

## ABHANDLUNGEN / ARTICLES

### Treatment of and Access to Foreign Law in Japan

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#### I. INTRODUCTION

In the era of globalization, the frequent movement of people, goods, capital and services across borders is resulting in a rapidly increasing number of international business transactions, exchanges of information, dispute resolutions and different ways in which family relationships are constituted.<sup>1</sup> Courts are, therefore, frequently faced with the challenge of applying and ascertaining foreign law. Standing at the crossroad of conflict of laws and procedural law, the treatment of foreign law is grounded on different theo-

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Abbreviations and Japanese legal notations: *Hō no tekiyō ni kansuru tsūsoku-hō*, Law No. 78/2006 (Act on General Rules for Application of Laws, hereinafter: AGRAL); *Minji soshō-hō*, Law No. 109/1996 (Code of Civil Procedure, hereinafter: CCP). For English translations of Japanese statutes and regulations, see the website of the Japanese government “Japanese Law Translation” at <http://www.japaneselawtranslation.go.jp/?re=01>.

1 For discussions on globalization, see, *inter alia*, MUIR WATT/FERNÁNDEZ ARROYO (eds.), *Private International Law and Global Governance* (Oxford 2014); Y. NISHITANI, *Identité culturelle en droit international privé de la famille* [Cultural Identity in Private International Family Law], in: Académie de droit international de La Haye (ed.), *Recueil des Cours* (forthcoming 2019).

retical foundations and practical conceptions in different legal systems. Throughout various jurisdictions, the distinctive features regarding the application and ascertainment of foreign law demonstrate contrasting ideas on the nature, functions and objective of private international law, including the permissibility of the applicable law.<sup>2</sup>

Against this background, this paper aims to examine the methods for applying and ascertaining foreign law in civil and commercial matters in Japan.<sup>3</sup> First, general principles concerning the application of conflict-of-law rules and the designated foreign substantive law governing the case at hand in Japan are expounded in detail. The admissibility and the extent of review by the Supreme Court are also examined (II.). Second, the implementation of the general principles is analysed from a practical viewpoint, especially in light of the question of how to ascertain the content of foreign law and complement any lacunae when foreign law is not ascertainable (III.). To conclude this paper, some remarks will be given in relation to the utility and feasibility of adopting an international instrument to improve access to foreign law (IV.).

## II. APPLICATION OF CONFLICTS RULES AND FOREIGN LAW

### 1. *General Principles*

In Japanese private international law, the judge is potentially required to apply foreign law when verifying a connecting factor (foreign law of nationality, foreign interregional or interpersonal law of a multi-unit state<sup>4</sup>), when performing *renvoi* (foreign conflicts rules<sup>5</sup>) and in situations involving the recognition and enforcement of foreign judgments<sup>6</sup> or the recognition of foreign insolvency proceedings.<sup>7</sup> Needless to say, however, the most common

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2 For extensive comparative studies, see SWISS INSTITUTE OF COMPARATIVE LAW (ed.), *The Application of Foreign Law in Civil Matters in the EU Member States and its Perspectives for the Future* (JLS/2009/JCIV/PR/0005/E4, 2011, available at <http://ec.europa.eu/>) Part I: Legal Analysis; Part II: Empirical Analysis; Synthesis Report with Recommendations; C. ESPLUGUES/J. LUIS IGLESIAS/G. PAOLO (eds.), *Application of Foreign Law* (Munich 2011); Y. NISHITANI (ed.), *Treatment of Foreign Law – Dynamics towards Convergence?* (Cham/Switzerland 2017).

3 For the treatment of foreign law in Japan, see also S. NAKANO, *Proof of and Information about Foreign Law in Japan*, in: Nishitani (ed.), *supra* note 2, 529 et seq.; D. YOKOMIZO, *Application of Foreign Law in Japanese Courts – Ideal and Reality*, in: Bruns/Suzuki (eds.), *Realization of Substantive Law through Legal Proceedings* (Tübingen 2017) 61 et seq.

4 Art. 38 (3) AGRAL.

5 Art. 41 AGRAL.

6 Art. 118 CCP, especially in relation to the reciprocity requirement (Art. 118 No. 4).

situation is the application of the foreign substantive law that has been designated as governing the case at hand by the Japanese conflicts rules.<sup>8</sup>

## 2. *Application of Conflict of Laws*

The Japanese conflict-of-law rules are provided in the 2006 Act on General Rules for Application of Laws (“AGRAL”),<sup>9</sup> in addition to some special conflicts rules deriving from international conventions.<sup>10</sup> It is a common understanding among Japanese authors and in court decisions that conflict of laws constitutes a part of national law and is to be treated the same way. Thus, as with the usual domestic law, the application of Japanese conflicts rules is mandatory for the judge and numbers among his or her responsibilities once the internationality of the case has been established. Therefore, regardless of whether the parties themselves have pleaded or invoked foreign law, the

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7 *Gaikoku tōsan shori tetsuzuki no shōnin enjo ni kansuru hōritsu*, Act on the Recognition of and Assistance for Foreign Insolvency Proceedings, Law No. 129/2000.

8 See S. IKEHARA, *Kokusai shihō sōron* [Private International Law: General Part] (Tōkyō 1973) 224.

9 Entry into force on 1 January 2007. For the 2006 reform, see, inter alia, contributions in Basedow/Baum/Nishitani (ed.), *Japanese and European Private International Law in Comparative Perspective* (Tübingen 2008), as well as in the *Japanese Annual of International Law* 50 (2007) and the *Japanese Yearbook of International Law* 51 (2008); M. DŌGAUCHI, *Four-Step Analysis of Private International Law*, in: *Académie de droit international de La Haye* (ed.), *Recueil des Cours* 315 (2006) 21 et seq.; Y. NISHITANI, *Die Reform des internationalen Privatrechts in Japan* [The Reform of Private International Law in Japan], *Praxis des internationalen Privat- und Verfahrensrechts* 2007, 552 et seq.; idem, *Internationales Privat- und Zivilverfahrensrecht* [Private International Law and International Civil Procedure Law], in: Baum/Bälz (eds.), *Handbuch Japanisches Handels- und Wirtschaftsrecht* (Köln 2011) 1211 et seq.

