Otherwise, the action shall be dismissed as to the defendant without prejudice upon the court's own initiative with notice to such party or upon motion. However, rule 4(i) shall prevail.

The issue of service abroad was previously covered in the Hague Convention (1965) which was ratified by Congress and signed by the President of the United States in 1969, and entered into force in February 1969. Unfortunately, Japan has not ratified this Convention as of this date, and therefore, these rules would not apply in Japan for judicial and extra-judicial document service abroad.

This Convention was signed by Germany, Belgium, the United States, Israel, the Netherlands, United Arab Republic, Great Britain, and Northern Ireland. It provides for each central authority to undertake to receive request for service coming from the other Contracting states, and to proceed in conformity. Each Contracting state, under article 8, is free to effect service of judicial documents upon persons abroad without application of any compulsion directly through its diplomatic or consul agents. Any state may declare that it is opposed to such service within its territory unless the document is to be served upon a national of the state in which the document originates. Each Contracting state, under article 9, can use consul channels to forward documents, for the purpose of service to those authorities of another Contracting state, which has been designated by the latter for this purpose. Each Contracting state may use diplomatic channels for the same purpose.

In the *Federal Trade Commission v. Companie De Saint-Gobain-Pont-a-Mousson* case [hereinafter *FTC*],[21] decided in 1980, there was a distinction made between the service of notice and service of compulsory process, under principles of both domestic and international law. Compulsory service compels that the party do something, and threatens sanctions should there be noncompliance. In general, the federal courts acknowledge that regulatory parties may have to extend across national boundaries to obtain certain production of documents located abroad. In this case, the Federal Trade Commission subpoenaed a French company through a general delegate in New York, to produce certain documents. In New York, they served a U.N. delegate's daughter. They also brought service in Paris. The French company, claiming unlawful service, argued that the Federal Trade Commission Act forbids the court from ordering them to honor the subpoena. The French company claimed an infringement on French national sovereignty. When the Federal Trade Commission was organized, Congress did not define how they could bring about service other than through registered or certified mail within U.S. territory.

The statutes did not give any guidance on international law. In general, the U.S. government recognizes that they have no power within a foreign nation such as Japan. If the foreign nation objects, the U.S. State Department will so inform the court, and the judge will be asked to follow the State Department guidelines to stop the use of power in a foreign country, since the issue of sovereignty is very sensitive. Descriptive jurisdiction is a notice that something will occur, while enforcement jurisdiction states that force will be used to carry out an act. Rule 4 of the FRCP provides a mechanism for bringing notice of the commencement of an action to a defendant's attention. Where there is a foreign subject, on foreign soil, the distinction between service of notice and service of compulsory force takes on added significance.

The act of service itself constitutes an exercise of the nation's sovereignty within the territory of another sovereign. This is an

21. Federal Trade Comm'n v. Companie De Saint-Gobain-Pont-a-Mousson, 493 F. Supp. 286, 293 (D.D.C. 1980), *vacated by* 636 F.2d 1300 (D.C. Cir. 1980).

exercise which constitutes, in general, a violation of international law. In most cases, one state may not exercise its powers within the territory of another state. In the *FTC* case, the district court failed to recognize these consequences in enforcing a Federal Trade Commission subpoena. The court ordered the district court's enforcement orders to be vacated, and the case then was dismissed by the district court.

Even if due process is satisfied, and proper procedures are followed, a foreign government can refuse to enforce a judgment based on its own internal law. Where one satisfies due process, satisfies jurisdiction, obtains a judgment, and then attaches assets in the United States, it is possible that the foreign country can put political pressure on the U.S. government, and the court, to take a different view. The courts are subject to both political and social pressure. In international law, the crossing of one country's boundaries can cause a change in law. This is different from crossing a U.S. state boundary. Various Hague conventions take national security into account, and many times the violations are prohibited under international law. In general, rules under an international treaty prevail over any state law since, in the U.S., an international treaty would be equal in power to the Federal Rules of Civil Procedure.[22] In *Harris v. Browning Ferris Industrial Chemical Services Inc.*,[23] a 1984 case, the court ruled that an international treaty prevails over any state law. In *Harris*, an international treaty prevailed over the Louisiana long arm statute.

Article 175 of the Japanese Code of Civil Procedure, provides that, service to be effected in a foreign country, shall be made upon entrustment thereof, by the presiding judge, to the competent government authority of that country, or to the Japanese Ambassador, or Minister of Consul stationed therein. Under articles 179 and 180, the Japanese code allows for service by public notice. The document is to be served in the custody of the court clerk, and is ready to be delivered at any time to the person on whom the

22. Harris v. Browning Ferris Indus. Chem. Services Inc., 100 F.R.P. 775, 776 (M.D. La. 1984).

23. *Id.*

service is to be effected. The court can order publication in the Official Gazette, or the newspapers, on the issuance of service by public notice, provided that, for service effected in a foreign country, the court is informed of the fact that the service of public notice has been made by mail. Public notice shall take effect upon lapse of two weeks from the date on which notification, or posting thereof, was made.

Service of process does not go to jurisdiction in civil law countries like Japan. In the United States, service of process has been held to be sufficient, as well as necessary, for the establishment of jurisdiction in personam. However, in a civil law country like Japan, service of process is not a fact giving the court jurisdiction, but merely a method of notifying the defendant of a pending lawsuit.[24] Since there is a possibility of the defendant's appearance (voluntary submission to the court's jurisdiction), service of process can be made without first determining whether the court has jurisdiction over the particular case brought before it, except where foreign sovereigns are sued. Ordinarily the court examines whether or not it is entitled to exercise jurisdiction over the particular case after the completion of service of process. In Japan, service of process is strictly an official function performed by the court. The plaintiff's attorney prepares and files a complaint, but never a summons. He cannot effect service of process on his own. That is done by direct mail or personal delivery to the defendant.[25] Service of process in Japan can only be affected by the court clerk in charge of the case with the assistance of a bailiff or a mailman, the latter acting by law as an officer of the court.[26] Where service is effected by a mailman in Japan, the court clerk must have the mail bear the stamp "special service" in Japanese, as prescribed by law.[27] Therefore, only a court clerk can effect service of process by mail in Japan.

---

24. ARTHUR NUSSBAUM, PRINCIPALS OF PRIVATE INTERNATIONAL LAW 193 (1943).

25. Fugita, *Service of American Process on Japanese Nationals by Registered Airmail and Enforceability of Resulting American Judgments in Japan*, 12 LAW IN JAPAN 69, 72-75, (1979).

26. CCP art. 162, ¶ 2; Postal Act, YUBINHO, Law No. 165, art. 66 (1947).

27. Postal Act art. 66.

VI. VENUE

Generally speaking, an alien may be sued in any district court.[28] Under section 1391 of the FRCP, an alien may be sued under clause D in any district. Under section 1391, clause F, a civil action against a foreign state may be brought:

1. In any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property which is the subject of action is situated.
2. In a judicial district in which the vessel or cargo is situated;
3. In any judicial district in which the agency or instrumentality is licensed to do business or is doing business.
4. In the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision.

VII. FORUM NON CONVENIENS

The doctrine of forum non conveniens provides for dismissal only if an adequate alternative forum exists which possesses jurisdiction over the entire action and over the defendant. There is ordinarily a strong presumption in favor of the plaintiff's choice of forum.

In *Gilbert v. Gulf Oil Co.*,[29] a case involving a dispute between a Virginia resident, and a corporation, a judgment was entered dismissing an action on the ground of forum non conveniens. The case was reversed by the circuit court of appeals,[30] and the defendant sought certiorari. The judgment of the circuit court of appeals was reversed by the Supreme Court,

---

28. 28 U.S.C. § 1391(d) (1988).

29. Gilbert v. Gulf Oil Corp., 62 F. Supp. 291 (S.D.N.Y. 1945), *rev'd*, 153 F.2d 883 (2d Cir. 1946), *rev'd*, 330 U.S. 501 (1947), *superceded by statute as stated in* Cowan v. Ford Motor Co., 713 F.2d 100 (5th Cir. 1983).

30. Gilbert v. Gulf Oil Corp., 153 F.2d 883 (2d Cir. 1946).

stating that the district court did not abuse its power, as one can dismiss based on forum non conveniens to avoid harassment, and to avoid letting others decide issues which are not effected by convenience. In this case, all of the witnesses were in Virginia, and the only New York citizen involved, was the plaintiff's lawyer. New York did not have any connection to this suit.

A plaintiff is given a choice of courts so that he may have a place to pursue his remedy. The court will weigh the relative advantages and obstacles to a fair trial. Unless the balance is strongly in favor of defendant, the plaintiff's choice of forum will rarely be disturbed. Factors such as public interest may also have a place in application of the doctrine. The burden of proof to obtain the transfer of a case based on forum non conveniens, rests on the defendant, as one must: (1) allow the plaintiff the choice of forum unless there is a strong balance in favor of the defendant, and (2) the balance must be proven to be strongly in favor of the defendant, otherwise the plaintiff's forum should rarely be disturbed.

