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New Rules on International Jurisdiction of Japanese Courts in Family Matters

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INTRODUCTION

Under Japanese law, as is well known, spouses can divorce by mutual agreement (*kyōgi rikon,* Art. 763 Civil Code[1]). They need not appear in court; rather, they may appear before a family registration official to file for divorce by mutual agreement (*kyōgi rikon todoke,* Arts. 739, 764 Civil Code).[2] Even if one of the spouses is non-Japanese, divorce by mutual agreement is permitted in many cases because Japanese law may be applied if one spouse is a Japanese national habitually resident in Japan (Art. 27 Act on the General Rules of Application of Laws[3]).

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1 *Minpō*, Law No. 89 of 1896, last amended by Law No. 34 of 2019.

2 Filing for divorce by mutual agreement is similar to that for marriage. Thus, Article 739 on filing for marriage applies *mutatis mutandis* to divorce according to Article 764.

If the spouses do not reach a mutual agreement, divorce is complicated in Japan. In principle, they should file for mediation to the family court (Arts. 244, 257 Act on Procedure in Family Matters, hereinafter cited as 'APFM'[4]). The certificate indicating that they have reached a divorce agreement after mediation is afforded the same force as a final judgment of the court (Art. 268 para. 1 APFM). A divorce by mediation (*chōtei rikon*) is similar to a divorce by mutual agreement before the family registration official, though the latter does not have the same force as a judgment.[5] Even if the spouses do not reach an agreement for divorce after mediation, the judge of the family court can make a decision as an alternative to mediation considering all circumstances of the spouses (*chōtei ni kawaru shinpan,* Art. 284 para. 1 APFM). However, if one or both spouses file a formal objection within two weeks, the decision loses its effect (Art. 279 para. 2, Art. 286 para. 1 to 5 APFM). If neither spouse files such an objection, the decision is afforded the same force as a final judgment (Art. 287 APFM). Divorce by decision (*shinpan rikon*) is distinguished from divorce by mutual agreement or by mediation, and is easily blocked by objection of the spouses. If none of these three options is available, the spouse who wants to divorce must file a suit against the other spouse in family court. Divorce by judgment (*hanketsu rikon*) is not regulated by APFM but by the Act on Litigation in Personal Matters (hereinafter cited as 'ALPM'[6]).

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3 *Hō no tekiyō ni kansuru tsūsoku-hō*, Law No. 78 of 2006. For an English translation by K. ANDERSON/Y. OKUDA, see ZJapanR/J.Japan.L. 23 (2007) 227–240. According to Article 27, Article 25 of the law applicable to the effects of marriage applies in principle *mutatis mutandis* to divorce – that is, the same national law of the spouses, or where the national law is not the same, the law of the same habitual residence, or where none of these applies, the law of the place with which the spouses are most closely connected applies to divorce. However, there is a provison in case of divorce; namely, where one of the spouses is a Japanese national with his or her habitual residence in Japan, the divorce will always be governed by Japanese law. This exception aims to facilitate the task of the family registration official to determine whether filing for divorce by mutual agreement is acceptable or not. See Y. OKUDA, Divorce, Protection of Minors, and Child Abduction in Japan's Private International Law, in: Basedow/Baum/Nishitani (eds.), Japanese and European Private International Law in Comparative Perspective (2008) 302–304.

4 *Kaji jiken tetsuzuki-hō*, Law No. 52 of 2011, last amended by Law No. 34 of 2019. The law is similar to the German, Swiss and Austrian laws regarding voluntary jurisdiction *(freiwillige Gerichtsbarkeit).* It regulates the procedure in non-contentious family cases such as guardianship, adoption (as a child), parental authority, and maintenance, as well as the mediation for contentious cases and a part of non-contentious cases.

5 As a result, one of the spouses can file for the annulment of divorce by mutual agreement due to fraud or intimidation (Arts. 747, 764 Civil Code).

There was, for a long time, no written rule on international jurisdiction over divorce by mediation, decision and judgment, though the laws mentioned above provided for domestic jurisdiction, that is, that the Japanese family court has jurisdiction (Arts. 245, 246 APFM, Arts. 4 to 8 ALPM).[7] Law No. 20 of 2018, which introduced new rules on the international jurisdiction of Japanese courts, came into force on 1 April 2019. As usual in Japan, the drafters declared that the new rules are based on the former case law of the Japanese courts.[8] However, the former case law on international jurisdiction was ambiguous and contradictory, and some of the cases are questionable in their conclusions.[9]

This paper will first provide an outline of the new rules,[10] and then a critical analysis of the provisions on jurisdiction over divorce considering the

6 *Jinji soshō-hō*, Law No. 109 of 2003, last amended by Law No. 20 of 2018. The law supplements *Minji soshō-hō* [Code of Civil Procedure], Law No. 109 of 2003, last amended by Law No. 45 of 2017 with special rules for cases in personal matters. Within the meaning of this law, the cases in personal matters are those involving matrimonial relations such as divorce, marriage annulment and annulment of divorce by agreement, parent-child relations such as denial of legitimacy, acknowledgment of a child and annulment of acknowledgment, as well as adoptive parent-child relations such as dissolution and annulment of adoption by agreement (Art. 2 ALPM).

7 In contrast, the rules on international jurisdiction in civil and commercial matters have been included in the Code of Civil Procedure since 2012. See Y. OKUDA, New Provisions on International Jurisdiction of Japanese Courts, Yearbook of Private International Law 13 (2011) 367–380 with further references.