10 As for conflict-of-law rules, Japan ratified the Hague Convention of 24 October 1956 on the law applicable to maintenance obligations towards children, the Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations (implemented as *Fuyōgimu no junkyo-hō ni kansuru hōritsu*, Law No. 84/1986) and the Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions (implemented as *Igon no hōshiki no junkyo-hō ni kansuru hōritsu*, Law No. 100/1964). In addition, Japan ratified the Geneva Convention of 7 June 1930 for the Settlement of Certain Conflicts of Laws in Connection with Bills of Exchange and Promissory Notes and the Geneva Convention of 19 March 1931 for the Settlement of Certain Conflicts of Laws in Connection with Cheques. The two instruments are implemented as national law in Articles 88–94 *Tegata-hō* (Negotiable Instrument Act, Law No. 20/1932) and Articles 76–81 *Kogitte-hō* (Check Act, Law No. 57/1933) respectively. Since 1 April 2014, the 1980 Hague Child Abduction Convention (Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction) has applied also in Japan. For details of the implementation, see NISHITANI, *supra* note 1.

judge is required to apply conflicts rules *ex officio* for any kind of cross-border legal relationships.<sup>11</sup> The theory of “facultative conflicts rules” advocated by *Flessner*<sup>12</sup> has also been discussed in Japan,<sup>13</sup> but the idea did not gain support. The mandatory application of conflict of laws is considered to be suitable to its nature as “law” and is also in accord with the objective of private international law to achieve international harmony of decisions.<sup>14</sup>

In order to properly apply the conflicts rules, the legal notion of the connecting factor – pointing to the applicable law – needs to be defined and verified by the judge. Thus, for example, the judge is to determine the question of what the parties intended when choosing the law applicable to the contract and whether this includes also tacit choice and multiple choice (*dépeçage*) (Art. 7 AGRAL). The question of how to define the *locus damni* as the place where the result of a tortious act has its effects, and whether it includes the place of mental suffering, is also left to the decision of the judge (Art. 17, 1<sup>st</sup> sentence AGRAL). As far as legal notions are concerned, the judge exercises his judicial authority *ex officio*.

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11 NAKANO, *supra* note 3, 530.

12 Flessner advocated making the application of conflict-of-law rule depend on the parties’ invocation, with a view to enhancing the efficiency of court proceedings and facilitating the application of law by giving priority to the application of the *lex fori*. A. FLESSNER, *Fakultatives Kollisionsrecht* [Facultative Conflict of Laws], *Rebels Zeitschrift für ausländisches und internationales Privatrecht* 34 (1970) 547 et seq.; see also IDEM, *Das Parteiinteresse an der Lex Fori nach europäischem Kollisionsrecht* [The Party Interests in the Lex Fori in Private International Law], in: Verbeke et al. (eds.), *Confronting the Frontiers of Family and Succession Law: Liber Amicorum Walter Pintens* (Cambridge et al. 2012) 593 et seq.; IDEM, *Das ausländische Recht im Zivilprozess – die europäischen Anforderungen* [Foreign Law in Civil Procedure – the European Requirements], in: Reichelt (ed.), *30 Jahre österreichisches IPR-Gesetz – Europäische Perspektiven* – (Vienna 2009) 35 et seq. Even in Germany, Flessner’s opinion did not find sufficient support at that time because it could hamper legal certainty and thwart the integrity of the domestic legal system by allowing the parties to circumvent the application of domestic mandatory rules. There was also a concern that the theory of facultative conflict of laws would frustrate legal certainty and international harmony of decisions. See, *inter alia*, R. HÜBNER, *Ausländisches Recht vor deutschen Gerichten* [Foreign Law in German Courts] (Tübingen 2014) 190 et seq.; O. REMIEN, Proof of and Information about Foreign Law, in: Schmidt-Kessel (ed.), *German National Reports on the 19<sup>th</sup> International Congress of Comparative Law* (Tübingen 2014) 224; M. JÄNTERÄ-JAREBORG, Foreign Law in National Courts: A Comparative Perspective, in: *Académie de droit international de La Haye* (ed.), *Recueil des Cours* 304 (2003) 197 et seq.

13 H. SANO, *Nin’i-teki teishoku-hō no riron* [Theory on Facultative Conflict of Laws], in: *Okayama Hōgaku* 173 (2000) 781 et seq.

14 NAKANO, *supra* note 3, 530 et seq.

On the other hand, it is disputed among Japanese authors whether the judge also examines the facts underlying the connecting factors *ex officio* in order to designate the applicable law, or whether he or she has to rely on the parties' presentation pursuant to the adversarial procedural rules. The majority of authors traditionally affirm the distinction between facts and law in this context (*da mihi factum, dabo tibi ius*), contending that it is up to the parties to plead and prove the facts constituting the concrete connecting factors in the case at hand.<sup>15</sup> Following this position, the fact that, for example, the parties have agreed to choose Chinese law as governing their contract (Art. 7 AGRAL) or that the damage from a traffic accident or copyright infringement has occurred in South Korea (Art. 17, 1<sup>st</sup> sentence AGRAL) needs to be pleaded and proven by the parties.<sup>16</sup> The judge would then proceed to apply conflict rules *ex officio* once the internationality of the case has been established and determine the applicable law based on the facts pleaded and proven by the parties.