One would have to show abusive discretion of the judge and it would be very difficult to win on appeal. For example, in admiralty, normally the first port of call would be proper venue if there is damage on the high seas. In the case of a Japanese defendant with no agent or representation in the U.S., the plaintiff would be allowed to select a U.S. court as the forum. The court will weigh public interest factors and private interest factors when deciding the forum issue.

The private interest factors will include: relative ease of access to the source of proof, availability of compulsory process for attendance and, if unwilling, the cost of obtaining attendance of these witnesses, possibility of viewing the premises, a view which would be appropriate to the action, and all of the practical problems which make trial of the case easy, expeditious, and inexpensive. The public interest factors include: administrative difficulties, court congestion, the local interest in having localized controversies resolved near the source, and the interest of having trial diversity in a case in a forum that is familiar with the law of discovery.

The court must not abuse its discretion if it fails to balance the relevant factors. Under the previously referred to *Gilbert* doctrine, unless the balance is strongly in favor of the defendant, normally the plaintiff's choice of forum will rarely be disturbed. The court will weigh carefully the public and private interest factors. The Supreme Court has observed that a plaintiff's choice of forum is entitled to greater deference when the plaintiff has chosen the forum. This will usually outweigh the inconvenience defendants may claim. If a U.S. citizen brings suit in a U.S. court, it would be up to the foreign defendant to show manifest injustice in order to effect a change in forum. Generally, forum non conveniens dismissal is only available if there exists an adequate alternative forum that possesses jurisdiction over the entire action and over all the named defendants.

The doctrine of forum non conveniens authorizes a federal district court, upon determining that defendant would be unduly inconvenienced by being forced to litigate in a forum where an action is pending, to dismiss the action notwithstanding the fact that it has subject-matter jurisdiction over the claim and personal jurisdiction over the defendant. The dismissal is only available if there exists an adequate alternative forum that possesses jurisdiction over the entire action and of all the named defendants. This would be a basis of dismissal.[31] The adequacy of the alternative forum, for the purposes of applying this rule, is not affected by the fact that the law applicable in the alternative forum is less favorable to the plaintiff's chance of recovery.[32] There is ordinarily a strong presumption in favor of the plaintiff's choice of forum, and this presumption is normally created where the plaintiff is either a citizen or a resident of the United States. The fact that the plaintiff is a U.S. citizen or resident is not controlling on the forum non conveniens decision.[33] A district judge was called upon to compare the inconvenience of litigating the action in the present

31. Pain v. United Technologies Corp., 637 F.2d 775 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981).

32. Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).

33. Alcoa S.S. Co. v. M/V Nordic Regent, 654 F.2d 147, 159 (2d Cir. 1980), *cert. denied*, 449 U.S. 890 (1980).

forum, to the inconvenience that would adhere in trying the case in the alternative forum. As was previously mentioned, various factors, including both private and public interest, aid the district judge in undertaking such analysis, where the district judge has discretion.

Strictly speaking, it appears that Japan has no concept of forum non conveniens. In Japan, a question of jurisdiction is to be answered on an all-or-nothing basis. It is not within the discretion of the court to decide whether to take, or refuse, a case brought before it, and there is no discretionary, or conditional, dismissal. It is possible that one can reach the object of the forum non conveniens by evoking the principle of equity incorporated in the Civil Code.[34] The article 1 provisions of the Civil Code were inserted in 1947 as an embodiment of the fundamental principles of private law, and civil procedure.[35] Under this article, if the circumstances show that Japan is an extremely inconvenient place, a forum non conveniens from the defendant's point of view, and if the plaintiff can easily commence an action in a foreign court, with the result being significantly more trial convenience a Japanese court may find that there is an abuse of the right to bring a suit in Japan, and thus dismiss the case in a legal action.

VIII. EXTRATERRITORIAL DISCOVERY

Due to the tremendous increase in transnational business, it is anticipated that disputes between international parties will become more common. For a case to be tried in the United States, the plaintiff must obtain service and discovery of evidence from witnesses in Japan by the taking of depositions, discovery by various means such as interrogatories, admissions, requests for documents, and letters rogatory. Since Japan is a civil law country,

34. Japanese Civil Code (CC) MIMPŌ (Law No. 89, 1896).
35. CC art. 1.

they do not share our common law concept of a trial being a separate and isolated part of litigation.[36]

The American legal system approaches discovery in an entirely different manner than does Japan. "The typical civil proceeding in a civil law country such as Japan, is actually a series of isolated meetings; . . . and written communications between counsel and judge, in which evidence is introduced, testimony is given, procedural motions and rulings are made and so on."[37]

In these proceedings, the matters that usually appear in the common-law trial are spread over the appearances and written acts before the judge.[38] Each appearance is usually brief and involves a small portion of the case such as examining one witness or introducing only one piece of evidence.[39] The judge examines the witnesses and summarizes the information which is then taken to the court clerk.[40] In Japan, the judge, not the lawyer, takes evidence. It is not like taking of depositions in the U.S., where every word is recorded, since in Japan no verbal account of the proceeding is kept. The main difference is that the judge is responsible for the taking of evidence.

If the unsupervised American attorney takes a deposition or inspects documents in Japan using our American system exclusively, the American attorney would be in violation of Japan's judicial sovereignty.[41] It could be considered an infringement on the judicial sovereignty of Japan, unless the American attorney has obtained special authorization.[42] It is possible that evidence abroad may be produced in a form that would be inadmissable in an American court, if no oath is taken, or if the record is too vague to be of any help.[43]

---

36. *See* James H. Carter, *Obtaining Foreign Discovery and Evidence for Use in Litigation in the US: Existing Rules and Procedures*, 13 INT'L LAW. 5 (1979).
37. JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION 112 (2d ed. 1985).
38. *Id.* at 112.
39. *Id.* at 113.
40. *Id.*
41. *See* Carter, *supra* note 36, at 6-7.
42. *Id.*
43. *Id.*

However, the Federal Rules do help in solving some of these problems for a U.S. attorney. The American pretrial discovery system is one of the most extensive in the world, since "the parties may obtain discovery regarding any matters, not privileged . . . as long as the information sought appears reasonably calculated to lead to the discovery of admissible evidence."[44] Under this rule, one can discover evidence which may not be admissible in a trial. In a civil-law country such as Japan, the judge, during the trial, determines the scope of evidence to be procured.

Another problem facing an American attorney trying to discover evidence abroad is the use of foreign statutes which are commonly referred to as "blocking statutes."[45] These statutes cover different situations, and generally prohibit foreign nationals from providing information that may be considered vital to foreign interests or information secrets under foreign law. For example, if an American filed suit in an American court against a foreigner over whom it has personal jurisdiction, and serves discovery requests, the foreign party may respond that no information can be disclosed because the blocking statutes prevent any disclosure which could lead to fines or imprisonment.[46]

The Federal Rules allow the U.S. litigant to seek possible sanctions, such as; the entry of a default judgment, the striking of pleadings or defenses, the preclusion of the introduction of evidence, among others.[47] In this instance, the American courts face the difficult problem of balancing the foreign countries' sovereign interest against the private individual's interest when deciding whether to impose the sanctions.

Since Japan has not signed the Hague Convention, the FRCP provide the only procedures to follow for the taking of evidence in Japan. The Federal Rules provide three methods by which depositions can be taken: (1) on notice before a person authorized to administer oaths in a place in which the examination is held,

---

44. FED. R. CIV. P. 26(b)(1).

45. *See* Paul A. Batista, *Confronting Foreign "Blocking" Legislation: A Guide to Securing Disclosure from Non-Resident Parties to American Litigation*, 17 INT'L LAW. 61, 62 (1983).

46. *Id.*

47. FED. R. CIV. P. 37(b).

either by the law thereof, or by the law of the United States; (2) before a person commissioned by the court, and a person so commissioned shall have the power, by virtue of the commission, to administer any necessary oath and take testimony; and (3) pursuant to letters rogatory.[48]

The notice procedure is the simplest and fastest method to take a deposition abroad because this procedure requires no court intervention in its implementation. The notice procedure provides that the person authorized to administer oaths at the place in which the deposition is held, either by the law of that place or by United States law, is qualified to give notice of such deposition.[49] United States law allows "every secretary of embassy or legation and consular office . . . at the post, port, place or within the limits of his embassy, legation, or consulate, to administer or to take from any person an oath, affirmation, affidavit or deposition . . . ."[50]

This Federal Rules statute permits the attorney to request a notice of deposition to be addressed to any qualified United States official in the country in which the deposition is to be taken. The request to a qualified official can be made with the name or descriptive title of the official.[51] However, if the official before whom the deposition is to be taken is designated by name, then only that officer may take the deposition.[52] A general request helps prevent any delay that might be caused if a specific official is not available by allowing for any consul official. Once the American attorney has made the request upon the proper U.S. official in Japan, the U.S. consul officials are required by statute to administer any oaths and take depositions within the territorial limits of the consulates.[53] The official is permitted a fee for his service, and the official is responsible for getting the necessary stenographers or translators.[54]

---

48. FED. R. CIV. P. 28(b).
49. FED. R. CIV. P. 28(b).
50. 22 U.S.C. § 4221 (1988); *see* 22 C.F.R. § 92.1-.7 (1990).
51. FED. R. CIV. P. 28(b).
52. *See* 22 C.F.R. § 92.55(a) (1990).
53. 22 U.S.C. § 4215 (1988).
54. *See* 22 C.F.R. § 92.56 (1990).

