The Global Need for Accessing the Content of Foreign Law - A Reality - A Perspective from Japan

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I. Introduction

With the increasing number of cross-border transactions in today's globalized world, courts are frequently faced with the application of foreign law. Standing at the crossroad of conflict of laws and procedural law, the theories and methods of applying foreign law show distintive features depending on jurisdiction. The difference of approaches reflects concurrently contrasting fundamental concepts on the nature, function and objective of conflict of laws, including the eligibility of applicable law.

In the following, the application of foreign law in civil and commercial matters in Japan is examined in detail. First, general principles concerning the application of conflict of laws rules and the designated foreign governing law, as well as the possibility and the scope of review by the Supreme Court are explained (II). Second, the implementation of the general principles is analyzed from a practical viewpoint, especially in light of how the content of foreign law is ascertained and what measures are taken in the event of unascertainability of foreign law (III). Some final remarks concerning the possibility and utility of an international instrument for the information exchange on foreign law will conclude this paper (IV).

II. Application of Foreign Law

1. General Principles

The judge can possibly be required to apply foreign law in defining the connecting factor (foreign law of nationality; foreign internal conflicts rules of a State with different territorial units[1]), renvoi (foreign conflicts rules[2]) and the recognition of foreign judgments[3]

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** For English translation of Japanese statutes and regulations, *see* the website of the government "Japanese Law Translation" (http://www.japaneselawtranslation.go.jp/?re=01).

[1] Article 38 (3) Japanese Act on General Rules for Application of Laws (*infra* note 6).

[2] Artcile 41 Japanese Act on General Rules for Application of Laws (*infra* note 6).

[3] Article 118 Japanese Civil Procedure Code (Law No. 109 of 26 June 1996, *hereinafter* "CPC"), especially in relation to the reciprocity requirement (Article 118 No. 4).

or insolvency proceedings[4]. However, the most common situation is the application of foreign substantive law designated by conflicts rules[5].

The present conflicts rules in Japan consist in the 2006 Act on General Rules for Application of Laws (*hereinafter* "AGRAL")[6], in addition to some special rules deriving from conventions[7]. Since conflict of laws rules constitute a part of domestic law, their application is mandatory and belongs to the judge's responsibility. The abstract connecting factor, such as the parties' intent to choose the applicable law for contracts (Article 7 AGRAL) or *locus damni* for torts (Article 17, 1st sentence AGRAL), is a legal notion that is to be determined by the judge.

On the other hand, the facts that constitute the connecting factor are subject to the adversarial procedural rules in civil and commercial matters (*da mihi factum, dabo tibi ius*). Hence, it is the parties' responsibility to plead and prove the facts that designate the concrete connecting factor. For example, the facts that the parties chose Chinese law for their contracts (Article 7 AGRAL) or the results of the infringing act were produced in South Korea (Article 17, 1st sentence AGRAL), are to be pleaded and proven by the parties[8]. Once the internationality of the case is established, the judge applies

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[4] Act on the Recognition of and Assistance to Foreign Insolvency Proceedings (Law No. 129 of 29 November 2000).

[5] *See* S. IKEHARA, *Kokusaishihô* (Tokyo 1973) p. 224.

[6] Law No. 78 of 21 June 2006 (Entry into force on 1 January 2007). For the 2006 reform, *see, inter alia,* contributions at J. BASEDOW/H. BAUM/Y. NISHITANI (ed.), *Japanese and European Private International Law in Comparative Perspective* (Tübingen 2008), as well as at Japanese Annual of International Law 50 (2007) and Japanese Yearbook of International Law 51 (2008); M. DOGAUCHI, "Four-Step Analysis of Private International Law", in: *Recueil des Cours* 315 (2006) pp. 21 *et seq.*; Y. NISHITANI, "Die Reform des internationalen Privatrechts in Japan", in: *IPRax* 2007, pp. 552 *et seq.*; for more comprehensive information, *see* Y. NISHITANI, "Internationales Privat- und Zivilverfahrensrecht", in: H. BAUM/M. BÄLZ (ed.), *Handbuch Japanisches Handels- und Wirtschaftsrecht* (Köln 2011) pp. 1211 *et seq.*