Some recent authors, however, reject this principle and assert that the judge has an *ex officio* duty to ascertain the facts constituting the connecting factors, arguing that it is an indispensable premise for applying conflict-of-law rules. These authors do not agree that the parties are *de facto* given the power of manipulating the connecting factors so as to induce the application of a law different from the actually applicable law. This would be the case, for example, when the parties intentionally plead that their property rights are governed by South Korean law despite the location of the disputed immovable being in Japan (Art. 13 AGRAL), this done with a view to avoiding the application of Japanese law. It appears inappropriate to leave the parties with discretion to determine the applicable law in legal relationships for which the legislator did not allow party autonomy. This would ultimately contradict the generally accepted principle of an *ex officio* application of conflict of laws aimed at achieving an international harmony of decisions.<sup>17</sup> Thus, the judge ought to be

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15 Y. NAKANISHI et al., *Kokusai shihō* [Private International Law] (Tōkyō 2014) 65 et seq.

16 See, *inter alia*, Y. EBISAWA, *Kokusai shihō no kyōkō-sei to minji soshō* [The Mandatory Nature of Private International Law and Civil Procedure], in: *Minshō-hō Zasshi* 64-5 (1971) 801 et seq.; also, e.g., Ōsaka District Court, 12 April 1960, *Kaminshū* 11-4, 817. This is in contrast to family and personal status matters whose procedural rules are subject to *ex officio* investigation. Art. 56 of *Kaji jiken tetsuzuki-hō* [Law on Procedure in Family Matters], Law No. 52/2011; Art. 20 of *Jinji soshō-hō* [Law on Procedure in Personal Status Matters], Law No. 109/2003.

17 T. SAWAKI, *Renketsu-ten no shuchō risshō* [Pleading and Proving Connecting Factors], in: *Rikkyō Hōgaku* 10 (1968) 104; K. YAMAMOTO, *Renketsu-ten no shuchō risshō* [Pleading and Proving Connecting Factors], in: Sakurada/Dōgauchi (eds.), *Chōshaku kokusai shihō* [Commentary on Private International Law] Vol. 2 (Tōkyō 2011) 369.

provided with the authority to ascertain the facts underlying connecting factors insofar as it is necessary for the proper administration of justice.

Once it is confirmed that the underlying case is governed by foreign law, the next question will be: How should foreign law be applied? Do the parties have the burden of proving foreign law or is the judge obliged to ascertain and apply foreign law *ex officio*?

### 3. Application of Foreign Law

Concerning the application of foreign law, the former Article 219 of the 1890 Japanese Code of Civil Procedure (hereinafter: CCP)<sup>18</sup> stipulated as follows: “Regional customary law, commercial customs, bylaw or foreign law in force are to be proven. Courts can make necessary investigations *ex officio* whether or not the parties prove it.” This provision, which was modelled after German law,<sup>19</sup> presupposed that foreign law had to be proven by the parties. Yet, since it concerned proof of legal norms, it concurrently entitled the judge to examine the content of foreign law *ex officio* independently of the parties’ pleading and proving foreign law. This rule was generally interpreted as alleviating the burden falling on the judge to ascertain foreign law by requesting the parties’ assistance, and not as subjecting the application of foreign law to the parties’ disposition by characterizing it as “fact”.<sup>20</sup> After this provision was abolished in 1926, allegedly because the underlying principle was self-evident, the method of applying and ascertaining foreign law was left to academic discussions and case law.

The majority of academics in Japan contend that foreign law is treated as “law” and that it is applied as such without being “incorporated” into the Japanese legal system.<sup>21</sup> Since foreign law has the same value as domestic

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18 *Minji soshō-hō* (Law No. 29/1890; repealed by Law No. 109/1996).

19 This provision was modelled after § 293 of the German Civil Procedure Code (*Zivilprozessordnung*, hereinafter: ZPO) of 1877.

20 T. ATOBE, *Kokusai shihō-ron* [Considerations on Private International Law] Vol. 1 (Kyōto 1926) 414; H. EGAWA, *Kokusai shihō* [Private International Law] (17<sup>th</sup> ed., Tōkyō 1970) 110. The former Supreme Court (*Taishin-in*) decided on 30 October 1905 (Minroku 11, 1439) that the earlier Article 219 CCP did not oblige the judge to apply foreign law, instead solely entitling him to do so.

21 See K. YAMAGUCHI, *Nihon kokusai shihō-ron* [Considerations on Japanese Private International Law] (Tōkyō 1927–29) 16 et seq., 66 et seq. Yamaguchi reasoned that private international law formed a part of substantive law. He advocated that former Article 3 (1) *Hōrei*, which pointed to the law of one’s nationality as governing the issue of capacity, was an abbreviation of all the substantive laws enumerated as “a Japanese national becomes of age at 20, a German national becomes of age at 21, a French national becomes of age at 21, etc.” Thus, he held that foreign law was applicable in the same capacity as domestic law.

law when designated by conflicts rules as stating the relevant adjudicatory norms, the authors generally argue that the principle “*jura novit curia*” applies to foreign law as well. Courts are, therefore, obliged to apply foreign law without its being introduced by the parties in the court proceedings. As a corollary, the ascertainment of the content of foreign law is also held to be effected by the judge’s own motion. In other words, the application and ascertainment of foreign law are subject to *ex officio* investigation, as is the case with domestic law. In order to facilitate the task of courts, assistance from the parties may be requested. The judge is, however, always obliged to assess and examine in his own capacity the reliability and accuracy of the information provided by the parties. Thus, even if the parties agree on the content of foreign law, it cannot be binding upon the judge, who always incurs the obligation to conduct a necessary examination *ex officio*.<sup>22</sup>