The American official is normally more familiar with the American legal system, and the procedures for taking depositions, and therefore using the official reduces the expense of delay in arranging the deposition.[55] It is the responsibility of the attorney to make certain that all documents are translated, and that a translator and stenographer are present at the deposition.[56] Once the attorney decides to proceed through an American official in Japan, or even through a foreign official, the party must follow the procedures for all depositions under Federal Rule 30, or the procedures in rule 31 if the deposition is on written questions.[57] This procedure is very effective when the witness voluntarily agrees to appear, since the officials have no power to compel a witness to appear, and by doing so can take the deposition without the U.S. attorney being present. The attorney is not required to be in attendance since the U.S. official can take the deposition.[58]

Another procedure available for the taking of a deposition in Japan is the commission procedure. The commission procedure differs from the notice procedure in that court intervention is required to issue a commission, and the commissioner is not limited just to U.S. officials or to foreign officials.[59] The attorney seeking the deposition must apply to the district court in which the action is pending for the issuance of a commission.[60] Then, the district court will issue the commission to a designated individual who can be any person appointed as a commissioner, before whom the deposition will take place.[61] This procedure is generally not used because of the costs involved. It is less costly, and more efficient, to simply follow the notice procedure rather than to use a private individual as a commissioner, and thereby avoid the cost of going before the U.S. court in order to take the deposition.

---

55. Note, *Taking Evidence Outside the United States*, 55 B. U. L. REV. 368, 369 n.7 (1975).
56. 22 C.F.R. § 92.82 (1990); *see* Note, *supra* note 55, at 371.
57. *Id.*
58. *See* 22 C.F.R. §§ 92.49-.71 (1990) (explaining duties of U.S. officials taking evidence in foreign countries).
59. Note, *supra* note 55, at 371.
60. *Id.*
61. *Id.*

The final procedure by which to take a deposition in a foreign country, such as Japan, is the use of letters rogatory.[62] The definition of a letter rogatory is "a formal request to a foreign court asking that court to perform a judicial act in aid of litigation pending in the forum court."[63] Rule 28(b) of the FRCP requires the party seeking the issuance of letter rogatory to apply to the district court with the letter, describing the scope of the proposed deposition, and identify the individual to be deposed.[64] The letter rogatory, and any necessary papers, should be translated into Japanese, and all documents should then be sent directly to the foreign court, or to the foreign state department for their transmission to the court.[65]

Testimony for use in foreign countries is available through the letters rogatory only when these are forwarded to the Japanese court through diplomatic channels on a reciprocal basis, and are accompanied by the full Japanese translation.[66]

The witness will be examined by the foreign tribunal, and the court in Japan will follow their custom or procedure for the taking of testimony.[67] The judge will question the witness, and the attorney may be able to ask supplemental questions to the witnesses directly or through the judge.[68] Here the judge keeps notes and dictates the summary of the testimony which the witness acknowledges as correct.[69] Federal Rule 28 prevents the lack of an oath or a verbatim record from excluding a letter rogatory by stating: "Evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that testimony was not taken under oath or for any

---

62. FED. R. CIV. P. 28.

63. Note, *supra* note 55, at 371.

64. *Id.*

65. 22 C.F.R. § 92.66(b) (1990).

66. 8 MARTINDALE-HUBBELL LAW DIRECTORY, Selected International Conventions, pt. VII, 14, (1990). Japan did not sign the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, but the U.S. and nineteen other countries are signatories.

67. *See* United States v. Paraffin Wax, 23 F.R.D. 289 (E.D.N.Y. 1959).

68. *See* Henry Lee Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515, 526-29 (1953).

69. *Id.*

similar departure from the requirement for depositions taken within the U.S. under those rules." A lot depends on the circumstances of each case as to what weight of evidence is given to the letter rogatory, as in some cases the testimony may be so void of substance or value as to be totally excluded from the case."[70]

On this point, the use of notice of commission procedures is more favorable than a letter rogatory because notice and commission procedures require little or no judicial involvement, and generally produce more useful evidence since the depositions are conducted in accordance with the Federal Rules.[71] Generally, notice and commission procedures rely on the witness voluntarily giving the evidence. There is a reluctance to allow the commissioner, or person noticing the deposition, from having any kind of compulsory power, and typically the party will not be given any aid in coercing a witness to appear.[72] If the party failing to comply with notice or commission procedures is a resident or national of the U.S., Federal Rule 45(e)(2)[73] permits the issuance of a subpoena under 28 U.S.C. § 1783.[74] It is possible to have the subpoena issued if the court will find that the evidence sought is necessary in the interest of justice, and not possible to obtain in admissible form, any other way.[75] This subpoena can require the production of documents, along with the individual, and if the witness fails to comply with the subpoena, then the witness will be subject to contempt sanctions.[76] The subpoena makes the scope of discovery in this situation the same as if the resident or national was in the U.S.

Under FRCP Rule 26(c), the court is allowed the power to grant protective orders, and state that, "discovery may be had only on specific terms and conditions, including designation of the time and place," and "that the discovery may be had only by a method

---

70. Danisch v. Guardian Life Ins. Co., 19 F.R.D. 235 (S.D.N.Y. 1956).
71. *Id.* at 373.
72. *See* Jones, *supra* note 68, at 525-28.
73. FED. R. CIV. P. 45(e)(2).
74. 28 U.S.C. § 1783 (1988).
75. *See* Note, *supra* note 55, at 375.
76. 28 U.S.C. § 1784 (1988); *see* Blackmer v. United States, 284 U.S. 421 (1983) (confirming sanctions).

of discovery other than that selected by the party seeking discovery."[77] This rule allows the court, when requested by a party or a person from whom discovery is sought, to require the deposition to be either oral or on written questions. This power allows the court to control the cost of foreign discovery since an oral deposition is much more costly than any deposition on written questions.[78] In general, an alien plaintiff would be required to come to the U.S. for any depositions.[79] The rational for these requirements is that the plaintiffs should not be allowed to subject the defendant to undue burdens or deprive him of the advantage of an oral examination, since the plaintiff has the opportunity to choose the forum in which to bring the case.

Rule 29 of the Federal Rules allows the parties, by written stipulation, to modify their deposition procedures, and any other discovery methods of the Federal Rules.[80]

The Hague Convention on the taking of evidence abroad in civil and commercial matters, was signed in 1970 by the United States and Japan, but unfortunately one of the United States largest trading partners, Japan, has not ratified the treaty.[81] The Hague Convention tries to bridge the differences between the common-law and civil-law approaches to the taking of evidence abroad. The Convention also sets minimum standards to which all Contracting states agree to comply, while preserving all domestic laws of a signatory country that are more flexible than the Convention procedures.[82] Until Japan ratifies the treaty known as the Hague Convention, an attorney from the U.S. will not be able to use the Convention for obtaining evidence in Japan.

Over the years, there has been a considerable amount of confusion over when to apply either the Hague Convention, or the

---

77. FED. R. CIV. P. 26.

78. Note, *supra* note 55, at 378 n.60.

79. *See* Sykes Int'l v. Pilch's Poultry Breeding Farm, Inc., 55 F.R.D. 138, 139 (D. Conn. 1972).

80. *See* FED. R. CIV. P. 29.

81. Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444. Japan, the U.S., and 24 other countries were signatories.

82. *See id.*

Federal Rules, to discover evidence in a country that has signed the Hague Convention Rules. The debate ranges from using the Hague Convention exclusively, instead of applying the Federal Rules, to the other extreme of follow the Hague Convention rules first, and if they are not useful, then resort to the Federal Rules.[83] For countries that have signed the Hague Convention, the U.S. Supreme Court decided the issue in the case *Société Nationale Industrielle Aerospatiale v. United States District Court* [hereinafter *Aerospatiale*].[84] Previously there were some attempts to treat Hague Convention procedures as purely optional.[85] In the *Aerospatiale* case, both parties followed the Federal Rules of Civil Procedure during initial discovery process.[86] The plaintiffs requested the production of documents pursuant to rule 34(b), and for admission pursuant to rule 36. The defendants responded to their first request without objection. The defendants deposed the witnesses and parties pursuant to rule 26, and even went to the extent of serving interrogatories pursuant to rule 33. They also requested production of documents under rule 34. At the beginning, the defendant complied with all of the requests.

It was only after the plaintiffs served a second set of interrogatories, and a second request for production of documents, and for admissions, all pursuant to the Federal Rules, that the defendant filed a motion for a protective order.[87] The defendants claimed they were French corporations, and the discovery could only be found in France. Therefore, the Hague Convention provided the exclusive procedures that must be followed for pretrial discovery.[88] The district court denied the motion for a protective order. The defendant sought a mandamus, and the 8th Circuit Court denied relief.