8 *Hōsei shingi-kai kokusai saiban kankatsu hōsei (jinji soshō jiken oyobi kaji jiken kankei) bukai* [Legal System Investigation Commission, Working Group on Law of International Jurisdiction in Personal and Family Matters], Minutes of the 18th Meeting, 18 September 2015, 1 *et seq.*, available at *http://www.moj.go.jp/shingi1/shingi04900273.html*; M. UCHINO (ed.), *Ichimon ittō heisei 30-nen jinji soshō-hō kaji jiken tetsuzuki-hō-tō kaisei: kokusai saiban kankatsu hōsei no seibi* [Q&A on Amendment of Act on Litigation in Personal Matters, Act on Procedure in Family Matters and other Laws of 30th Year of Heisei Era: Codification of Rules on International Jurisdiction], (2019) 24.

9 See Y. OKUDA, *Kokusai kazoku-hō* [International Family Law], (2nd ed., 2020) 54.

10 As for English explanatory reports of the new rules, see the symposium "New Legislation on the International Jurisdiction of Japanese Courts on Personal Status Litigations and Domestic Relations Cases": A. KITAZAWA, Introductory Note, Japanese Yearbook of International Law 62 (2019) 118; Y. NISHITANI, New International Civil Procedure Law of Japan in Status and Family Matters, *ibid.*, 119–150; Y. NISHITANI, International Adjudicatory Jurisdiction in Matrimonial Matters in Japan, *ibid.*, 151–188; M. MURAKAMI, International Jurisdiction of Child-Related Cases in Japan, *ibid.*, 189–208; T. HAYASHI, International Jurisdiction in Case Related to Succession: New Rules in Japan, *ibid.*, 209–225; M. IWAMOTO, Recognition and Enforcement of Foreign Decisions on Personal Status Litigation and Family Relations Cases, *ibid.*, 226–250.

former case law, in which the domicile of the defendant, the matrimonial domicile, and the common nationality, as well as emergency cases and *forum non conveniens* are discussed. It will mention also the provisions on jurisdiction over other cases in family matters and over mediation. The impact of the new rules on the recognition of foreign judgments will be examined, and the paper will finally comment on future Japanese practice and differences between Japanese law and European laws.

I. Outline of the New Rules

Law No. 20 of 2018 introduced the new rules on the international jurisdiction of Japanese courts into both the ALPM and the APFM. This is because Japanese procedural law distinguishes between the contentious family cases regulated by the ALPM on the one hand and the non-contentious family cases regulated by APFM on the other hand.[11] Thus, the jurisdiction of Japanese courts should be provided both in the ALPM and the APFM.[12] This paper focuses on the jurisdiction over contentious cases but also mentions the jurisdiction over mediation.

According to the ALPM, Japanese courts have jurisdiction where the case concerns a suit against one party to the personal matter and the party is domiciled in Japan (Art. 3-2 no. 1 ALPM). In a divorce case, the parties to the personal matter mean the spouses, so that the provision declares the jurisdiction as being at the domicile of the defendant spouse. Japanese courts also have jurisdiction over a suit against both parties (Art. 3-2 no. 2 ALPM) and a suit in the case of the death of one or both parties (Art. 3-2 no. 3, 4 ALPM). However, these provisions are not relevant to a divorce case that concerns a suit against one spouse by another spouse and where a suit cannot be instituted if one or both spouses are dead. They apply to other cases such as marriage annulment, denial of legitimacy, acknowledgement of a child.

Japanese courts have jurisdiction where both of the parties to the personal matter are Japanese nationals, including where one or both were Japanese nationals at the time of death (Art. 3-2 no. 5 ALPM). In divorce cases, jurisdiction based on nationality is permitted only where the spouses as plaintiff and defendant are both Japanese. The jurisdiction based on domicile of

11 The APFM is similar to the German, Swiss and Austrian laws regarding voluntary jurisdiction (*freiwillige Gerichtsbarkeit*). See *supra* note 4.

12 As for an English translation of all new provisions on international jurisdiction introduced by the Law No. 20 of 2018 into the ALPM and the APFM as well as the provisions of *Minji shikkō-hō* (Code of Civil Execution), Law No. 4 of 1979, amended by the same Law regarding execution of foreign judgments, see hereafter in this Issue of the Journal, at p. 235.

the plaintiff is likewise restricted. That is, Japanese courts have jurisdiction where both spouses were last domiciled in Japan and the plaintiff is still domiciled there (Art. 3-2 no. 6 ALPM), as well as where the plaintiff is domiciled in Japan and a special circumstance requires the trial and judgment to be in Japan for reasons of fairness between the parties or due and prompt administration of justice, as is the case where the defendant is missing or where the final judgment of divorce rendered in a country of the defendant's domicile is not recognized in Japan (Art. 3-2 no. 7 ALPM). The latter provides for jurisdiction in emergency cases. Such an exception is admitted also in cases where Japan is a *forum non conveniens*. The Japanese courts with jurisdiction according to Article 3-2 may dismiss the suit in exceptional cases where trial and judgment in Japan cause prejudice or unfairness to one of the parties or hinder due and prompt administration of justice (Art. 3-5 ALPM).