Interestingly enough, *Mikazuki*, an authority on civil procedure law, takes a different approach. He points out that judges are neither trained in foreign law nor knowledgeable in all laws in the world, whereas attorneys often have sufficient expertise in foreign law. In light of procedural economy, he advocates adopting some elements of the “fact” doctrine of common law jurisdictions.<sup>23</sup> Hence, *Mikazuki* rejects the argument that the judge is obliged to ascertain foreign law, concluding instead that he is only entitled to do so.<sup>24</sup> Thus, the parties may seek to prove the content of foreign law, but the judge is not restricted to the evidence submitted by the parties. Rather, the judge can use any other means to ascertain foreign law independently, such as making inquiries to judicial or administrative authorities, without being bound by the result obtained. Where appropriate, the judge can also simply rely on the agreement of the parties on the content of foreign law.<sup>25</sup>

22 IKEHARA, *supra* note 8, 230 et seq.; Y. KAWAMATA, *Wagakuni saiban-sho ni okeru gaikoku-hō no tekiyō* [The Application of Foreign Law in Japanese Courts], in: Hōgaku Ronsō 62-5 (1956) 10 et seq.; NAKANISHI et al., *supra* note 15, 105; Y. TAMEIKE, *Kokusai shihō kōgi* [Lectures on Private International Law] (3<sup>rd</sup> ed., Tōkyō 2005) 243 et seq.; R. YAMADA, *Kokusai shihō* [Private International Law] (3<sup>rd</sup> ed., Tōkyō 2004) 130 et seq.; J. YOKOYAMA, *Kokusai shihō* [Private International Law] (Tōkyō 2012) 88 et seq.

23 A. MIKAZUKI, *Gaikoku-hō no tekiyō to saiban-sho* [The Application of Foreign Law and the Courts], in: Sawaki/Aoyama (eds.), *Kokusai minji soshō-hō no riron* [Theories of International Civil Procedure Law] (Tōkyō 1987) 252 et seq.

24 Mikazuki relies on the German notion of “*Prüfung von Amts wegen*”, which is applied to procedural pre-requisites and is characterized as a principle between the adversarial principle (*Verhandlungsgrundsatz*) and the principle of *ex officio* investigation (*Amtsermittlungsprinzip*). MIKAZUKI, *supra* note 23, 260 et seq.

25 Mikazuki allows other means of evidence than stipulated in the CCP (“*Freibeweis*”). MIKAZUKI, *supra* note 23, 264 et seq.; for criticism, see K. Ishiguro, *Gaikoku-hō no tekiyō to saiban-sho* [The Application of Foreign Law and the Courts], in:

Some other authors go even further and contend that foreign law ought to be treated as “fact” in civil procedure setting dominated by the adversarial principle, with the parties thus incurring the obligation to plead and prove foreign law as in common law jurisdictions. These authors accept the *ex officio* application and ascertainment of foreign law solely in proceedings dominated by the principle of *ex officio* investigation, such as disputes over personal status or family relations.<sup>26</sup>

While courts are generally considered to follow the majority opinion without mentioning it explicitly, the attitudes of some courts, such as to rely on the parties’ agreement on the content of foreign law, may under certain circumstances in fact come closer to the latter minority opinions.<sup>27</sup> It is ultimately a question of how best to divide the task between the parties and the judge. Considering the general procedural rules in Japan – as well as private international law’s functional premise under which domestic law and foreign law are assigned equal status so as to secure international harmony of decisions – the *ex officio* application and ascertainment of foreign law advocated by the majority of authors seems to be preferable.

#### 4. Review by the Supreme Court

As mentioned above, conflict-of-law rules constitute a part of domestic law. Thus, if the judge fails to apply conflict-of-law rules properly and erroneously designates the law of State A instead of the law of State B, this ruling can be judicially reviewed by the Supreme Court. Pursuant to former Article 394 CCP prior to the 1996 reform of the CCP, a violation of laws and regulations that obviously affected the decision of the appellate court constituted a ground for review by the Supreme Court. It included the incorrect application of conflicts rules pursuant to case law.<sup>28</sup> Since 1996, review by

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*Minji tetsuzuki hōgaku no kakushin* [Renovation of Doctrines on Civil Procedure Law] (Liber Amicorum Akira Mikazuki) Vol. 1. (Tōkyō 1991) 452 et seq.

26 Y. HONMA/S. NAKANO/ H. SAKAI, *Kokusai minji tetsuzuki-hō* [International Civil Procedure Law] (2<sup>nd</sup> ed., Tōkyō 2012) 165 et seq.

27 As an exception, some early court decisions subjected the ascertainment of foreign law to the parties’ pleading and proving it. See, e.g., Fukuoka District Court (Kokura Branch), 22 January 1962, Kamin-shū 13-1, 64; Ōsaka High Court, 6.4.1962, Kamin-shū 13-4, 653.

28 See Supreme Court, 27 December 1961, Katei Saiban Geppō 14-4, 177 (damages on ground of terminating cohabitation); 20 April 1978, Minshū 32-3, 616 (claim pledge); 13 September 1991, Minshū 45-7, 1151 (annulment of acknowledgement as a child); 8 March 1994, Minshū 48-3, 835 (disposition of land prior to a division of the inherited property); 8 March 1994, Katei Saiban Geppō 46-8, 59 (succession and renvoi); 12 March 1998, Minshū 52-2, 342 (acknowledgement of a child); 27



the Supreme Court has been subject to certiorari under Article 318 (1) CCP. Certiorari is granted if the decision of the appellate court concerns “important matters” on the interpretation of law, especially where there is an inconsistency with the previous case law. As for review of the application of conflicts rules, the position of the Supreme Court has not changed, as it continues to grant certiorari for a failure to apply conflicts rules.<sup>29</sup>