---

83. *See, e.g.* Philadelphia Gear Corp. v. American Pfauter Corp., 100 F.R.D. 58 (E.D. Pa. 1983).

84. 482 U.S. 522 (1987).

85. *See, e.g., In re* Anschuetz & Co., GmbH, 754 F.2d 602, 615 (5th Cir. 1985), *vacated,* Anschuetz & Co., GmbH v. Miss. River Bridge Auth., 483 U.S. 1002 (1987).

86. *See* 482 U.S. at 523.

87. *Id.*

88. *Id.* at 526.

On certiorari, the U.S. Supreme Court ruled the judgment of the court of appeals vacated, and remanded in a 5-4 decision. All members of the Court, however, agreed that the Hague Convention was not the exclusive method for obtaining evidence from foreign litigants.[89] The split in the Supreme Court opinion occurred over the issue of whether an American litigant should first resort to the Hague Convention before initiating any discovery as provided by the Federal Rules.[90] The majority held that resorting to the Hague Convention first was not necessary. The Court felt that, in many situations, the use of a letter of request, as provided by the Convention, could be unduly time consuming and expensive, as well as less certain to produce needed evidence. Thus, one would prefer direct use of the Federal Rules.[91] A minority of the Court held that the use of the Hague Convention was purely optional. The Court stated that the lower court should scrutinize the particular facts of each case, and use a case by case comity analysis to decide whether or not to require the use of the Hague Convention, or the Federal Rules.[92]

The Court further suggested that the Restatement of Foreign Relations Laws of the United States, section 437(1)(c), should be the guide for those factors that are relevant in a comity analysis. The Supreme Court also urged lower courts to exercise special vigilance in protecting foreign parties from having to respond to unnecessary and unduly burdensome discovery requests.[93] The Court advised that district courts should supervise pretrial discovery proceedings carefully when evidence is sought from a foreign country, and to give serious consideration to the claims advanced by these litigants concerning abusive discovery requests.[94]

In regard to the foreign blocking statute, the Court found that the statute did not deprive the American court of the power to

89. *Id.* at 539, 548 (Blackmun, J., concurring in part and dissenting in part).
90. *Id.* at 541-42.
91. 482 U.S. at 542-43.
92. *Id.* at 544.
93. *Id.* at 546.
94. *Id.* at 545.

order any party subject to its jurisdiction to produce evidence, even though the act of production may violate the statute.[95]

On the comity issue, the dissent felt that comity should be considered when no treaty existed to solve the problem of discovery between two countries. However, by doing the comity analysis in every case, the dissent felt the additional comity analysis was added as an unnecessary burden.[96]

In the first case decided after the *Aerospatiale*, *Hudson v. Hermann Pfauter GmbH & Co.*,[97] the district court followed a comity analysis and found that the Hague Convention procedure should be used. The court found that the West German defendant's interest was effected by judicial sovereignty, and the need for comity between nations required this result. However, *Hudson* did not follow the comity guidelines of the Restatement of Foreign Relations Law of the U.S., but used a tripartite analysis that considered the "foreign interest, the U.S. interest and the mutual interest of all nations in a smoothly functioning international regime."

In *Hayes v. Kalex Chemical Products, Corp.*,[98] another case involving a West German defendant, after performing a close analysis, the district court held that the Federal Rules should be followed. Based on these cases, when the Hague Convention Treaty exists between nations, it appears that a district court has the option to require either the use of the Federal Rules, or the Hague Convention, in discovering evidence located in a foreign country.

With Japan, since there is no signed treaty, the U.S. court will require that the Federal Rules be used for discovering evidence. The court will consider and weigh the interest of the litigants, and their respective foreign countries, by using the Restatement of Foreign Relations Law as a guideline. When the Hague Convention does not apply, such as in the case of Japan, the discovery of evidence in the foreign country will be done according to the

95. *Id.* at 545 n.29.
96. *Id.* at 556.
97. 117 F.R.D. 33 (N.D.N.Y. 1987).
98. 119 F.R.D. 335, 337-38 (E.D.N.Y. 1988).

Federal Rules. Based on the vagueness of the comity test required of the lower courts by the Supreme Court, the decision to use either the Federal Rules or the Hague Convention will be controversial where the foreign country has signed the Hague Convention. Future Supreme Court decisions should clarify the comity analysis on the proper method to obtain discovery in an overseas country.

IX. JURISDICTION

In the leading U.S. Supreme Court case, *Asahi Metal Industries Co. v. Superior Court*,[99] the Supreme Court shifted the focus of debate in the stream of commerce cases.[100] Unable to agree on the minimum contacts issue, the Court prohibited the exercise of jurisdiction in *Asahi* under the reasonableness element of the *International Shoe* standard alone.[101] The decision both increased the importance of reasonableness in personal jurisdiction cases, and developed the factors the Court considers crucial to its determination of reasonableness. The Court ruled that a reviewing court must look at the following factors to determine whether jurisdiction is fair and reasonable: (1) the burden on the foreign defendant, (2) the interests of the forum state, (3) the plaintiff's interest in obtaining relief, and (4) the interests of the other states or foreign nations whose interests will be affected by the forum state's assertion of jurisdiction.

The facts of this important case were that the plaintiff, while traveling on a California highway, lost control of his motorcycle and collided with another vehicle.[102] He sustained severe injuries, and his wife, who was riding with him, died as a result of the accident. In 1979, alleging in part that a defective tire tube had caused the accident, the plaintiff brought suit in California against

---

99. 480 U.S. 102 (1987).

100. *The Supreme Court, 1986 Term–Leading Cases*, 101 HARV. L. REV. 119, 261, 263 (1988).

101. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

102. Abram Cheyes, *How Does the Constitution Establish Justice?*, 101 HARV. L. REV. 1026, 1029 (1988).

the Taiwan tube's manufacturer. Seeking indemnification, the defendant filed a cross complaint against Asahi, the Japanese manufacturer of the tube's valve assembly.[103] Asahi sold valve assemblies to the defendant on a regular basis, but the sales amounted to only a small percentage of Asahi's total business.[104] All sales between Asahi and the defendant took place in Taiwan, with shipments sent from Japan to Taiwan. Although Asahi knew the defendants sold tubes equipped with Asahi's valves in California, and throughout the world, the Japanese company had no other contacts with the state. Asahi had no offices, property, or agents in California, did not advertise, solicit, or do business there, and did not design the valve assembly specifically for the California market. Asahi moved to quash the summons, arguing that the Due Process Clause of the Fourteenth Amendment prohibits California from exercising jurisdiction over Asahi.[105] California's long-arm statute provides that a court may exercise jurisdiction "on any basis not inconsistent with the constitution of this state or of the United States."[106] The California Supreme Court ruled that Asahi had placed its valves in the stream of commerce, and was aware that some of its products would find their way into California and, therefore, the state could exercise jurisdiction. However, the United States Supreme Court unanimously reversed this decision. Justice O'Connor wrote the opinion, asserting that Asahi had not satisfied the minimum contacts element of the *International Shoe* standard because the company had not directed purposeful action toward California.[107] Justice O'Connor expressed the opinion of eight members of the Court and concluded that, even assuming the existence of purposeful action, the exercise of jurisdiction would be unreasonable, and would violate the Due Process Clause. Justice O'Connor further wrote that a defendant does not establish minimum contacts with a foreign state unless it engages in

103. *Id.* at 1029-30.
104. *Id.* at 1030.
105. *Id.*
106. CAL. CIV. PROC. § 410.01 (West 1973).
107. 480 U.S. 102, 105 (1987).

additional conduct beyond merely placing the products into the stream of commerce, and knowing that the products will make their way to the state. She suggested that advertising, providing advice to customers, having a sales agent, or designing the product for the market in the foreign state would suffice. Because Asahi had done none of these things, and had no other connections with California, Justice O'Connor concluded the state could not assert personal jurisdiction.

The *Asahi* case alters the focus of debate in stream of commerce cases. However, *Asahi* left a long-standing disagreement unresolved over what constitutes minimum contacts in such cases, and this case will encourage lower courts to deny jurisdiction on the ground of unreasonableness alone whenever possible.

In addition to the various Supreme Court cases, there have been a number of district court cases covering jurisdiction where a Japanese defendant was involved, and the firm did not have a U.S. subsidiary.

Oswalt v. Scripto, Inc.[108] involved a Japanese cigarette lighter manufacturer and an American distributor. The plaintiff brought an action to recover damages for injuries sustained when the lighter allegedly malfunctioned. The U.S. Court of Appeals, Fifth Circuit, held that since the Japanese firm manufactured, assembled, sold, and delivered in Japan, millions of lighters to an American distributor, with the understanding that the distributor would be the exclusive distributor with national retail outlets for the sale of lighters in the United States, this Japanese manufacturer had reason to know or expect that lighters would be sold in the U.S., would reach Texas in the course of the distribution chain, and was therefore subject to in personam jurisdiction in Texas. The Federal Rules allow for in personam jurisdiction over a nonresident manufacturer, as a result of a distribution system employing independent wholesalers or by employing its own corporate activity.