[7] As for conflict of laws 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 *Fuyôgimu no Junkyohô ni kansuru Hôritsu,* Law No. 84 of 12 June 1986) and the Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions (implemented as *Igon no Hôshiki no Junkyohô ni kansuru Hôritsu,* Law No. 100 of 10 June 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. Both instruments are implemented as national law in Articles 88-94 *Tegata-hô* (Law No. 20 of 15 July 1932) and Articles 76-81 *Kogitte-hô* (Law No. 57 of 29 July 1933) respectively. Japan is currently planning to ratify the 1980 Hague Child Abduction Convention soon.

[8] *See, inter alia,* Y. EBISAWA, "Kokusaishihô no Kyôkôsei to Minjisoshô", in: *Minshôhô Zasshi* 64-5 (1971) pp. 801 *et seq.*; also, *e.g.,* Osaka District Court, 12.4.1960, Kaminshû 11-4, 817. This is in contrast to family and personal status matters whose procedural rules are subject to ex officio investigation. Article 56 of *Kaji-jiken Tetsuzuki-hô* Law No. 52 of 25 May 2011; Article 20 of *Jinji Soshô-hô,* Law No. 109 of 16 July 2003.

conflicts rules *ex officio* and determine the applicable law based on the facts pleaded and proven by the parties. If the underlying case is governed by a foreign law, the next question is: How should it be applied? Do the parties have the burden of proof to ascertain the foreign law, or is the judge obliged to ascertain and apply it *ex officio*?

Concerning the application of foreign law, ex-Article 219 of the Japanese Civil Procedure Code (*hereinafter* "CPC") of 1890[9] used to stipulate 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 at German law[10], presupposed that foreign law was 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' proof. This rule was generally interpreted as alleviating the burden of the judge to ascertain foreign law by requesting the parties' assistance, and not as subjecting the application of foreign law as "facts" to the parties' pleadings and proofs[11]. 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 contend that foreign law is treated as "law" and applied as such[12], without being "incorporated" into the Japanese legal system[13]. Since foreign law has the same value as the domestic law in the capacity of adjudicatory norms designated by conflicts rules, the authors generally advocate that the principle "*jura novit curia*" applies to foreign law as well. Courts are, therefore, obliged to apply foreign law and ascertain its content *ex officio*. In other words, the application of foreign law is subject to the principle of *ex officio* investigation, as is the

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[9] Law No. 29 of 1890.

[10] This provision was modelled at § 293 of the German Civil Procedure Code (ZPO) of 1877 [Fremdes Recht; Gewohnheitsrecht; Statuten]: "Das in einem anderen Staat geltende Recht, die Gewohnheitsrechte und Statuten bedürfen des Beweises nur insofern, als sie dem Gericht unbekannt sind. Bei Ermittlung dieser Rechtsnormen ist das Gericht auf die von den Parteien beigebrachten Nachweise nicht beschränkt; es ist befugt, auch andere Erkenntnisquellen zu benutzen und zum Zwecke einer solchen Benutzung das Erforderliche anzuordnen."

[11] T. ATOBE, *Kokusaishihô-ron,* Vol. 1, p. 414; H. EGAWA, *Kokusaishihô (Yûhikaku Zensho),* p. 110. Supreme Court (Taishin-in), 30.10.1905, Minroku 11, 1439 interpreted ex-Article 219 CPC as denying the obligation of the judge to apply foreign law, solely entitling him to do so.

[12] IKEHARA, op.cit., pp. 230 *et seq.*; Y. KAWAMATA, Wagakuni Saibansho ni okeru Gaikoku-hô no Tekiyô, in: *Hôgaku Ronsô* 62-5 (1956) pp. 10 *et seq.*; Y. TAMEIKE, *Kokusaishihô Kôgi,* 3rd ed. (Tokyo 2005); R. YAMADA, *Kokusaishihô,* 3rd ed. (Tokyo 2004), pp. 130 *et seq*.