On the other hand, when the judge fails to apply the foreign law properly, the question of whether to allow review by the Supreme Court is often answered in the negative in foreign jurisdictions, including Germany and France.<sup>30</sup> According to the majority of Japanese authors, however, so far as foreign law is designated by conflict-of-law rules as the applicable law, it has the same weight as a domestic law serving as an adjudicatory norm. The judiciary should therefore do its best to correct a failure in ascertaining or interpreting foreign law. Furthermore, with the increasing number of cross-border cases, a uniform interpretation of not only domestic law but also foreign law should be guaranteed among Japanese courts. Considering that the Supreme Court is better equipped with personnel and materials to ascertain foreign law, it appears reasonable to allow it to review the application of foreign law.<sup>31</sup>

The Japanese Supreme Court has rightly held that it is entitled to review the application of foreign law both under former Article 394 CCP and the current Article 318 (1) CCP.<sup>32</sup> The most recent decision of the Supreme Court in 2008<sup>33</sup> concerned the application of South Korean law as to the contestation of parentage that had existed *de facto* between the defendant and his alleged father for over thirty years. While the appellate court had affirmed the denial of parentage pursuant to Article 865 of the South Korean Civil Code, the Japanese Supreme Court granted certiorari on the ground

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- January 2000, Minshū 54-1, 1 (parentage under the “house” system in Korea); cf. also Supreme Court, 4 September 1997, Minshū 51-8, 3657 (arbitral agreement).
- 29 Supreme Court, 26 September 2002, Minshū 56-7, 1551 (U.S. patent infringement); 29 October 2002, Minshū 56-8, 1964 (ownership of a German car stolen in Italy and found in Japan); 17 October 2006, Minshū 60-8, 2853 (employee invention).
- 30 See Y. NISHITANI, *Treatment of Foreign Law: Dynamics towards Convergence? — General Report*, in: Nishitani (ed.), *supra* note 2, 37 et seq.
- 31 IKEHARA, *supra* note 8, 238 et seq.; YAMADA, *supra* note 22, 139. On the other hand, in view of practicality and procedural economy, Mikazuki advocated for a restriction of the scope of review by the Supreme Court. MIKAZUKI, *supra* note 23, 276 et seq.
- 32 In two precedents under the previous Art. 394 CCP, an incorrect application of South Korean law was reviewed by the Supreme Court. See Supreme Court, 2 July 1981, Minshū 35-5, 881 (statutory inheritance share); Supreme Court, 25 February 1997, Katei Saiban Geppō 49-7, 56 (divorce claim by a spouse at fault).
- 33 Supreme Court, 18 March 2008, Saiban-sho Jihō 1456, 4 = Hanrei Jihō 2006, 77.

that the decision concerned “important matters” regarding the interpretation of law. The Supreme Court eventually remanded the case to the lower court for further examination as to whether the claim by the plaintiffs, namely the defendant’s sisters, constituted an “abuse of right” pursuant to Article 2 (2) South Korean Civil Code such that the claim ought to be dismissed.

If the lower court had affirmed an “abuse of right” in the underlying case, the result would have coincided with the interpretation provided by the Japanese Supreme Court decision in 2006 under Article 1 (3) Japanese Civil Code.<sup>34</sup> Needless to say, however, the task of the Japanese courts is not to adopt an interpretation along the lines of Japanese case law but to find out how the South Korean legislature and judges have so far decided on these issues. In this respect, the interpretation and application of foreign law needs to follow the practice in the relevant state.

### III. IMPLEMENTATION OF THE PRINCIPLES

#### 1. *Means to Facilitate Access to Foreign Law*

As mentioned above, according to the majority opinion in Japan, the judge is obliged to investigate and establish the content of foreign law *ex officio*. Since foreign law is legal norms that are in force in a foreign jurisdiction,<sup>35</sup>

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34 Supreme Court, 7 July 2006, Minshū 60-6, 2307; Supreme Court, 7 July 2006, Ka-tei Saiban Geppō 59-1, 98; for the establishment and revocation of parentage under Japanese substantive law, see Y. NISHITANI, *State, Family and Child in Japan*, in: Verbeke et al. (eds.), *Confronting the Frontiers of Family and Succession Law: Liber Amicorum Walter Pintens* (Cambridge et al. 2012) 987 et seq.

35 The view that non-state law may be applied in Japanese courts is still a minority scholarly opinion, but it is increasing. For recent authors, see T. MORISHITA, *Kokusai shō-torihiki ni okeru hi-kokka-hō no kinō to tekiyō* [Functioning and application of non-state law in cross-border commercial transactions], in: *Kokusai-hō Gaikō Zasshi* 107-1 (2008) 35 et seq.; S. NAKANO, *Hi-kokka-hō no junkyo-hō tekikaku-sei: kokusai shihōteki sokumen kara mita Lex Mercatoria* [The admissibility of non-state law: Lex mercatoria from a viewpoint of private international law], CDAMS Discussion Paper (2004) 6 et seq., available at <http://www.lib.kobe-u.ac.jp/repository/80100028.pdf>; N. TAKASUGI, *Kokusai shihō ni okeru shin-yōjō tōitsu kisoku no toriatsukai* [The treatment of the ICC Uniform Customs and Practice for Documentary Credits in private international law], in: *Tezukayama Hōgaku* 5 (2001) 111 et seq.; IDEM, *Kokusai kaihatsu keiyaku to kokusai shihō: anteika jōkō no yūkōsei to hi-kokka-hō no junkyo-hō tekikaku-sei* [Cross-border development contracts and private international law: stabilization clauses and the applicability of non-state law], in: *Ōsaka Daigaku Hōgaku* 52 (3/4) (2002) 1022 et seq.; for further reference, see Y. NISHITANI, *Party Autonomy in Contemporary Private International Law – The Hague Principles on Choice of Law and East Asia –*, in: *Japanese Yearbook of International Law* 59 (2016) 336 et seq.; idem, *Lex Mercatoria and Self-Regulation*

the judge is expected to comply with the interpretation provided in the legal system concerned. Furthermore, the judge is supposed to adopt the methods of interpretation (*e.g.*, restrictive or teleological interpretation) and recognize legal sources (*e.g.*, customary law or equity) and the authority of case law or scholarly opinions under the foreign law.<sup>36</sup> In this respect, the ascertainment of foreign law remains a difficult task for the judge, especially in the absence of bilateral or multilateral instruments allowing access to foreign law in Japan.