In this diversity case, the question was answered as to whether due process would permit the application of the Texas long-arm

108. 616 F.2d 191 (5th Cir. 1980).

statute to impose in personam jurisdiction over the Japanese manufacturer. Personal jurisdiction over the defendant was urged pursuant to the Texas long-arm statute.[109] The defendant argued that there was a lack of necessary minimum contacts to comply with due process. This case continued the trend to expand the powers of the states to impose jurisdiction over domestic or international defendants particularly where they have economic activity in the state.

The leading case in establishing jurisdiction is *World-wide Volkswagen Corp. v. Woodsen.*[110] This case went before the Supreme Court, which ruled that contacts were foreseeable in Oklahoma, even though the defendant had not intended to do business in Oklahoma. The facts in the case were that a car was bought in New York and, in being driven to Arizona, was finally rear-ended in Oklahoma. A products liability action was instituted against the dealer in New York, the regional distributor, the manufacturer, and the importer. A number of the defendants did business in Oklahoma, and the accident actually took place in Oklahoma. The local court ruled that a car is a mobile product, and the defendant could foresee use of the car in Oklahoma. The appeals court reversed the local court, but the majority in the Supreme Court decision stated that contact was foreseeable even though the defendant did not intend to do business in that state. It was not accidental that the product landed in that state, and there was a high probability that the product would end up in that state.

This is an excellent example of limited minimum contacts which are foreseeable in order to give jurisdiction. The Supreme Court held that it was consistent with the Due Process Clause of the Fourteenth Amendment, and that the Oklahoma court could exercise in personam jurisdiction over the nonresident automobile retailer and its wholesale distributor in a products liability action.

The Due Process Clause of the Fourteenth Amendment limits the power of a state court to render a valid personal judgment against a nonresident defendant. Due process requires that the

109. Texas Long-Arm Statute, TEX. REV. CIV. STAT. ANN. art. 203 1(b) (West 1988).
110. 444 U.S. 286, 297-98 (1980).

defendant be given adequate notice and be subject to the personal jurisdiction of the court.

The Court held that an automobile is mobile by its very design and purpose, and it was foreseeable that it could be driven to Oklahoma and cause injury in Oklahoma. The allegedly defective merchandise was the source of injury, and the state court ruled that the Due Process Clause powers were not exceeded by asserting personal jurisdiction over the corporation that delivered this product into the stream of commerce, with the expectation that it could be purchased by consumers in the forum state. The United States Supreme Court ruled that petitioners have no contacts, ties, or relations with the state of Oklahoma, and therefore reversed the judgment of the Supreme Court of Oklahoma.

A state's power to impose jurisdiction does have limits. An example is *Asahi*, where the Court held that due process would not permit the state of California to impose jurisdiction through a local retailer. The Japanese defendant was dismissed, as the Court found it would be manifestly unjust to have the defendant in the U.S. court, when the allegedly defective product had not been designed, sold, or intentionally placed into the stream of American commerce by the defendant, and such part comprised a small portion of the total product which was delivered exclusively to the Taiwanese tire manufacturer in Taiwan. The Court recognized that the defendant could have foreseen that the product would find its way into the United States. However, the Court further held that it was doubtful that the defendant could have reasonably anticipated being brought into court in the state. The defendant had not advertised, solicited any business, or otherwise sought to serve any market in the United States as it merely sold its products in Japan to their buyers specifications and design.[111]

In *Wessinger v. Vetter Corp.*,[112] another United States district court case, a Japanese corporation designed motorcycles, and a successor Japanese corporation manufactured the motorcycle. The court held that there was sufficient minimum contacts with Kansas

111. *See* Texas Long-Arm Statute, TEX. REV. CIV. STAT. ANN. art. 203 1(b) (West 1988).
112. 685 F. Supp. 769 (D. Kan. 1987).

under the stream of commerce theory. The court exercised personal jurisdiction over the defendant in the action arising from a motorcycle accident, allegedly caused by a defective motorcycle design. The court further held that the Japanese corporation's conduct, in allegedly designing a defective motorcycle, which was involved in a Kansas accident, fell within the scope of service authorized by the Kansas long-arm statute.[113]

In *Tomashevsky v. Komori Printing Machinery Co.*,[114] a case involving a U.S. worker injured in Florida by a printing press manufactured by a Japanese company, it was held that the federal district court lacked personal jurisdiction under the Florida long arm statute. The Japanese company did not have any dealers in Florida, had not advertised in the state, did not have an office in the state, and merely manufactured the printing press which allegedly injured the plaintiff in Florida. The Court held that the mere fact that the defendant could foresee that the purchaser, after the initial sale of the press by a distributor, would resell the product to plaintiff's employer in Florida, was not sufficient basis for exercising personal jurisdiction by the Florida court.

In a recent case, *Wilson v. Kuwahara Co.*,[115] a Japanese wheel manufacturer engaged in a moderate amount of pretrial activity, for a relatively short period of time, after properly raising an objection. The court said this was not a waiver of the defense of lack of personal jurisdiction. There must be sufficient contact with the foreign state to justify exercising personal jurisdiction.[116] The Due Process Clause forbids exercise of long arm jurisdiction over nonresident defendants who have insufficient minimum contacts with the foreign state. To receive personal jurisdiction, one needs traditional notions of fair play and substantial justice, and the elements of constitutional tests, including reasonable minimum contacts under the circumstances. Simply because an economic

113. KAN. STAT. ANN. § 60-308b(7) (1988).
114. 715 F. Supp. 1562 (S.D. Fla. 1989).
115. 717 F. Supp. 525 (W.D. Mich. 1989).
116. U.S. CONST. amend. V, XIV.

benefit is derived from the use of a product in a foreign state does not justify the exercise of personal jurisdiction in that state.[117]

It is important that one keep in perspective the previously mentioned *World-wide Volkswagen Corp.* case where the Supreme Court held that the Oklahoma court could not constitutionally exercise personal jurisdiction over a New York automobile distributor, on a record showing that the distributor's sole contact with Oklahoma was the fortuitous circumstances that one of the distributor's cars sold in New York to a New York resident happen to suffer an accident while passing through Oklahoma. The instant record in *Wilson* is very comparable, as it shows that the defendant was killed in an accident using a bicycle manufactured in Japan, yet the court ruled there was not sufficient contact to exercise personal jurisdiction.

Reference was made in *Wilson* to the Hague Convention, under service abroad of judicial and extrajudicial documents in civil or commercial matters.[118] This treaty requires the translation of the complaint into Japanese, and service in a particular manner, by a central authority in Japan.

In *Hall v. Zambelli*, a plaintiff had substantially complied with the treaty provisions, and therefore service of process was not the issue; only the issue of personal jurisdiction remained.[119] Here the Japanese manufacturer produced a finished product which was sold directly to Zambelli who used the product throughout the United States. The Japanese company knew that Zambelli was selling its products outside of the state of Pennsylvania, as it had visited their factory and was well aware of the scope of the operation. The defendant had every expectation that the product would be used in states other than Pennsylvania. For this reason, the court ruled that the Japanese defendant was subject to the jurisdiction of the court.

---

117. U.S. CONST. amend. V, XIV.

118. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163 (entered into force Feb. 10, 1969).

119. 669 F. Supp. 753 (S.D.W. Va. 1987).

Another motor vehicle products liability action was *Cunningham v. Subaru of America, Inc.*, filed against a Japanese corporation which manufactured automobiles in Japan, and sold them to its exclusive American distributor in Japan. The court found sufficient "minimum contacts" to constitutionally subject the defendant to personal jurisdiction under the long-arm statutes of the states of Missouri and Kansas. The court reached this conclusion despite the contention that it never sold any vehicles in the United States, conducted any advertising, maintenance, repair, warranty, or after-sales servicing in the United States. The two step analysis was used again in considering the jurisdictional question, *viz*: (1) it must be determined whether the defendant's contacts with the forum are sufficient to satisfy the minimum contact test of *International Shoe Co. v. Washington*,[120] and (2) the court must determine whether the defendant's conduct falls within the scope of service authorized by statute.

The court found personal jurisdiction since it was in Kansas' interest, even though it was an inconvenience to the defendant to defend their lawsuit in Kansas, as there is a duty to protect the citizens from injury. The court found that it would be fundamentally unfair to allow a foreign manufacturer to insulate themselves from the jurisdiction of the court by use of a distributor. The court determined that the Japanese company was properly subjected to service under the Kansas long-arm statute, because of an injury that arose out of the ordinary use of their vehicle in Kansas. It held that the Japanese manufacturer could reasonably anticipate use of its vehicle in Kansas. The court ordered that the plaintiff be granted leave in order to serve the defendant Japanese company according to the Federal Rules of Civil Procedure and the terms of the Hague Convention.[121]

The United States district court dismissed *Sousa v. Ocean Sunflower Shipping Co.*, a case against a Japanese ship builder, and the ship's Japanese owner, holding that the ship builder did not have sufficient contacts to justify exercising personal jurisdiction

120. 326 U.S. 310 (1945).