These rules differ in some ways from those provided in the Brussels II *bis* Recast and under the Swiss PIL.[13] The domicile of the defendant is a well-established connecting factor for international jurisdiction over divorce (Art. 3 (a) (iii) Brussels II *bis* Recast, Art. 59 (a) Swiss PIL). The last common domicile, as a connecting factor, is set out at Article 3 para. 1 (iii) of the Brussels II *bis* Recast and under the new Japanese legislation. Through this connecting factor, the country of the plaintiff's domicile also has jurisdiction when the plaintiff has resided there for the period stipulated in Article (a) (v) (vi) of the Brussels II *bis* Recast.[14] Similarly, Article 59 (b) of the Swiss PIL also provides jurisdiction at the plaintiff's domicile after a certain period of residence or where the plaintiff is a Swiss citizen.[15] By contrast, the plaintiff's domicile in Japan can only be invoked as grounds for jurisdiction where the last common domicile was Japan, or in emergencies. Article 3 (b) of the Brussels II *bis* Recast also provides for common nationality of the spouses.

Furthermore, in contrast to the Japanese legislation, Article 60 of the Swiss PIL provides for jurisdiction over Swiss citizens domiciled abroad (*Auslandschweizer*) if divorce is impossible or unreasonably difficult in the

13 Brussels II *bis* Recast Regulation: Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction. Swiss PIL Act: Switzerland's Federal Act on Private International Law of 18 December 1987.

14 The jurisdiction is granted to the country of the plaintiff's domicile if the plaintiff has resided there for one year, or if either of the spouses is a national of the forum, for six months immediately before the suit.

15 Unless the plaintiff is a Swiss citizen, the jurisdiction is granted to the court at the plaintiff's domicile only if the plaintiff has resided in Switzerland for one year.

country where the Swiss citizens are domiciled. Article 3 (a) (iv) of the Brussels II *bis* Recast provides for jurisdiction in case of a joint application in the country where either of the spouses is domiciled. In such a case, both spouses agree to the divorce. As such, in Japan, they can file for divorce by mutual agreement before the family registration official, as long as one of the spouses is a Japanese national with his or her habitual residence in Japan. Neither the Brussels II *bis* Recast, nor the Swiss PIL provides for the dismissal of the suit in exceptional cases in a manner that resembles *forum non conveniens* in Anglo-American laws.[16]

II. JURISDICTION OVER DIVORCE

1. Domicile of Defendant

Most spouses married in Japan are Japanese; some couples are mixed: Japanese and non-Japanese,[17] such that it can be assumed that Japanese law is applicable to divorce in most cases. It is reported that divorce in Japan is mostly by mutual agreement and sometimes by mediation, decision or judgment.[18] Under Japanese law, divorce by judgment is more difficult than in Europe. A breakdown of the marriage or a factual separation of the spouses is not enough to justify divorce if one spouse objects to it.[19] According to Japanese case law, where the spouse responsible for the breakdown of the marriage files for divorce by judgment, the suit, which was previously always rejected, is now admitted, but only in exceptional cases.[20]

16 However, the Japanese courts do not determine whether the trial and decision in a foreign country are better than those in Japan. On this point, Article 3-5 ALPM is a little different from *forum non conveniens* of Anglo-American laws.

17 According to the statistical report for 2013, marriage was celebrated in Japan by 639,125 Japanese couples, 21,488 Japanese and non-Japanese couples, and 3,127 non-Japanese couples. See KŌSEI RŌDŌ-SHŌ [Ministry of Health, Labor and Welfare], *Heisei 26-nen jinkō dōtai tōkei* [Vital Statistics for 26th Year of Heisei Era].

18 According to the statistical report for 2016, there were 188,960 divorces by mutual agreement before the family registration official, 21,651 divorces by mediation, 547 divorces by decision as an alternative to mediation, and 3,474 divorces by judgment. See the statistics between 1948 and 2016 available in Japanese language at *https://www.estat.go.jp/dbview?sid=0003214873*.

19 By contrast, divorce without consent of the other spouse is broadly permitted in European countries, for example based on a breakdown of the marriage or solely on a factual separation. See D. MARTINY, Divorce, in: Basedow et al. (eds.), The Max Planck Encyclopedia of European Private Law (2012) 495.

20 Previously, the Supreme Court of Japan always rejected suits by the responsible spouse. See Supreme Court of 19 February 1952, Minshū 6, 110; Supreme Court of 5 November 1954, Minshū 8, 2023; Supreme Court of 14 December 1954, Minshū 8, 2143; Supreme Court of 7 June 1963, Katei Saiban Geppō 15-8, 55; Supreme Court of

This was arguably reflected in previous case law regarding international jurisdiction over divorce.

In 1964, the Supreme Court *en banc* held that from the rule of reason, international jurisdiction over divorce should, in principle, be granted to the country where the defendant is domiciled.[21] However, the Court has exceptionally recognized the jurisdiction of the court at the plaintiff's domicile in cases where the defendant was missing or had abandoned the plaintiff, or in similar cases. For example, one case concerned a Korean woman, who was born as Japanese national but had lost Japanese nationality after marrying a Korean before the Second World War. She returned from Korea to Japan and filed for divorce against her Korean husband with whom she had previously lived in Korea but who was now missing. Accordingly, Japanese jurisdiction was affirmed. Several days later however, the Supreme Court denied jurisdiction in a case where an American husband filed for divorce against his American wife who lived in the United States and had never visited Japan.[22] In both cases, the divorce was governed by a foreign law, but the Supreme Court considered the interests of the defendant who could object to the divorce.