[13] *Cfr.* K. YAMAGUCHI, *Kokusaishihô,* Vol. 1, p. 73.

case with the application of domestic law. In order to fascilitate the task of courts, assistance from the parties can be requested. The judge is, however, always obliged to evaluate and examine in his own responsibility the reliability and accuracy of the information provided by the parties. Even if the parties agree on the content of foreign law, the judge has to conduct necessary investigation *ex officio*.

Interestingly enough, an author of civil procedure law takes a different position. He points out that judges are neither trained in foreign law nor knowledgeable in all laws in the world, whereas attorneys dealing with the particular case often have sufficient expertise in foreign law. In light of procedural economy, he advocates to modify the prevailing opinion by integrating some elements of the "facts" approach of common law jurisdictions[14]. The author denies the obligation of the judge to apply foreign law, but only entitles the judge to do so without the parties' pleadings[15]. While the parties may seek to prove the content of foreign law, the judge is not bound by the evidence submitted by the parties and can ascertain its content independently. The judge can refer to different means, such as to make inquiries to foreign authorities without being bound by the result obtained. Where appropriate, the judge can even simply rely on the agreement of the parties on the content of foreign law[16].

While courts are generally considered to follow the majority opinion without mentioning it explicitly, attitudes of some courts, such as to rely on the parties' agreement on the content of foreign law, may come closer to the latter opinion under certain circumstances[17].

2. Review by the Supreme Court

As mentioned above, Conflict of laws rules constitute a part of domestic law. Therefore, if the appellate judge fails to apply conflict of laws rules properly and

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[14] A. MIKAZUKI, "Gaikokuhô no Tekiyô to Saibansho", in: Sawaki/Aoyama (ed.), *Kokusai Minji Soshôhô no Riron* (Tokyo 1987), pp. 252 *et seq.*

[15] He relies on the German notion of "*Prüfung von Amts wegen*", which is applied to procedural pre-requisites and characterized as a principle between the adversarial principle (*Verhandlungsgrundsatz*) and the principle of *ex officio* investigation (*Amtsermittlungsgrundsatz*). MIKAZUKI, op.cit., pp. 260 *et seq.*

[16] He allows other means of evidence than stipulated in the CPC ("*Freibeweis*"). MIKAZUKI, op.cit., pp. 264 *et seq.*; for criticism, *see* K. Ishiguro, "Gaikokuhô no Tekiyô to Saibansho", in: *Minji Tetsuzuki Hôgaku no Kakushin (Liber Amicorum Akira Mikazuki),* Vol. 1 (Tokyo 1991), pp. 452 *et seq.*

[17] Some early court decisions exceptionally subjected the ascertainment of foreign law to the parties' proof. *See, e.g.,* Fukuoka District Court (Kokura Branch), 22.1.1962, Kaminshû 13-1, 64; Osaka High Court, 6.4.1962, Kaminshû 13-4, 653.

designates by mistake the law of State A instead of the law of State B, it can be reviewed by the Supreme Court. Pursuant to the ex-Article 394 CPC prior to the 1996 reform, 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 wrong application of conflicts rules pursuant to case law[18]. Since 1996, review by the Supreme Court is subject to a certiorari under Article 318 (1) CPC. Certiorari is granted if the decision of the appellate court concerns "important matters" on interpretation of law, especially the 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[19].

On the other hand, when the appellate judge fails to apply the foreign law properly, the question of whether to allow a review by the Supreme Court is often answered in the negative in other jurisdictions. According to the majority of Japanese authors, however, so far as foreign law is designated by conflict of laws rules as applicable law, it has the same weight as domestic law in the capacity of 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, not only a uniform interpretation of domestic law, but also that of 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[20].