121. Cunningham v. Subaru of America, Inc., 631 F. Supp. 132 (D. Kan. 1986).

over it in California, where its only contact with the state was the arrival of the ship in California. The ships arrival in California was foreseeable. However, foreseeability alone is insufficient to invoke personal jurisdiction against the Japanese ship builder whose only contact with California was the arrival of the ship and the occurrence of an alleged injury to a longshoreman.[122]

The concept of in-rem jurisdiction or quasi-in-rem jurisdiction is unknown in Japan. A justiciable controversy may arise between persons over a certain thing which is the res, but not between a person and a thing. A thing is an object of a suit, it cannot be a party to a suit. This jurisdiction is always necessarily in personam.

It should be noted that even when an alien has no domicile or residence in Japan, a Japanese court can still exercise jurisdiction over any of the alien's assets found in Japan. However, the courts have held that there must be justice and fairness when they rule on the relationship to Japan, so that the property involved must be sufficient to make the exercise of jurisdiction reasonable under article 8 of the Japanese Code of Civil Procedure.

There are a number of treaties and administrative agreements between the United States and Japan, limiting Japanese court jurisdiction over the members, dependents, and bases of the U.S. armed forces in Japan.[123] Japanese courts will not take cases brought by Japanese nationals employed by the U.S. armed forces, against their employer.[124] The American concept of domestic sovereign immunity is nonexistent in Japan. Therefore, Japan, as a state, can be sued like any other private person. In suing the Japanese government there is no discrimination against aliens, since article 32 of the Japanese Constitution states "no person shall be deprived of the right of access to the courts."

---

122. Sousa v. Ocean Sunflower Shipping Co., 608 F. Supp. 1309 (N.D. Cal. 1984).

123. Treaty of Mutual Cooperation and Security, art. VI, Jan. 19, 1960, 11 U.S.T. 1632, T.I.A.S. No. 4509; Agreement Under Article VI of the Treaty Regarding Facilities and Armed Forces in Japan, 11 U.S.T 1952; T.I.A.S. No. 4510.

124. Judgment of Feb. 14, 1956 (*In re* Hoover), Aomori Dist. Ct., *translated in* 2 JAP. ANN. INT'L L. 140 (1958); Judgment of Mar. 16, 1957 (Susuki v. Tokyo Civlilian Open Mess), Tokyo Dist. Ct., *translated in* 2 JAP. ANN. INT'L L. 144 (1958).

X. STREAM OF COMMERCE

There is a means of sustaining jurisdiction in various cases, such as products liability cases where a product has traveled through an extensive chain of distribution before it reaches the ultimate consumer, where it then causes damage. The theory, is that when a manufacturer's products are sold directly through intended sales and marketing schemes, or even through importers or distributors, there is an assumption of jurisdiction in these cases consistent with due process requirements. The courts will allow jurisdiction when the product is put into commerce, and is expected to be distributed into a state. A good example of the stream of commerce rule is the previously referred to *Asahi*.[125] As mentioned before, the plaintiff sued the Taiwanese manufacturer in a California court claiming the rear tire on a motorcycle was defective, causing a wrongful death. The U.S. Supreme Court stressed that Asahi had sold tire valves manufactured in Japan to a Taiwanese company, and they were incorporated in tire tubes which were eventually sold in California. The Court ruled that jurisdiction over Asahi was consistent with the Due Process Clause since it concluded Asahi placed its components into the stream of commerce.

The Due Process Clause of the Fourteenth Amendment limits the power of a state court to exercise personal jurisdiction over a nonresident defendant. The test is whether the defendant established minimum contacts in the forum state, based on the acts of the defendant. In *Asahi*, the facts did not establish sufficient minimum contacts to allow personal jurisdiction consistent with fair play and substantial justice. Therefore, the judgment of the Supreme Court of California was reversed, and the case was remanded for further proceedings.

125. Asahi Metal Indus. Co. v. Superior Court, 408 U.S. 102 (1987).

XI. The Hague Convention on Evidence

The Hague Convention on Evidence grew out of an effort in 1972, to promote cooperation, and develop uniform rules of private international law. Unfortunately, Japan has not signed this Convention. Therefore, it does not apply in litigation with a U.S. resident. However, it should be noted that this convention was a substantial breakthrough to provide a bridge between civil-law and common-law practices. It allows for taking of evidence abroad. Prior to that time, the procedures for gathering evidence were governed only by domestic U.S. law, which called for the making of discovery according to the procedures under the Federal Rules, where the parties had agreed. Hopefully, Japan will eventually ratify the Hague Convention. In the U.S., the treaty has the force and effect of a federal statute. It made no major changes in U.S. procedures, and required no changes in U.S. legislation or rules.

XII. Evidence in Japan

Under Japan's Code of Civil Procedure, article 262, the court may entrust a foreign government office, public office, or school, Chamber of Commerce Exchange, or any other organization, with a necessary investigation. Under article 264, covering evidence in a foreign country, the examination of evidence to be undertaken in the foreign country should be done by entrusting it to the competent government office of the country or to the Japanese Ambassador, Minister, or Consul stationed in the foreign country.

Under Japan's CCP, article 284, a witness may refuse to testify when a lawyer or foreign solicitor is questioning the witness regarding facts which came to his knowledge in the course of performance of his duties, and which should be kept secret. In cases where the questions are regarding matters relating to technical or professional secrets, unless the witness has been released from his duty, he must keep the secrets.

XIII. THE ACT OF STATE DOCTRINE

The United States Supreme Court articulated the classical statement of the Act of State Doctrine as follows:[126]

> Every sovereign state is bound to respect the independence of every other sovereign state and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of, by the sovereign powers as between themselves.

The history of the Act of State Doctrine has been reviewed in detail from 1895 to today.[127]

The latest decision by the Supreme Court on the Act of State Doctrine was *Kirkpatrick, Inc. v. Environmental Techtonics Corp.*,[128] handed down in 1990, involving the bribing of Nigerian officials. The Court held that the Act did not apply because nothing in the suit required the Court to declare the official act of a foreign sovereign invalid. In the process of deciding, the acts of foreign sovereigns taken within their own jurisdiction shall be deemed valid.

Within its own territory, the jurisdiction of a nation is absolute, and this is the basis of the Act of State Doctrine, which applies within the territory of a nation. It is really a territorial doctrine. The actions of a sovereign within the sovereign's own territory are normally not questioned by another sovereign. In general, a foreign sovereign is immune except for: (1) waiver of immunity, (2) commercial activity, or (3) other appropriate exceptions.

---

126. Underhill v. Hernandez, 168 U.S. 250, 252, (1897).

127. Brund A. Ristau, *The Act of State Doctrine* (Apr. 1991) (presented by State Bar of Texas in International Litigation and Arbitration Course).

128. 493 U.S. 400 (1990).

XIV. ENFORCEABILITY OF JUDGMENTS IN JAPAN

The most serious legal problem in U.S.-Japanese transnational litigation is the enforcement of a judgment against a Japanese defendant.[129] When a defendant has no U.S. assets, then enforcement of a judgment must take place in the defendant's country. The Japanese court must recognize the U.S. court's judgment. A final judgment by a foreign court, such as the U.S., is recognized as binding only when:[130]

(1) Jurisdiction of the foreign court is not denied by Japanese law or treaties;

(2) If the defeated party is a Japanese subject, service was made by means other than publication, or the party appeared without such notice;

(3) The judgment is not contrary to public order and good morals of Japan; and

(4) The foreign government reciprocates through recognition of Japanese judgments.[131]

Execution of a final and conclusive foreign judgment, meeting with the above conditions, is possible only when a competent Japanese court has affirmed the validity of that judgment in a special action.[132] Full reciprocity does not exist with U.S. by treaty, but reciprocity will be afforded upon proof of recognition of Japanese judgments in foreign jurisdictions such as the U.S.

If Japan will not enforce the judgment, then a serious problem exists. It is best that the foreign attorney carefully analyze the matter of enforcement in Japan from the outset of the case. For example, Japan does not recognize punitive damages, as it is against their public policy. If one obtains punitive damages in a U.S. judgment, it is very unlikely that it will be enforceable in

---

129. Interview with John Bates, attorney representing Bryant in *Bryant v. Mansei Kogyo Co.*, in San Francisco, California. *Bryant* is still before the Japanese courts. *See* Richard B. Schmitt, *Claimant Against Japanese Learns the Word for Delay*, WALL ST. J., Dec. 14, 1990, at B1.

130. Judgements, MARTINDALE-HUBBELL INTERNATIONAL LAW DIGEST, Japan Law Digest JPN-9, 1992, (Blakemore & Mitsuki, ed.).

131. *See* CCP § 200.