By contrast, in 1996 the Supreme Court made a decision that was nuanced a little differently as compared to the 1964 rulings.[23] In that case, a Japanese husband, who returned from Germany to Japan with his child, filed for divorce and requested parental authority over the child. His German wife had already obtained a German judgment for divorce and parental authority. However, the German judgment was not in force in Japan because the suit

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15 October 1963, Katei Saiban Geppō 16-2, 31; Supreme Court of 23 February 1965, Shūmin 77, 573; Supreme Court of 13 December 1979, Shūmin 128, 183. The turning point was the Supreme Court *en banc* of 2 September 1987, Minshū 41, 1423. However, it allowed a suit by the responsible spouse only in exceptional cases such as where the spouses lived separately much longer than they lived in common and had no minor children, and where the defendant spouse was neither psychologically nor sociologically or economically in hardship. After that, the Supreme Court often allowed suits filed by responsible spouses. See Supreme Court of 24 November 1987, Katei Saiban Geppō 40-3, 27; Supreme Court of 8 December 1988, Katei Saiban Geppō 41-3, 145; Supreme Court of 8 November 1990, Katei Saiban Geppō 43-3, 72; Supreme Court of 2 November 1993, Katei Saiban Geppō 46-9, 40; Supreme Court of 8 February 1994, Katei Saiban Geppō 46-9, 59. For the rejected cases, see Supreme Court of 28 March 1989, Katei Saiban Geppō 41-7, 67; Supreme Court of 18 November 2004, Katei Saiban Geppō 57-5, 40.

21 Supreme Court *en banc* of 25 March 1964, Minshū 18, 486.

22 Supreme Court of 9 April 1964, Katei Saiban Geppō 16-8, 78, engl. transl. The Japanese Annual of International Law 10 (1966) 148.

23 Supreme Court of 24 June 1996, Minshū 50, 1451, engl. transl. The Japanese Annual of International Law 40 (1997) 132.

had begun with constructive service of process (by publication) and without the husband appearing (Art. 200 no. 2 Old Code of Civil Procedure[24]). The Supreme Court held that international jurisdiction should be granted to a Japanese court, even with the defendant not being domiciled in Japan, where the case is otherwise connected with Japan in light of the circumstances. These circumstances include the plaintiff's domicile, as long as Japanese jurisdiction is justified by fairness between the parties or by due and prompt administration of justice. Thus, though the interests of the defendant who is summoned to appear in court should be taken into account, the interests of the plaintiff seeking divorce should also be respected considering the legal or factual difficulty for the plaintiff to file for divorce in the country of the defendant's domicile. Thus, in this case, the plaintiff could not file a suit in Germany where the defendant was domiciled, because the judgment obtained by the wife was in force there. Yet the German judgment had no force in Japan because it did not satisfy the condition of Article 200 number 2 of the old Code of Civil Procedure. Accordingly, Japanese jurisdiction was affirmed.

As mentioned below (II.4.), the conclusion of the 1996 decision is reasonable, but the reasoning is questionable as the Supreme Court treated the defendant's domicile as one of several elements affirming jurisdiction, not as the principal element. The new rules provided in the ALPM follow the 1996 rulings rather than those of 1964. That is, Article 3-2 ALPM listed the defendant's domicile as being equal to other elements affirming jurisdiction, such as the matrimonial domicile and the common nationality of the spouses. However, under Japanese substantive law, the interests of the spouse who could object to divorce, continue to be protected. This should be a basic concept of Japanese law to be respected for international jurisdiction as well.[25] In most cases, spouses who agree to divorce can simply file with the family registration official, and most suits before the court involve cases where one spouse objects to divorce. In those cases, Japanese law often applies, such that the court must examine which spouse is responsible for the breakdown of the marriage and whether divorce should be exceptionally permitted even if the responsible spouse filed the suit. For such an examination, jurisdiction should, in principle, be granted to the court of the defendant's domicile, and only in

24 *Kyū-minji soshō-hō*, Law No. 29 of 1890, as amended by Law No. 61 of 1926. This provision was replaced with a slight modification by Article 118 no. 2 of the current Code of Civil Procedure. For details regarding the current provision, see Y. OKUDA, Recognition and Enforcement of Foreign Judgments in Japan, Yearbook of Private International Law 15 (2013/2014) 414–416.

25 See OKUDA, *supra* note 9, 179.

exceptional cases to the court of the plaintiff's domicile. The new rules of the ALPM seem to contradict the basic concept of Japanese law.

2. Matrimonial Domicile

In 1999, the Nagoya District Court declared a new rule that the jurisdiction of Japanese courts should be affirmed if the spouses last shared a common domicile, and the plaintiff is still domiciled in Japan.[26] According to the Court, this is justified by the principle of due and prompt administration of justice because much of the evidence for a divorce is located at the last common domicile of the spouses, and by the principle of fairness between the parties because spouses usually decide to live together in Japan by mutual agreement. Accordingly, jurisdiction should be granted to the court of the last common domicile of the spouses, excluding cases where there are special circumstances such as the plaintiff having forced the defendant to leave Japan. That particular case involved a Japanese husband domiciled in Japan who filed a suit against his American wife who had left Japan to return to Oregon with their children because of the husband's domestic violence. However, the Court held that the defendant had voluntarily left Japan: though the defendant was reluctant to appear in a Japanese court because of the plaintiff's violence, this reason was not sufficient. Normally, only her representative lawyer would be appearing; she needed only to appear once for derogation, during which time, the plaintiff's violence could have been avoided by due diligence.