The Japanese Supreme Court has rightly held that it is entitled to review the application of foreign law both under ex-Article 394 CPC and the current Article 318 (1) CPC mentioned above[21]. The most recent decision of the Supreme Court in 2008[22]

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[18] *See* Supreme Court, 27.12.1961 (breaking of cohabitation); 20.4.1978, Minshû 32-3, 616 (claim pledge); 13.9.1991, Minshû 45-7, 1151 (annulment of recognition as a child); 8.3.1994, Minshû 48-3, 835 (disposition of land prior to the inheritance division); 8.3.1994, Katei Saiban Geppô 46-8, 59 (succession and renvoi); 12.3.1998, Minshû 52-2, 342 (recognition of a child); 27.1.2000, Minshû 54-1, 1 (parentage under the "house" system in Korea); *cfr.* also Supreme Court, 4.9.1997, Minshû 51-8, 3657 (arbitration agreement).

[19] Supreme Court, 26.9.2002, Minshû 56-7, 1551 (U.S. patent infringement); 29.10.2002, Minshû 56-8, 1964 (ownership of a German car stolen in Italy and found in Japan); 17.10.2006, Minshû 60-8, 2853 (employee invention).

[20] IKEHARA, op.cit., pp. 238 *et seq.*; YAMADA, op.cit., p. 139. On the other hand, in view of practicality and procedural economy, Mikazuki advocated to restrict the scope of review by the Supreme Court under Article 394 CPC. MIKAZUKI, op.cit., pp. 276 *et seq.*

[21] In two precedents under the previous Article 394 CPC, a wrong application of South Korean law was reviewed by the Supreme Court. *See* Supreme Court, 2.7.1981, Minshû 35-5, 881 (statutory inheritance

concerned a negative declaration of a parentage that had existed *de facto* between the defendant and his alleged father for over 30 years. While the appellate court approved the negative declaration pursuant to Article 865 South Korean Civil Code, the Supreme Court granted certiorari, on the ground that the decision concerned "important matters" on interpretation of law. The Supreme Court eventually remanded the case to the lower court for further examination on 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. If it is the case, it would be in line with the interpretation which the Japanese Supreme Court had adopted in 2006 in relation to the corresponding Article 1 (3) Japanese Civil Code[23].

III. Implementation of the Principles

1. Means to Facilitate Access to Foreign Law

As mentioned above, according to the majority opinion, 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[24], the judge is expected to comply with the interpretation provided in the legal system concerned. Furthermore, the judge is supposed to adopt the method of interpretation (*e.g.,* restrictive or teleological interpretation) and to recognize legal sources (*e.g.,* customary law or equity) and the authority of case law or scholarly opinions under the foreign law[25]. The ascertainment of foreign law remains a difficult task for the judge, especially in the absence of bilateral or multilateral instruments for the access to foreign law as in Japan[26].

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share); 25.2.1997, Katei Saiban Geppô 49-7, 56 (divorce claim by a faulty spouse).

[22] Supreme Court, 18.3.2008, Saibansho Jihô 1456, 4 = Hanrei Jihô 2006, 77.

[23] Supreme Court, 7.7.2006, Minshû 60-6, 2307; Supreme Court, 7.7.2006, Katei Saiban Geppô 59-1, 98; *see* Y. NISHITANI, "State, Family and Child in Japan", in: Liber Amicorum Walter Pintens (*forth- coming 2012*).