132. Japanese Civil Execution Law No. 24.

Japan. It is important that the basis of enforcement be analyzed from the very outset, before legal action is begun. The service of process step, and many others, must be taken keeping in mind that postjudgment enforcement will later depend on these steps. The steps taken to give service in a foreign nation must include all conditions imposed on service by that nation, since sovereignty has its many privileges.[133]

Under the Japanese CCP, article 200, section 72, a foreign judgment which has become final and conclusive shall be valid only upon the fulfillment of the following conditions: (1) that the jurisdiction of the foreign court is not prevented by any laws, orders, or treaties; (2) that the Japanese defendant has received service of summons, or any other necessary orders, to commence the procedure other than by public notice, or the defendant appeared without receiving service thereof; (3) that the judgment of a foreign court is not contrary to the public order or good morals in Japan; and (4) that reciprocity exists, in other words, there is a mutual guarantee between the U.S. and Japan to enforce each other's judgments. Of these four matters, the ones which cause the most difficulty on foreign judgments are subsections two, three, and four. Subsection 2 deals with the service of process. It becomes obvious that if a Japanese defendant makes an appearance, even just a special appearance to quash the service, this subsection is satisfied regardless of the service.

If the defendant does not make an appearance, the Japanese courts will look to see if the method of service was proper.[134] In a lower court case, *Daiei K.K. v. Blagojevic*,[135] the Japanese party argued that Japan should not recognize a French default judgment because: (1) process was served by mail, (2) it was not translated, (3) the Japanese party could not read French, and (4) it was not served in accordance with the Service Abroad Convention. The court upheld the Japanese party's contentions stating: "It is clear

133. FED. R. CIV. P. 4, C(4)-(34); 1988 Practice Commentary.

134. Judgment of Dec. 21, 1976, 352 HANTA 46, Tokyo Dist. Ct., *translated in* 22 JAP. ANN. INT'L L. 160 (1978).

135. *Id.*

that the Japanese party intends in this action to deny the satisfaction of the requirement under article 200 subparagraph two of the CCP." The court relied on the Japanese party's statement that all the summons and complaints concerning the services of civil actions brought to the French court were sent by mail, without the required attached Japanese translations. By not using a method in compliance with the laws of Japan, the court could not recognize compliance of the requirement of article 200, subparagraph 2 of the Japanese CCP.[136]

The safest procedure is to serve a summons and complaint with Japanese translations through the Japanese Central Authority. It is important that, at all times, the service procedures will insure that the Japanese court will find the service proper. The service to the Japanese Central Authority is as per the Hague Service Convention, and one must not serve through the mail. Subsection 3 deals mainly with the issue of whether the foreign judgment is contrary to public order or the good morals of Japan. It appears that public policy questions will most likely be an issue in cases of family law, and where punitive or treble damages are an issue. However, it will not be of concern in cases of tort and contract money judgments.

The case of *Bryant v. Mansei Kogyo Co.*,[137] which is still before the Japanese court, could have a bearing on future holdings, since there are no other Japanese cases that are on record on the issue of punitive or treble damages. It does appear that Japanese courts are ruling against punitive damages and treble damages as against public policy.

In *Marubani-America v. Kansai Iron Works*,[138] a U.S. citizen sued a U.S. importer, who then filed a third-party complaint against the Japanese manufacturer. The Japanese company used article 15 of the Japanese CCP to obtain jurisdiction in Japan for a declaratory judgment of nonliability. Under article 15, jurisdiction in a tort suit is allowed in a court near where the act was committed. This ruling shows that the place of the act can include

136. *See* 22 JAP. ANN. INT'L L. 160, 164 (1978).
137. *See supra* note 129.
138. Judgment of Dec. 22, 1987, 361 HANTA 127, Osaki Dist. Ct.

both the place of injury and the place of manufacturer; therefore Japan would have jurisdiction. This seems to conclude that, even though declaratory judgment was against the distributor, article 15 of the CCP should not be construed as broad enough to require the ultimate consumer to respond, in Japan, to a declaratory judgment filed by a Japanese manufacturer.

Subsection 4 deals with the idea of reciprocity between Japan and the foreign country seeking enforcement of the judgment. In 1983, the Japanese adopted a more liberal definition of reciprocity. The Japanese Supreme Court found that reciprocity exists so long as the rules for rendering recognition of jurisdiction are "not materially different from, or are equivalent in essence, to those of Japan." Therefore, it is important that when one seeks to enforce a U.S. judgment in Japan, the case should be filed in a jurisdiction in the U.S. that has already been approved by the Japanese court as having reciprocity in enforcement of judgments. Japanese courts have enforced judgments from the District of Columbia, California,[139] and states that have adopted the Uniform Foreign Money Judgments Recognition Act. It is safe to conclude that since Texas has also adopted the same Uniform Foreign Money Judgments Recognition Act, that judgments in federal court, on federal claims in those states, should be recognized in Japan. Federal courts sitting in diversity or, presumably alien jurisdiction actions, would probably follow the recognition rules of the state in which it sits.[140]

In order to assert jurisdiction over an alien defendant, one should refer to certain specialized federal long-arm statutes, which are mainly antitrust, securities, and actions for lien enforcement. These long-arm statutes are applied to any nonresident, living outside the United States, and allows for service wherever the defendant may be found. The jurisdiction over alien defendants is generally asserted under the applicable state laws.[141] The international character of the defendant can no longer be ignored.

---

139. CAL. CIV. PROC. §§ 1713-1713.8 (West 1982).
140. Tahan v. Hodgson, 662 F.2d 862, 867-868 (D.C. Cir. 1981).
141. FED. R. CIV. P. 4(e).

The United States Supreme Court gives a great deal of weight to the burdens imposed on the foreign defendant, and takes the position that the Due Process Clause of the Fourteenth Amendment must be applied to assertions of personal jurisdiction. Yet it has no bearing on what American courts can do to foreigners. In their view, it regulates only what the courts of one American state can do to persons who are in another American state.

In *Asahi*, Justice O'Connor simply transformed the interest of several states into the interest of nations. The Due Process Clause is not a privileges and immunities clause. Aliens cannot claim the protection of the Privileges and Immunities Clause where there is a limit to citizens.[142] A model approach to the problem of when is it proper to assert jurisdiction over a nonresident consists of three parts: (1) one should inquire into the kind and nature of contact the defendant had with the United States as a whole. Substantial contacts with the country should be evaluated, and a determination made as to whether one can demand that a foreign national submit to our courts; (2) due process in international setting should be satisfied as to sufficiency of the notice involved; and (3) the application of forum non conveniens should be applied, in so far as fairness concerns are tied to convenience.

Using this three-part analysis is sound and consistent with international notions of the allocation of jurisdiction between sovereign nations. In addition, this approach avoids many of the problems of predictability inherent in the balancing standard of minimum contacts verses fair play and substantial justice.[143]

Practically speaking, there seem to be very few remedies that are unavailable in Japan in transnational cases.[144] However, the following deserve mention. (1) *Damages*–only a lump sum judgment is available in an action for damages for tort or breach of contract. Punitive damages may not be awarded either in tort or

142. U.S. CONST. amend. XIV, § 1.

143. Ronan E. Degnan & Mary Kay Kane, *The Exercise of Jurisdiction Over and Enforcement of Judgments Against Alien Defendants*, 39 HASTINGS L. REV. 799, 855 (1988).

144. *Doing Business in Japan*, supra note 1, § 5023, XIV, 5-44-45.

in contract, and treble damages are foreign to Japan.[145] (2) *Injunctions*—lacking a history of chancery or equity courts, it is understood in Japan that a court may not grant injunctions or other equitable remedies without statutory authorization. Presently, injunctions are only available for infringements of patents, trademarks, copyrights, and other statutorily established industrial property or real property, and for unfair competition, or illegal corporate actions. They are not, however, generally available for ordinary torts or breaches of contract.[146]

XV. ACTUAL ENFORCEMENT IN JAPAN

To highlight the problem of enforcement, refer to the previously mentioned pending lawsuit, *Bryant v. Mansei Kogyo Co.*,[147] wherein the California court granted compensatory and punitive damages several years ago. Enforcement of the judgment is being attempted in Japan, since the defendant has no assets or agents in the United States. The Japan Tribunal, which is the Japanese government judiciary set up to protect its citizens, only recently granted compensatory damages, but disallowed the punitive damages. It further noted that in Japanese law, a punitive damages claim is possible, but in this case ruled that there was not enough facts to support it. However, according to the plaintiff's lawyer, in the U.S. legal proceedings, the Japanese defendant never challenged the sufficiency of the evidence.[148] The litigation has been on going for a period of eleven years, and the plaintiff expects to recover the compensatory damages in this the twelfth year.[149] It was reported that the U.S. State Department, various elected U.S. governmental officials, and other legal entities in the U.S., were of

145. CC art. 416 (recovery allowed only for ordinary and foreseeable damages in breach of contract); Anti-monopoly and Fair Trade Maintenance Act, Law No. 54, art. 25 (1947).

146. *See* Patent Act, art. 100; Trademark Act, art. 36; Utilities Models Act, art. 27; Copyright Act, art. 112; Design Act, art. 37.

147. *See supra* note 8.

148. *See supra* note 129.