There is unfortunately no available data on which countries' law is most frequently applied in civil and commercial matters in Japan. Among published court decisions, the application of Chinese law, Taiwanese law, South Korean law, Philippine law, Brazilian law, English law and U.S. law is frequently requested, but requests are by no means limited to these jurisdictions.<sup>37</sup>

Judging from interviews this author has conducted, as far as civil and commercial matters are concerned, the judge often asks the parties for assistance in ascertaining the content of foreign law. In business disputes, the interested party is generally willing to submit documents on foreign law to enable expeditious proceedings and possibly bring about a decision in his favour. Documents submitted by the parties as evidence, especially a translation of foreign legislation and legal opinions of academics or foreign law firms, serve as the basis for the ascertainment of foreign law once the judge examines them *ex officio* and verifies them as reliable. This is also the case when the parties agree upon the content of foreign law. When additional information is needed, the judge conducts investigation by using materials published in books and journals or by retrieving information from the Internet.

Expert opinion can be ordered to ascertain foreign law when applied for by the interested party and approved by the court.<sup>38</sup> This means is rarely used in practice, though. Courts are generally considered as not entitled to request an expert witness *ex officio*. The judge can only ask the parties to clarify factual and legal issues and eventually induce them to apply for an expert witness.<sup>39</sup>

Courts can also refer to the General Secretariat of the Supreme Court to ask for information on the relevant foreign law. It is frequently used in the practice of family courts concerning family and personal status matters as

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in Transnational Perspective, in: Baum et al. (eds.), *Self-Regulation in Private Law in Japan and Germany* (Köln 2018) 236 et seq.

36 IKEHARA, *supra* note 8, 231 et seq.; YAMADA, *supra* note 22, 133 et seq.

37 See also NAKANO, *supra* note 3, 530.

38 Art. 212 ff. CCP.

39 Art. 149 CCP; cf. Y. KIKUI/T. MURAMATSU, *Konmentāru minji soshō-hō* [Commentary on Civil Procedure Law] Vol. 3 (Tōkyō 2003) 303.

governed by the principle of *ex officio* investigation. In these matters, the Family Division of the General Secretariat of the Supreme Court replies to inquiries based on available documents published by the General Secretariat of the Supreme Court, the Ministry of Justice or the Parliamentary Library.<sup>40</sup> In civil and commercial matters, however, courts usually do not refer to the Civil Division of the General Secretariat of the Supreme Court as it does not have specific expertise in foreign law. In lieu of this method, courts sometimes make inquiries through the General Secretariat of the Supreme Court to the relevant regional division at the Ministry of Foreign Affairs or to Japanese embassies or consulates abroad. Other methods of inquiries, such as referring to universities or other research institutions, are generally not used in practice.<sup>41</sup>

## 2. Solutions in the Event of Unascertainability

Foreign law may remain unascertainable despite all efforts made by the judge. In such a case, academics and courts in Japan have developed different solutions to fill the lacunae.<sup>42</sup> Some court decisions have referred directly to Japanese law as the *lex fori* when the foreign applicable law could not be ascertained.<sup>43</sup> Although this solution is feasible and understandable

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40 As for North and South Korean, Chinese and Philippine laws that are often applied by family courts, there are translations published in accessible media.

41 Where courts examine foreign law *ex officio*, costs are allocated to the courts. On the other hand, when the parties call expert witnesses, the unsuccessful party usually incurs the expenses.

42 A minority opinion advocates dismissal of the claim on the ground that the parties failed to plead and prove foreign law (ATOBE, *supra* note 20, 418; also Fukuoka District Court (Kokura Branch), 22 January 1962, *supra* note 27). This presupposes, however, that the parties have the burden of proof concerning the application of foreign law, as is the case with facts. Furthermore, while such an approach would yield a final legal decision on the matter before the court, it results *de facto* in a denial of justice. Another minority opinion points to a different applicable law by referring to subsidiary connecting factors (T. KANZAKI, *Junkyo gaikoku-hō no fumei o megutte* [On the unascertainability of the foreign applicable law], in: *Hōgaku Kyōkai Zasshi* 107-6 (1990) 1039 et seq.; also Art. 14 (2) of the 1995 Italian Private International Law). Nevertheless, the unascertainability of foreign law can hardly be remedied by referring to the next closest element in the cascade of connecting factors.