The new rule was adopted in Article 3-2 no. 6 ALPM, based on the argument that much of the evidence for a divorce is generally located at the last common domicile of the spouses.[27] However, the most important evidence for a divorce is the testimony of the spouses. The Nagoya District Court underestimated the plaintiff's violence toward the defendant.[28] For a wife, a victim of domestic violence, even seeing her husband once, in court, may be intolerable. Furthermore, it was assumed that the wife had to leave Japan because of the husband's violence. This is equivalent to the case where the husband forced the wife to leave Japan. Accordingly, as the Supreme Court held in 1964, jurisdiction at the plaintiff's domicile should be affirmed only in exceptional cases, for instance where the defendant is missing or has abandoned the plaintiff.

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26 Nagoya District Court of 24 November 1999, Hanrei Jihō 1728 (2001) 58, engl. trans. The Japanese Annual of International Law 45 (2002) 159.

27 See UCHINO, *supra* note 8, at 33.

28 See OKUDA, *supra* note 9, at 182.

3. Common Nationality

The common nationality as provided in Article 3-2 no. 5 ALPM was adopted in the wake of the Tōkyō District Court decision affirming jurisdiction in 1999.[29] That case concerned Japanese spouses who last shared a common domicile in the United States of America for 13 years, after which the husband returned to Japan with their child. The Court held that the trial in Japan did not prejudice fairness between the parties because they were both Japanese, and the defendant sometimes visited her mother domiciled in Japan; for reasons of due and prompt administration of justice, the Japanese court was required to decide the question of parental authority because the child had lived for a long time in Japan. Moreover, the divorce of the spouses, both Japanese nationals whose marriage was celebrated in Japan, was closely connected with Japan.

However, the reasoning of the Court was not persuasive for affirming jurisdiction based on the common nationality of the spouses.[30] The wife was domiciled abroad and had her principal residence there. Thus, a trial in Japan was very burdensome for her. Parental authority should have been decided in Japan after the question of divorce was decided at the defendant's domicile.[31] According to a comment on Article 3-2 no. 5 ALPM, Japanese courts are required to register the divorce of Japanese spouses in the family book (*koseki*).[32] However, the comment disregards the Japanese rule on family registration that divorce between a Japanese and a non-Japanese should also be registered in the family book of the Japanese national. That is, the divorce of a Japanese national, regardless of whether the other spouse is Japanese or not, should be reported in the family book within ten days of the entry into force of the judgment of a Japanese or non-Japanese court (Arts. 63, 77 Family Registration Act)[33].

Japanese nationality is not always the closest connection with Japan. For example, Alberto FUJIMORI, former president of Peru, acquired Peruvian

29 Tōkyō District Court of 4 November 1999, Hanrei Taimuzu 1023 (2000) 267.

30 See OKUDA, *supra* note 9, at 181.

31 Since, according to European laws, the parental authority is often attributed to both father and mother even after their divorce, European courts do not always decide the divorce and parental authority issues at the same time. Even if foreign courts decided both of them, the part of the decision on the parental authority will not be recognized in Japan if the child lived in Japan at the time the suit was filed in the foreign country. See Kyōto Family Court of 31 March 1994, Hanrei Jihō 1545 (1995) 81, engl. trans. The Japanese Annual of International Law 39 (1996) 275 (non-recognition of a French Court decision affirming visitation rights for the father).

32 Comment of M. DŌGAUCHI in the talk on the new rules, *Shōgaiteki na jinji soshō kaji jiken ni kakaru tetsuzuki hōsei* [Procedural Law on Cases in Personal and Family Matters with foreign Elements], Ronkyū Jurisuto 27 (2018) 15.

nationality by birth in Peru and also Japanese nationality from his parents.[34] His former wife also is likely to have Peruvian and Japanese nationality. Though the spouses divorced in Peru, according to the new Japanese rules, they could have divorced by judgment of the Japanese courts. However, they were born and educated in Peru with little contact to Japan and are scarcely able to understand the Japanese language. Accordingly, the nationality of the spouses should be taken into account only in exceptional cases where the divorce in the country of their domicile is impossible or unreasonably difficult, as the Swiss PIL provides.

4. Emergency Cases and Forum Non Conveniens

As mentioned above, Article 3-2 no. 7 ALPM provides for jurisdiction at the plaintiff's domicile in emergency cases. The examples cited as emergency cases include the unknown whereabouts of the defendant, as was the case in the 1964 decision of the Supreme Court *en banc*; and, the non-recognition of a foreign divorce judgment at the defendant's domicile, as was the case of the 1996 decision of the Supreme Court.[35] Jurisdiction at the plaintiff's domicile may also be affirmed in similar cases, where trial and judgment in Japan are required for fairness between the parties or for the due and prompt administration of justice. Such is the case where the defendant has abandoned the plaintiff and left Japan, as the 1964 rulings suggest. The other example comes from a 2004 decision of the Tōkyō District Court,[36] in which a Japanese wife returned to Japan from France with her child, as her French husband was violent towards her. The Court affirmed international jurisdiction for the suit filed by the wife, even though the last common domicile of the spouses was in France. The jurisdiction was justified on grounds that the wife could not file a suit in France because of her husband's violence.