149. *See supra* note 129.

no assistance to the plaintiff in trying to collect the judgment in Japan.

XVI. ARBITRATION AND CONCILIATION

In future contracts between U.S. and Japanese companies, it is legal to include clauses on arbitration.

Because of the difficulty in getting a court case tried, obtaining a judgment, and enforcement, one way to overcome this time delay difficulty is to include an arbitration clause in all contracts between United States and Japanese firms. For example, one could include a clause in a contract that would read along the following lines: "All disputes arising in connection with the contract between the U.S. company and the Japan firm shall be finally settled under the rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with said rules."

In addition, one could include a statement that the laws of the United States would govern in the contract, and list the location to arbitrate the dispute. Naturally, the parties to the contract would have a free choice of rules governing the contract, and the place and language of the arbitration, which is not limited by the International Chamber of Commerce (ICC) rules.

The ICC Court of Arbitration has been in existence since 1923. To date, it has arbitrated over 6000 cases, involving some eighty-nine different countries, with approximately one-third of the parties being developing countries. In the preamble to the ICC Rules, it states that settlement is a desirable solution for business disputes of an international nature, and the ICC is a good forum for that purpose.

The International Chamber of Commerce sets out rules of optional conciliation in order to facilitate amicable settlement of disputes. It allows for business disputes of an international character to be submitted for conciliation by a sole conciliator appointed by the ICC. The party requesting the conciliation applies to the Secretariat of the court of the ICC, succinctly setting out the purpose of the request, and accompanied by a fee. The Secretariat

will, as soon as possible, inform the other party of the request, and the party will have fifteen days to inform the Secretariat whether it agrees to, or declines conciliation. In the absence of any reply, or in the case of a negative reply, the request for conciliation shall be deemed to have been declined.

If an agreement has been reached to attempt conciliation, the Secretary General of the court shall appoint a conciliator as soon as possible. The conciliator informs the parties of his appointment and sets a time limit for the parties to present their respective arguments. The conciliator can conduct a conciliation process at the sole discretion guided by the principles of impartiality, equity, and justice. The conciliator can at any time during the conciliation process request the parties to submit additional information as deemed necessary. The parties may be assisted by counsel of their choice, and the confidential nature of the conciliation process is expected by every person involved in whatever capacity.

The ICC rules of conciliation and arbitration were amended January 1, 1988 and apply today. The conciliation process ends when: (1) the parties sign the agreement, (2) upon the production by the conciliator of a report regarding the unsuccessful attempt to conciliate, or (3) upon notification to the conciliator by one or more parties at any time during the conciliation process of an intention to no longer pursue the conciliation process. Upon successful termination of the conciliation, the settlement agreement will be signed by the parties, or if there is a lack of success, a notice will be issued by one or more parties of their intention to no longer pursue the conciliation process. When the file is open, the Secretariat fixes the sum required to permit the process to proceed taking into consideration the nature of the dispute. Such sum is paid in equal shares by the parties. The sum includes the estimated fees of the conciliator, expenses of the conciliation, and administrative expenses. This is an alternative method to allow for the settling of disputes.

When using the American Arbitration Association rules, language similar to the following can be used in any future contract: "Any controversy or claim arising out of or relating to this contact shall be determined by arbitration in accordance with

the International Arbitration Rules of the American Arbitration Association."

One can add language to stipulate the number of arbitrators, the place of arbitration, and the language of the arbitration. Under arbitration, the international body has members who are appointed to the council for the ICC. The arbitration court is to provide for the settlement and arbitration of business disputes of an international character in accordance with the ICC rules. The principal court meets once a month and draws upon its own internal regulations. The chairman or the deputy has the power to make urgent decisions on behalf of the court. The court may delegate to one or more groups of its members the power to make certain decisions.

The court of arbitration itself does not settle disputes. It appoints or confirms the appointment of arbitrators in accordance with provisions of the articles. In appointing arbitrators, the court takes into account the proposed arbitrators nationality, residence, and other relationships with the countries over which the parties, or the arbiters, are nationals.

The disputes may be settled by a sole arbitrator or by three arbitrators. When the parties have agreed, the dispute shall be settled by a sole arbitrator. If the parties fail to nominate a sole arbitrator within thirty days within the date when the claimants request for arbitration has been communicated to the other party, the sole arbitrator shall then be appointed by the court. If the dispute is referred to three arbitrators, the parties shall nominate the request for arbitration. There are many rules for maintaining the independence of the arbitrator, and the arbitrator is required to disclose in writing to the Secretary General any facts or circumstances which might be of such a nature as to call into question the arbitrators independence. Decisions of the court as to the appointment, confirmation, challenge, and replacement of the arbitrator are final. The parties agree that the arbitration is the method for settlement and then the arbitrators rule shall be final.

The use of arbitration or conciliation is a way to reduce legal expenses and time to bring about settlement of disputes, and the provisions provide that the arbitrated award is enforceable in law.

The arbitrator's award shall, in addition to dealing with the merits of the case, fix the cause of the arbitration, decide which of the parties shall bear the cost, or in what proportions the cost shall be borne by the parties. No award is signed until it has been approved by the court as to its form. The arbitrator award shall be final. By submitting the dispute to arbitration by the ICC, the parties shall be deemed to have undertaken to carry out the resulting award without delay, and to waive their right to any form of appeal insofar as such waiver can validly be made.

The Japanese CCP includes a section of arbitration.[150] Under article 786 it allows for a controversy to be submitted to one or more arbitrators and is held valid insofar as the parties are entitled to effect a compromise regarding the subject matter in dispute. Under article 787, it provides that an arbitration agreement regarding a future controversy shall not be valid insofar as it does not concern a certain relation of right, and the controversy is developing based on the agreement. It basically appears to follow the ICC rules. For example, under article 789 the award shall contain an entry of the day, month and year when it was drawn up and the arbitrator shall sign and seal thereof. The exemplification of the awards bearing the signatures and seals of the arbitrators shall be served upon the parties, and the original is deposited with the court, together with a certificate of service.

Article 809 allows for the award to have the same effect as a judgment which is final and conclusive between the parties. Article 801 does allow for the filing of a motion for cancellation of the award in the following cases: (1) in the case where the arbitration procedure should not be allowed; (2) in a case where the award condemns a party to perform an act, the performance of which is prohibited by law; (3) in a case where the parties were not represented in accordance with the provisions of the law; (4) in a case where the parties were not examined in the arbitration procedure; (5) in a case where the award is not accompanied by reasons; and (6) in a case where prior conditions existed allowing a suit for retrial. Cancellation of the award shall not be made for

150. CCP § 2300; 8 ARBITRATION PROCEDURE (Eibun-Horeisha Inc. Law Series No. 2 LA).

reasons four and five unless the parties have agreed otherwise. It is interesting that the Japanese laws allow for binding arbitration, and U.S. laws also permit it.

The most important convention on international commercial arbitration is the Convention on the Recognition of Enforcement of Foreign Arbitral Awards, [hereinafter New York Convention] to which most of the important trading countries have acceded, including the United States and Japan. The New York Convention unified the substance of the Geneva Protocol on Arbitration clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927, and at the same time added its innovations to these conventions.[151] In article 7, paragraph 2 of the New York Convention, the two earlier treaties ceased to have effect between Contracting states, to the extent that they become bound by the New York Convention.

At the time of its accession to the New York Convention in 1961, Japan made a declaration on the basis of reciprocity under article 1, paragraph 3 of the Convention to the effect that "it will apply the convention to the recognition and enforcement of awards made only in the territory of another contracting state." Most of the Contracting states have made such a declaration, therefore, Japan will recognize and enforce in Japan a foreign arbitral award rendered in another Contracting state and made pursuant to both provisions of the New York Convention and Japan's arbitration law.[152] This is based on the principle that an arbitral award is rendered pursuant to the parties voluntary agreement to arbitrate and to appoint arbitrators who are private persons. In the hearings by arbitrators, all of the proceedings are based on the principles of the parties and are substantially different from judicial judgments, which are the operations of national sovereignty.

Japan will recognize an arbitration clause and an arbitration award in their courts between a U.S. party and a Japanese corporation. This is a good reference for the preparation of new

151. *Doing Business in Japan*, vol. 7, § 4.062 (describing the relationship between the New York Convention and Japan's laws).

152. CCP ch. 8.

contracts to be aware of this legal standing. The Japan Commercial Arbitration Association signed in June 1981 all the cooperation agreements with various institutions such as the American Arbitration Association, the London Chamber of Commerce and Industry, and many other arbitration boards in various countries worldwide.

The agreement between the Japan American Trade Association and the American Arbitration Association calls for in the agreement "all disputes, controversies or differences which may arise between the parties out of or in relation to or in connection with the contract or the breach thereof shall be finally settled by arbitration pursuant to the Japan American Trade Arbitration Agreement of September 16, 1952 by which each party hereto is bound." If arbitration is to be held in Japan it would be conducted under the rules of the Japan Commercial Arbitration Association. Arbitration held in the United States is normally conducted in accordance with the rules of the American Arbitration Association.