[24] Admitting the applicability of non-state law before Japanese cours has remained as a minor scholarly opinion, such as M. YAMATE, "Lex mercatoria ni tsuite no Ichikôsatsu: Sono Seisei to Tenkai oyobi Tekiyô Process", in: *Hôgaku Zasshi* 33-3 (1987) pp. 343 *et seq.*; idem, "Lex mercatoria ni tsuite: Kokusai Torihiki Kisei-kihan no Dokujisei to sono Hôteki-seishitsu", in: *Tôhoku Gakuin Daigaku Ronshû* 34 (1989) pp. 121 *et seq.*; N. TAKASUGI, "Kokusaishihô ni okeru Shin-yô-jô Tôitsu-kisoku no toriatsukai", in: *Tezukayama Hôgaku* 5 (2001) pp. 75 *et seq.*; idem, "Kokusai Kaihatsu-keiyaku to Kokusaishihô: Anteika-jôkô no Yûkôsei to Hi-Kokkahô no Junkyohô Tekikakusei", in: *Osaka Daigaku Hôgaku* 52-3/4 (2002) pp. 1007 *et seq.*; S. NAKANO, "Hi-Kokkahô no Junkyohô Tekikakusei: Kokusaishihô-teki Sokumen kara mita Lex Mercatoria", in: CDAMS Discussion Paper 2004 (http://www.cdams.kobe-u.ac.jp/archive/dp04-6.pdf).

[25] IKEHARA, op.cit., pp. 231 *et seq.*; YAMADA, op.cit., pp. 133 *et seq.*

[26] *Cfr.* European Convention of 7 June 1968 on Information on Foreign Law (London).

There are 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, English law and U.S. law is frequently requested, but it is by no means limited to them.

Judging from interviews this author 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 favor. Documents submitted by the parties as evidence, especially a translation of foreign legislations 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[27]. This is also the case when the parties agree upon the content of foreign law. If additional information becomes necessary, the judge does additional investigation by using materials published in books and journals or retrieving information from the Internet.

Expert opinion can be ordered to ascertain foreign law when applied by the interested party and approved by the court[28]. This means is though rarely used in practice, presumably due to difficulties to find an appropriate expert witness. Courts are generally considered as not entitled to request expert witness *ex officio*. The judge can only ask the parties to clarify factual and legal issues[29], and eventually induce them to apply for expert witness.

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 governed by the principle of *ex officio* investigation. In these matters, the Family Division of the General Secretariat of the Supreme Court replies to the inquiries based on available documents published by the General Secretariat of the Supreme Court, the Ministry of Justice or the Parliamentary Library[30]. 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 is

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[27] Response to the 2008 Questionnaire on the Treatment of Foreign Law from Japan (*hereinafter* "2008 Response of Japan") (http://www.hcch.net/upload/wop/genaff_pd09jp.pdf), no. 19.

[28] Article 212 ff. CPC.

[29] Article 149 CPC.

[30] As for North and South Korean, Chinese and Philippine laws that are often applied by Family Courts, there are translations published in accessible media.

not provided with 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[31].

2. Solutions in the Event of Unascertainability

In the event of unascertainability of foreign law, academics and courts have developped different solutions in Japan[32]. Some court decisions referred directly to Japanese law as *lex fori* when the foreign applicable law could not be ascertained[33]. Although this solution is feasible from a practical viewpoint, it was criticized for adopting a "homeward trend" and running counter to the equality between domestic and foreign law as the fundamental principle of conflict of laws[34].

In lieu of the *lex fori* approach, the majority of court decisions rely on the "reasonableness" test to deduce rules which should be in force in the jurisdiction concerned. In applying this test, the fundamental principles of the legal system concerned and the appropriateness of the solution are considered. The criteria, however, varied among court decisions. While some courts referred to the general

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[31] 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.

[32] A minor opinion asserts to dismiss the claim, on the ground that the parties failed to plead and prove foreign law (ATOBE, op.cit., p. 418; also Fukuoka District Court (Kokura Branch), 22.1.1962, op.cit.). It presupposes, however, that the parties have the burden of proof concerning the application of foreign law as is the case with facts. In addition, although a decision is rendered on the merit, it results *de facto* in a "denial of justice". Another minor opinion points to a different applicable law by referring to subsidiary connecting factors (T. KANZAKI, Jukyo Gaikokuhô no Fumei wo megutte, in: *Hôgaku Kyôkai Zasshi* 107-6 (1990), pp. 1039 *et seq.*; *also* Article 14 (2) of the 1995 Italian Private International Law). Though the unascertainability of foreign law is to be distinguished from referring to cascading connecting factors in seeking common nationality or common habitual residence between the spouses or the parents and the child.