43 Nagoya District Court (Handa Branch), 20 May 1952, *Kamin-shū* 3-5, 676 (North Korea); Nagoya District Court, 29 May 1954, *Kamin-shū* 5-5, 788 (North Korea); Tōkyō District Court, 28 September 1954, *Kamin-shū* 5-9, 1640 (North Korea); Ōsaka District Court, 27 November 1956, *Kamin-shū* 7-11, 3393 (South Korea); Nagoya High Court (Kanazawa Branch), 25 March 1980, *Hanrei Jihō* 970, 163 (North and South Korea); Tōkyō High Court, 26 September 1984, *Katei Saiban Geppō* 37-9, 87 (South Korea); Yamaguchi Family Court (Shimonoseki Branch), 28

from a practical viewpoint, it has been criticized for adopting a “homeward trend” and running counter to the equality of domestic law and foreign law as the fundamental principle of the Japanese private international law system.<sup>44</sup>

Instead of the *lex fori* approach, the majority of court decisions rely on the “reasonableness” test, seeking to deduce relevant norms that are presumably in force in the foreign jurisdiction concerned. In applying this test, the fundamental principles of the foreign legal system concerned and the appropriateness of the solution for the case at hand are considered. The criteria, however, have notably varied among court decisions. While some judges have relied on the general reasonableness test,<sup>45</sup> others have referred to the reasonableness test under Japanese law<sup>46</sup> or the presumed foreign law.<sup>47</sup>

In order to avoid arbitrary decisions and provide for concrete criteria, it has been further suggested that the legal systems most similar to that of the applicable foreign law should be referred to.<sup>48</sup> Some court decisions followed this position to determine the content of North Korean law, pointing to the

July 1987, Katei Saiban Geppō 40-3, 90 (North Korea); Kyōto District Court, 30 September 1987, Hanrei Jihō 1275, 107 (North Korea); also M. DŌGAUCHI, *Pointo kokusai shihō: sōron* [Issues of Private International Law: General Part] (2<sup>nd</sup> ed., Tōkyō 2007) 247 et seq.; MIKAZUKI, *supra* note 23, 268 et seq.

44 IKEHARA, *supra* note 8, 242 et seq.

45 Tōkyō District Court, 12 August 1958, Kamin-shū 9-8, 1573 (North Korea); Utsunomiya Family Court, 10 August 1959, Katei Saiban Geppō 11-11, 134 (North Korea); Kōbe District Court, 6 October 1959, Kamin-shū 10-10, 2099 (English Law); Kōbe Family Court, 14 September 1960, Katei Saiban Geppō 12-12, 101 (North Korea); Urawa Family Court, 31 August 1961, Katei Saiban Geppō 13-12, 65 (North Korea); Urawa Family Court, 5 June 1962, Katei Saiban Geppō 14-12, 154 (North Korea); Tōkyō District Court, 13 January 1966, Katei Saiban Geppō 19-1, 43 (North Korea); Kyōto Family Court, 10 March 1975, Katei Saiban Geppō 27-11, 61 (China); Tōkyō High Court, 13 July 1981, Katei Saiban Geppō 34-9, 72 (China); Ōsaka District Court, 27 September 1985, Hanrei Jihō 1179, 94 (North Korea).

46 Shizuoka District Court, 12 February 1971, Kamin-shū 22-1/2, 160 (North Korea); Ōsaka Family Court, 26 March 1979, Katei Saiban Geppō 34-2, 160 (China); Nagano Family Court, 12 March 1982, Katei Saiban Geppō 35-1, 105 (North Korea); Kōbe District Court, 30 March 1983, Hanrei Jihō 1092, 114 (India).

47 Tōkyō High Court, 8 August 1959, Hanrei Jihō 227, 34 (North Korea); Tōkyō District Court, 25 October 1962, Kamin-shū 13-10, 2146 (China); Tōkyō Family Court, 28 February 1974, Katei Saiban Geppō 26-8, 99 (China); Sapporo Family Court, 23 July 1974, Katei Saiban Geppō 27-5, 146 (Malaysia); Tōkyō Family Court, 27 December 1974, Katei Saiban Geppō 27-10, 71 (Malaysia and Chinese customary law); Nagoya District Court, 7 October 1975, Kamin-shū 26-9/12, 910 (North Korea); Kōfu District Court, 29 October 1976, Hanrei Jihō 852, 103 (North Korea); Sapporo District Court, 26 June 1984, Katei Saiban Geppō 37-7, 65 (Zimbabwe); Hiroshima District Court, 30 January 1986, Katei Saiban Geppō 38-6, 43 (Laos); Tōkyō District Court, 28 August 1987, Hanrei Jihō 1278, 97 (China).

general principles of socialism on divorce law (1965)<sup>49</sup> or the rules on post-mortem acknowledgment of a child in the Soviet Union, Czechoslovakia and Poland at that time (1976).<sup>50</sup> To ascertain Chinese adoption law, one court decision referred to the then applicable law of the Soviet Union, East Germany, Poland, Rumania and Hungary (1983).<sup>51</sup> Recently, to determine the rules on tort and unjust enrichment in Myanmar, a court relied on English law (2015).<sup>52</sup> As this shows, Japanese courts generally make an effort to fill the gap when the applicable foreign law cannot be ascertained.

Interestingly enough, there has since the beginning of the 1990s been a remarkable decrease in the number of published court decisions declaring foreign law as unascertainable. This is mainly due to the improved means of ascertaining foreign law and the progress of codification in family law in neighbouring countries, especially in China and Taiwan as well as in North and South Korea. As far as civil and commercial matters are concerned, courts have seldom declared that foreign law could not be ascertained, arguably because the parties assisted courts in providing information. This does not mean, however, that access to foreign law is no longer an issue. Rather, with the continuing increase in cross-border business activities of Japanese companies in Asia, especially in China, South Korea, Thailand, Vietnam, the Philippines and other countries, the challenge and importance of securing accurate information on foreign law is rapidly growing as some of these countries do not yet have sufficient accessible media to provide information on their law.