The exceptional dismissal of a suit provided in Article 3-5 ALPM may also be justified to ensure fairness between the parties or due and prompt

33 *Koseki-hō*, Law No. 224 of 1947, last amended by Law No. 17 of 2019. The report is accepted even after ten days, but a non-criminal fine of not more than 50,000 yen may be imposed (Arts. 46, 135 of the same Act).

34 FUJIMORI, born in 1938 in Peru, was eligible for Japanese nationality because his father registered his birth with the Japanese embassy in Lima within 14 days; namely, he satisfied the requirement for retention of Japanese nationality according to Article 20-2 of *Kyū-kokuseki-hō* [Old Nationality Act], Law No. 66 of 1899, as amended by Law No. 19 of 1924. See K. ANDERSON, An Asian Pinochet – Not Likely: The Unfulfilled International Law Promise in Japan's Treatment of Former Peruvian President Alberto Fujimori, Stanford Journal of International Law 38 (2002) 187.

35 See *supra* notes 21 and 23.

36 Tōkyō District Court of 30 January 2004, Hanrei Jihō 1854 (2004) 51, engl. trans. The Japanese Annual of International Law 48 (2005) 186.

administration of justice, even where the jurisdiction of Japanese courts is affirmed by Article 3-2 ALPM. In contrast to Article 3-2 no. 7 ALPM, Article 3-5 ALPM does not provide specific examples. In my opinion, a suit in Japan should be dismissed where the defendant has had to leave Japan because of the plaintiff's violence, even where the spouses were last commonly domiciled in Japan, and the defendant is tenuously connected with Japan, though both spouses are Japanese nationals. If a suit in Japan is often dismissed in such cases, Article 3-2 nos. 5 and 6 should, in future, be repealed.

III. Jurisdiction over Other Cases

Contentious family cases, other than divorce, involve matrimonial relations such as marriage annulment and annulment of divorce by agreement, parent-child relations such as denial of legitimacy, acknowledgment of a child and annulment of acknowledgment, as well as adoptive parent-child relations such as dissolution and annulment of adoption (Art. 2 ALPM).[37] Before the Law No. 20 of 2018, the case law of inferior courts followed the 1964 rulings or the 1996 rulings of the Supreme Court on divorce cases for jurisdiction over other cases as well.[38] However, for confirmation of a lack of parent-child relations, some inferior courts granted jurisdiction to the country of domicile either of the child or the defendant, considering the child's interests.[39] Since the amendment of the ALPM, Japanese courts have had jurisdiction over suits filed by one of the parties to the personal matter against the other, where the defendant is domiciled in Japan, both of the parties have Japanese nationality, the plaintiff is domiciled in Japan and the parties had their last common domicile in Japan, or in emergency cases, though the court may dismiss the suit where Japan is found to be *forum non conveniens* (Art. 3-2 nos. 1, 5 to 7, Art. 3-5).

37 Though the child adoption by agreement may be dissolved or annulled by the judgment according to the ALPM, the special child adoption may be dissolved by the decision according to APFM. As special child adoption is based on a final decision of the family court (Art. 817-2 Civil Code), it may not be annulled.

38 See Ōsaka District Court of 24 December 1984, Katei Saiban Geppō 37-10, 104 (for annulment of marriage); Mito Family Court of 16 December 2016, Hanrei Taimuzu 1439 (2017) 251 (same); Ōsaka District Court of 9 October 1964, Kaminshū 15-10, 2419 (for confirmation of a lack of parent-child relations); Tōkyō District Court of 13 January 1966, Katei Saiban Geppō 19-1, 43 (same).

39 See Nagoya District Court of 24 December 1975, Hanrei Jihō 816 (1976) 75; Urawa District Court of 14 May 1982, Katei Saiban Geppō 36-2, 112.

In cases other than divorce or dissolution of adoption, one of the parties to the personal matter may file a suit against the solicitor general,[40] if the other party to the personal matter is dead (Art. 12 para. 3 ALPM). Before the Law No. 20 of 2018, some inferior courts granted jurisdiction to the country where the defendant was domiciled at the time of death,[41] other courts to the country where the plaintiff is domiciled.[42] Following the amendment of the ALPM, Japanese courts have jurisdiction for cases where the defendant was domiciled in Japan at the time of death, the plaintiff has Japanese nationality and the defendant had Japanese nationality at the time of death, or the plaintiff is domiciled in Japan and both parties to the personal matter had their last common domicile in Japan (Art. 3-2 nos. 3, 5 to 7 ALPM). However, as the defendant is the solicitor general of Japan, Article 3-2 para. 7 should broadly apply in order to affirm jurisdiction at the plaintiff's domicile. By contrast, the suit should be dismissed according to Article 3-5 if the plaintiff is not domiciled in Japan, even where the defendant was domiciled in Japan at the time of death, or the plaintiff has Japanese nationality and the defendant had Japanese nationality at the time of death.[43]

In cases other than divorce or dissolution of adoption, relatives or the solicitor general may file a suit against both of the parties to the personal matter, against one party after death of the other, or the solicitor general after death of the both parties (Art. 12 paras. 2 and 3 ALPM). Before the Law No. 20 of 2018, no case law was reported regarding international jurisdiction over these cases. Following the amendment of the ALPM, Japanese courts have jurisdiction where the case concerns a suit against both parties to the personal matter and one or both is domiciled in Japan, both parties to the personal matter are dead and one or both was domiciled in Japan at the time of death, or both parties to the personal matter have Japanese nationality (including the case where one or both had Japanese nationality at the time of death), though the court may dismiss the suit if it is found that Japan is *forum non conveniens* (Art. 3-2 nos. 2, 4 and 5, Art. 3-5).