[33] Nagoya District Court (Handa Branch), 20.5.1952, Kaminshû 3-5, 676 (North Korea); Nagoya District Court, 29.5.1954, Kaminshû 5-5, 788 (North Korea); Tokyo District Court, 28.9.1954, Kaminshû 5-9, 1640 (North Korea); Osaka District Court, 27.11.1956, Kaminshû 7-11, 3393 (South Korea); Nagoya High Court (Kanazawa Branch), 25.3.1980, Hanrei Jihô 970, 163 (North and South Korea); Tokyo High Court, 26.9.1984, Katei Saiban Geppô 37-9, 87 (South Korea); Yamaguchi Family Court (Shimonoseki Branch), 28.7.1987, Katei Saiban Geppô 40-3, 90 (North Korea); Kyoto District Court, 30 September 1987, Hanrei Jihô 1275, 107 (North Korea); *also* M. DOGAUCHI, *Point Kokusaishihô: Sôron,* 2nd ed. (Tokyo 2007), pp. 247 *et seq.*; MIKAZUKI, op.cit., pp. 268 *et seq.*

[34] IKEHARA, op.cit., pp. 242 *et seq*.

reasonableness test[35], others referred to the reasonableness test under Japanese law[36] or alleged foreign law[37].

In order to avoid arbitrary decisions and provide for concrete criteria, it was further suggested that the legal systems most similar to the applicable foreign law should be referred to[38]. Some court decisions followed this position to find out the content of North Korean law, pointing to the general principles of socialism on divorce law (1965)[39] or the rules on postmortem recognition as a child in the Soviet Union, Czechoslovakia and Poland at that time (1966)[40]. To find out Chinese adoption law, one court decision referred to the law of the Soviet Union, East Germany, Poland, Rumania and Hungary at that time (1983)[41]. As it shows, Japanese courts generally make efforts to fill the gap when the applicable foreign law cannot be ascertained.

Since the beginning of the 1990s, published court decisions that declared the unascertainability of foreign law have remarkably decreased. This is mainly due to the improved means to ascertain foreign law and the progress of codification in family law in the neighboring countries, especially in China, Taiwan, as well as North and South Korea. As far as civil and commercial matters are concerned, courts have seldom

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[35] Tokyo District Court, 12.8.1958, Kaminshû 9-8, 1573 (North Korea); Utsunomiya Family Court, 10.8.1959, Katei Saiban Geppô 11-11, 134 (North Korea); Kobe District Court, 6.10.1959, Kaminshû 10-10, 2099 (English Law); Kobe Family Court, 14.9.1960, Katei Saiban Geppô 12-12, 101 (North Korea); Urawa Family Court, 31.8.1961, Katei Saiban Geppô 13-12, 65 (North Korea); Urawa Family Court, 5.6.1962, Katei Saiban Geppô 14-12, 154 (North Korea); Tokyo District Court, 13.1.1966, Katei Saiban Geppô 19-1, 43 (North Korea); Kyoto Family Court, 10.3.1975, Katei Saiban Geppô 27-11, 61 (China); Tokyo High Court, 13.7.1981, Katei Saiban Geppô 34-9, 72 (China); Osaka District Court, 27.9.1985, Hanrei Jihô 1179, 94 (North Korea).

[36] Shizuoka District Court, 12.2.1971, Kaminshû 22-1/2, 160 (North Korea); Osaka Family Court, 26.3.1979, Katei Saiban Geppô 34-2, 160 (China); Nagano Family Court, 12.3.1982, Katei Saiban Geppô 35-1, 105 (North Korea); Kobe District Court, 30.3.1983, Hanrei Jihô 1092, 114 (India).