#### IV. FINAL REMARKS

As has been examined in this paper, the application and ascertainment of foreign law should be understood as being conducted *ex officio* in Japan. Consequently, it is a challenge for judges to properly apply foreign law. In Japan, the available means for obtaining information on foreign law in civil and commercial matters are still limited. Other than asking for the assis-

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48 Fukuoka District Court, 14 January 1958, Kamin-shū 9-1, 15 (North Korea); Ōsaka Family Court, 22 August 1962, Katei Saiban Geppō 15-2, 163 (North Korea); Tōkyō Family Court, 13 June 1963, Katei Saiban Geppō 15-10, 153 (North Korea); Ōsaka District Court, 17 March 1964, Hanrei Times 162, 197 (North Korea); Yokohama Family Court, 2 October 1973, Katei Saiban Geppō 26-6, 52 (Taiwan); Naha Family Court, 17 January 1975, Katei Saiban Geppō 28-2, 115 (Taiwan); also IKEHARA, *supra* note 8, 243; YAMADA, *supra* note 22, 136.

49 Chiba District Court (Matsudo Branch), 11 August 1965, Katei Saiban Geppō 18-9, 53 (North Korea).

50 Tōkyō District Court, 19 March 1976, Kamin-shū 27-1/4, 125 (North Korea).

51 Nagoya Family Court, 30 November 1983, Katei Saiban Geppō 36-11, 138 (China).

52 Tokyo District Court, 28 December 2015, LEX/DB No. 25532655 (Myanmar).

tance of the parties, courts generally obtain information only from published media or via the Internet. Although inquiries can theoretically be made to administrative bodies or to foreign states via diplomatic channels, such means are not used on account of their being time-consuming and unable to guarantee a satisfactory result.

In this respect, adopting an international instrument – possibly under the auspices of the Hague Conference on Private International Law – to establish a framework of cross-border administrative cooperation between states to exchange information on foreign law seems to be a viable solution. The 1968 London Convention can be taken as a model and possibly be revised and improved upon.<sup>53</sup> In fact, in ascertaining foreign law, it is often not sufficient to know the black-letter rules; rather, information in a particular context is crucial. A cooperation mechanism that allows a judge to obtain information on foreign law tailored to the case at hand would be helpful and desirable. Moreover, direct judicial communication with judges in the foreign country at issue could also be useful, even if Japanese judges are thus far hindered in exchanging information on the particular case at hand.<sup>54</sup>

The need to access foreign law is also felt among private parties, attorneys and arbitrators. Under the current practice, Japanese law firms often contact foreign law firms to ask for legal opinions, but this is costly and can only be done in large cases. Small and medium-sized claims are handled with the restricted materials available at hand. It would be attractive for various practitioners to have a less costly and more effective method of obtaining information on foreign law. Thus, a possible future instrument on administrative cooperation should also be open to private parties and attorneys.<sup>55</sup>

The feasibility of such an international instrument depends on how much work can be expected from both of the respective governments involved. Currently, when foreign authorities send written or oral requests to Japanese ministries seeking information on Japanese law, each ministry responds in light of the statute which it is responsible for administering.<sup>56</sup> It is hoped that a more effective administrative cooperation can be established, possibly by delegating some task to academics or research institutions so as

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53 European Convention of 7 June 1968 on Information on Foreign Law, signed at London. For further detail, see NISHITANI, *supra* note 30, 47 et seq.

54 In fact, since Japan joined the 1980 Hague Child Abduction Convention in 2014 (see *supra* note 10), network judges have been appointed also from Japan. While the Japanese network judges do not exchange information on individual cases in order to ensure their independency and the proper administration of justice (NISHITANI, *supra* note 1), having this framework is helpful for obtaining information on foreign law.

55 For further detail, see NISHITANI, *supra* note 30, 54 et seq.

56 No fees are charged to foreign authorities.

to provide information in an efficient way. Future developments are awaited, for the need to improve and enhance access to foreign law will only further increase with the advance of globalization.

#### SUMMARY

*The treatment of foreign law by courts is an important issue as it determines the functioning of private international law and the outcome of the case. Standing at the crossroad of conflict of laws and procedural law, the methods of ascertaining and applying foreign law are grounded on different theoretical foundations and practical conceptions across various jurisdictions. This paper aims to examine how foreign law is treated in court proceedings in Japan. First, this study expounds general principles concerning the application of conflict-of-law rules and the designated foreign substantive law governing the case at hand in Japan, including the possibility of judicial review. Second, this study analyses the implementation of these general principles from a practical viewpoint, especially in light of the question of how to ascertain the content of foreign law and fill the gap when it is not ascertainable. Finally, some remarks on the utility and feasibility of adopting an international instrument to improve access to foreign law conclude this paper.*

#### ZUSAMMENFASSUNG

*Es ist eine Grundsatzfrage des internationalen Privatrechts (IPR), ob und wie ausländisches Recht von den nationalen Gerichten festgestellt und angewendet wird. Denn hiervon werden die Funktionsweise des IPR sowie die Lösung des konkreten Falles entscheidend geprägt. Die Frage nach den Methoden zur Ermittlung und Anwendung ausländischen Rechts steht an der Schnittstelle zwischen Kollisionsrecht und Verfahrensrecht, so dass deren Beantwortung in der jeweiligen Rechtsordnung auf die eigenen theoretischen Grundlagen und praktischen Vorstellungen gestützt wird. Dieser Beitrag untersucht, wie ausländisches Recht im Gerichtsverfahren in Japan behandelt und zur Anwendung gebracht wird. Zunächst erläutert er die allgemeinen Grundsätze hinsichtlich der Anwendung der Kollisionsnormen sowie des maßgeblichen ausländischen Rechts in Japan, einschließlich des möglichen Rechtsmittels der Revision. Zum zweiten werden die Art und Weise der Umsetzung dieser allgemeinen Grundsätze in der Praxis analysiert, insbesondere im Hinblick auf die Frage nach der Feststellung des Inhalts des anwendbaren ausländischen Rechts und der Lückenfüllung im Falle der Nichtfeststellbarkeit. Den Schluss bilden einige Anmerkungen zur Nützlichkeit und Tauglichkeit eines internationalen Instruments zur Erhaltung von Auskünften über ausländisches Recht.*