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40 Under Japanese law, a *'kensatsu-kan'* is mostly charged with prosecution in criminal cases and sometimes with representation of public interests in family law cases. On this point, he or she is similar to *'Staatsanwalt'* under German law, though their specific duties differ.

41 See Chiba District Court of 25 December 1974 (for confirmation of absence of parent-child relations), Hanrei Jihō 781 (1975) 96; Ōsaka High Court of 9 May 2014 (same), Hanrei Jihō 2231 (2014) 53; Tōkyō District Court of 9 October 1981 (for annulment of child acknowledgement), Hanrei Jihō 1041 (1982) 87.

42 See Tōkyō District Court of 4 March 1972 (for child acknowledgement), Hanrei Jihō 675 (1972) 71; Ōsaka District Court of 6 February 1992 (for annulment of child acknowledgement), Hanrei Jihō 1430 (1992) 113.

43 See OKUDA, *supra* note 9, at 195, 297.

IV. Jurisdiction over Mediation

For all contentious cases defined by Article 2 ALPM, an application for mediation should be filed before filing a suit, except where the counterparty is missing (Arts. 244, 257 APFM). This is called the 'principle of mediation first' (*chōtei zenchi shugi*). Japanese courts have jurisdiction over an application for mediation where jurisdiction over a suit regarding the same matter should be affirmed according to the ALPM, the counterparty is domiciled in Japan, or the parties agreed that they may file for mediation with a Japanese court (Art. 3-13 para. 1 APFM). However, jurisdiction at the domicile of the counterparty and by agreement is excluded for cases other than divorce and dissolution of child adoption (para. 3 of the same Article). This is because a decision of the family court to the same effect as the agreement of the parties (*gōi ni sōtō suru shinpan*) is made for these cases after examination of the relevant facts (Art. 277 para. 1 APFM). By contrast, for divorce and dissolution of adoption, the dispute is settled by mediation if the agreement of the parties is entered in a record that has the same force as a final judgment (Art. 268 para. 1 APFM). Thus, jurisdiction in the domicile of the counterparty or by agreement is only permitted for divorce and dissolution of adoption, in addition to cases where jurisdiction is affirmed by the ALPM.

V. Impact on Recognition of Foreign Judgments

Though the ALPM supplements the Code of Civil Procedure (hereinafter cited as 'CCP') with special rules (Art. 1 ALPM), it has no provision regarding the recognition of a foreign judgment, such that Article 118 CCP also applies to foreign divorce judgments.[44] Thus, the foreign court must have jurisdiction according to Japanese laws or conventions in force in Japan (Art. 118 no. 1 CCP). Jurisdiction is provided to foreign courts to recognize their judgments via 'indirect jurisdiction'. Though there is no written rule concerning indirect jurisdiction over divorce in Japan, it is assumed to be identical to the direct jurisdiction of Japanese courts, as provided in the ALPM.

As mentioned above (I), the new rules of the ALPM are in some parts different from Brussels II *bis* Recast and the Swiss PIL. Accordingly, it is assumed that indirect jurisdiction of European courts will not always be affirmed by Japanese courts. Above all, though jurisdiction at the plaintiff's domicile is broadly affirmed in Brussels II *bis* Recast and the Swiss PIL, in Japan, it is restricted to cases where the spouses were last commonly domiciled in that country, or to emergency cases. Furthermore, indirect jurisdic-

44 For the details of Article 118 CCP, see Okuda, *supra* note 24, at 412 *et seq*.

tion will be denied where the rendering country is deemed *forum non conveniens,* as provided in Article 3-5 ALPM. For example, a judgment of the European courts will not be recognized where a Japanese spouse and a European spouse lived together in the country where the judgment was rendered, but the Japanese spouse returned to Japan because of the other spouse's violence.

Like the 1996 rulings of the Supreme Court, a judgment from a European court will not be recognized where the suit began with a constructive service of process, even though the court determined that the defendant was missing. This is because service by publication is excluded for recognition of foreign judgments (Art. 118 no. 2 CCP). It should also be noted that a judgment of the European courts may be held contrary to Japanese public policy (Art. 118 no. 3 CCP) where the judgment was simply based on the breakdown of the marriage and the plaintiff was responsible for the breakdown. For example, the 2007 decision of the Tōkyō Family Court denied recognition of the divorce judgment of an Australian court, among other reasons, because the Australian husband who filed the suit was responsible for the breakdown of the marriage, and the judgment for the suit against the Japanese wife was contrary to Japanese public policy.[45] Finally, lack of reciprocity is a reason for non-recognition of a foreign judgment (Art. 118 no. 4 CCP). If Japanese judgments for divorce are not recognized in the rendering country due to the absence of a treaty for mutual recognition of judgments, the judgment of that country will not be recognized in Japan for lack of reciprocity.[46]

Final Remarks

Normally, the enactment of rules on international jurisdiction is welcome, because it promotes the predictability of decisions on jurisdiction. However, the new rules provided in the ALPM are likely to result in ambiguity and confusion in future Japanese practice. Jurisdiction based on matrimonial domicile and common nationality is questionable, though it was affirmed by the decisions of some inferior courts made before the entry into force of the new rules. Assuming that the 1964 rulings of the Supreme Court *en banc* declared the principle of the defendant's domicile, the jurisdiction at the

45 Tōkyō Family Court of 11 September 2007, Katei Saiban Geppō 60-1, 108, engl. transl. Japanese Yearbook of International Law 52 (2009) 697. However, the ruling may be criticized because the determination that the Australian husband was responsible for the breakdown of the marriage was the *révision au fond*. See Okuda, *supra* note 9, at 210.