[37] Tokyo High Court, 8.8.1959, Hanrei Jihô 227, 34 (North Korea); Tokyo District Court, 25.10.1962, Kaminshû 13-10, 2146 (China); Tokyo Family Court, 28.2.1974, Katei Saiban Geppô 26-8, 99 (China); Sapporo Family Court, 23.7.1974, Katei Saiban Geppô 27-5, 146 (Malaysia); Tokyo Family Court, 27.12.1974, Katei Saiban Geppô 27-10, 71 (Malaysia and Chinese customary law); Nagoya District Court, 7.10.1975, Kaminshû 26-9/12, 910 (North Korea); Kofu District Court, 29.10.1976, Hanrei Jihô 852, 103 (North Korea); Sapporo District Court, 26.6.1984, Katei Saiban Geppô 37-7, 65 (Zimbabwe); Hiroshima District Court, 30.1.1986, Katei Saiban Geppô 38-6, 43 (Laos); Tokyo District Court, 28.8.1987, Hanrei Jihô 1278, 97 (China).

[38] Fukuoka District Court, 14.1.1958, Kaminshû 9-1, 15 (North Korea); Osaka Family Court, 22.8.1962, Katei Saiban Geppô 15-2, 163 (North Korea); Tokyo Family Court, 13.6.1963, Katei Saiban Geppô 15-10, 153 (North Korea); Osaka District Court, 17.3.1964, Hanrei Times 162, 197 (North Korea); Yokohama Family Court, 2.10.1973, Katei Saiban Geppô 26-6, 52 (Taiwan); Naha Family Court, 17.1.1975, Katei Saiban Geppô 28-2, 115 (Taiwan); also IKEHARA, op.cit., p. 243; YAMADA, op.cit., p. 136.

[39] Chiba District Court (Matsudo Branch), 11.8.1965, Katei Saiban Geppô 18-9, 53 (North Korea).

[40] Tokyo District Court, 19.3.1966, Kaminshû 27-1/4, 125 (North Korea).

[41] Nagoya Family Court, 30.11.1983, Katei Saiban Geppô 36-11, 138 (China).

declared that foreign law could not be ascertained, presumably because the parties assisted courts in providing information. However, with recent increasing cross-border business activities of Japanese companies in Asia, especially in China, South Korea, Thailand, Vietnam and other countries, the need to have accurate information on foreign law is remarkably growing, as some of these countries do not have sufficient accessible media to provide information on their law yet.

IV. Final Remarks

As mentioned above, means to obtain information on foreign law in civil and commercial matters are still limited in Japan. Beside assistance by the parties, courts obtain information from published media or via the Internet. Inquiries can be made to other administrative bodies or via diplomatic channel as well. It can though be time-consuming and the result is not always satisfactory. In this respect, an international instrument of cross-border administrative cooperation to facilitate access to foreign law seems to be a desirable solution. To ascertain foreign law, it is often not sufficient to know the written rules, but information in the particular context is crucial. A mechanism that allows the judge to obtain expert opinions on foreign law tailored to the particular case and possibly communicate directly with the foreign authorities or competent institutions would be helpful.

In addition, the need to access to foreign law is also felt among private parties, attorneys or arbitrators. Under the current practice, Japanese law firms often contact foreign law firms to ask for legal opinions. It is though costly and can be used only in big cases. Smaller claims are handled with restricted materials available at hand. If a less costly and more effective method to ascertain foreign law can be achieved, it would be attractive for different groups of practitioners.

The feasibility of such an international instrument depends on how much work can be expected from both sides. Under the current practice in Japan, when foreign authorities send written or oral requests to Japanese ministries to provide information on Japanese law, each ministry usually responds with regard to the statute of which it takes charge[42]. Hopefully, a more intensified administrative cooperation can be established from the Japanese side as well, possibly by delegating some tasks to academics or different research institutions.

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[42] No fees are requested to foreign authorities. 2008 Response of Japan, op.cit., No. 10 *et seq.*