46 For example, Article 52 of the execution order (*Exekutionsordnung*) of Liechtenstein requires a treaty for recognition of foreign judgments. The official text in German language is available at *https://www.gesetze.li/konso/1972.032.002*.

plaintiff's domicile should be restricted to exceptional cases, as prescribed in Article 3-2 no. 7 ALPM.

It should also be noted that most cases of divorce in Japan will be governed by Japanese law, according to which divorce by judgment is restricted to exceptional cases, if the spouse responsible for the marriage breakdown files the suit. By contrast, European laws tend to allow divorce simply as a result of the breakdown of the marriage or the factual separation of the spouses.[47] From the European point of view, jurisdiction is broadly affirmed at the plaintiff's domicile for restarting his or her new life, though in Japan the interests of the spouse who may object to the divorce should be protected.[48] In general, harmonization of the rules on jurisdiction and the mutual recognition of judgments are desirable, but the differences between the basic concepts of family in Japan and European countries will not be easily bridged.

SUMMARY

Most divorces in Japan are based on a mutual agreement of the spouses. If no agreement is possible, a divorce may be reached by mediation or by decision within the procedural frame of the Act on Procedure in Family Matters. If none of these three options is available, a divorce may be achieved, in rare cases, by a judgment in a contentious court proceeding based on the Act on Litigation in Personal Matters. Both laws provide for rules on domestic jurisdiction only and for a long time, no written rule on international jurisdiction over divorce by mediation, decision, or judgment existed in Japan. This situation changed with Law No. 20 of 2018, which introduced new rules on the international jurisdiction of Japanese courts into both laws. The reform came into force on 1 April 2019.

This article provides an outline of the new rules followed by a critical analysis of the provisions on jurisdiction over divorce considering the former case law in which the domicile of the defendant, the matrimonial domicile, and the common nationality, as well as emergency cases and forum non conveniens are discussed. As usual in Japan, the drafters of the Law declared that the new rules are based on the former rulings of Japanese courts. However, the article raises the critique that the former case law on international jurisdiction was ambiguous and contradictory, and some of the cases are questionable in their conclusions.

Normally, the enactment of rules on international jurisdiction is welcome, because it promotes the predictability of decisions on jurisdiction. However, as the author emphasizes, the new rules are likely to result in ambiguity and con-

47 See *supra* note 19.

48 See OKUDA, *supra* note 9, at 179.

fusion in future Japanese practice. The analysis is supplemented by a translation of new rules on international jurisdiction of Japanese courts in family matters by the author.

(The Editors)

ZUSAMMENFASSUNG

Die meisten Ehescheidungen werden in Japan einvernehmlich außergerichtlich vollzogen. So dies nicht gelingt, erfolgt die Scheidung im Wege der Schlichtung oder durch eine Entscheidung im Rahmen des Gesetzes über die freiwillige Gerichtsbarkeit. In seltenen Fällen kann eine Scheidung jedoch auch durch ein Urteil in einem streitigen Verfahren auf der Grundlage des Gesetzes über das gerichtliche Verfahren in Personenstandsangelegenheiten erfolgen. Beide Gesetze treffen Regelungen über die örtliche Zuständigkeit, aber bis vor kurzem fehlte es in Japan an gesetzlichen Vorschriften zur internationalen Zuständigkeit japanischer Gerichte in derartigen Verfahren. Dies hat sich mit dem Gesetz Nr. 20 von 2018 geändert, das derartige Regeln in beiden genannten Gesetzen ergänzt hat. Diese sind mit Wirkung zum 1. April 2019 in Kraft getreten.

Der Beitrag gibt einen Überblick über die Neuregelung und setzt sich sodann auf der Grundlage der früheren Rechtsprechung kritisch mit den Vorschriften zur internationalen Zuständigkeit für die verschiedenen Scheidungsverfahren auseinander. Es werden u.a. Fragen der Anknüpfung an den gewöhnlichen Aufenthalt des Beklagten, des ehelichen Wohnsitzes und die gemeinsame Staatsangehörigkeit diskutiert wie auch Notzuständigkeiten und das forum non conveniens. Die Verfasser des Gesetzes betonen, dass die Neuregelung sich wie üblich an der früheren Rechtsprechung japanischer Gerichte orientiere. Der Beitrag kritisiert indes, dass diese unklar und widersprüchlich gewesen sei, und dass einige Entscheidungen in ihren Schlussfolgerungen anfechtbar seien.

Üblicherweise bringt eine Kodifizierung der Regelungen zur internationalen Zuständigkeit nationaler Gerichte einen Gewinn an Vorhersehbarkeit und Rechtssicherheit mit sich. Vorliegend fürchtet der Autor jedoch, dass sie zu Mehrdeutigkeiten und Unklarheiten in der künftigen Praxis in Japan führen dürften. An den Beitrag schließt sich eine Übersetzung der neuen Vorschriften zur internationalen Zuständigkeit japanischer Gerichte in Familiensachen aus der Feder des Verfassers an.

(Die Redaktion)