

## **FOREIGN LAW IN JAPANESE COURTS – A COMPARISON WITH THE ENGLISH APPROACH: IDEALISM VERSUS PRAGMATISM**

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The dichotomy of idealism versus pragmatism pervades the contrast between the Japanese and English approaches to conflict of laws but its manifestation is at its starkest in the treatment of foreign law. When choice-of-law rules indicate the application of a foreign law, its treatment gives rise to various issues. While the Japanese approach is geared to the equal treatment of the domestic and foreign laws, the English approach is very much informed by the need to promote speedy and efficient proceedings. Both idealism and pragmatism are positive attributes and the best balance should be sought between the two for each issue involved.

### I. INTRODUCTION

When faced with cases with international elements, the courts of each country apply their own choice-of-law rules. Those rules differ in details from country to country but they share the same objective, *ie* to identify the law of the country most closely connected with the dispute and the parties. Where the law identified is a foreign law, its treatment involves a variety of issues. This article will consider four of them: when the identified foreign law is actually to be applied; who bears the responsibility to ascertain the content of the applicable foreign law; what evidence is admissible for proving the content of the applicable foreign law; and how to deal with failure to ascertain the content of the applicable foreign law. Those issues are apt to illustrate the contrasting approaches taken in Japan and England: the idealistic or even dogmatic approach in Japan and the generally pragmatic English approach.<sup>1</sup> The same contrast can be observed generally

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in the way conflict-of-laws issues are handled in the two countries but its manifestation is at its starkest in the treatment of foreign law.<sup>2</sup>

## II. APPLICABILITY OF FOREIGN LAW

Where the choice-of-law rules indicate the application of a foreign law, the question arises whether a court should apply the foreign law of its own motion or whether it should do so only at the request of either or both of the parties.

### A. England

In England, as a general rule, the foreign law is applied only where either or both of the parties plead its application. Otherwise, English law is applied. This approach reflects the pragmatism of English courts, in particular their willingness to promote efficient and speedy proceedings. Since ascertaining the content of a foreign law is expensive and time-consuming, the English lawyers would ask why the courts should embark upon such a difficult process if both parties are content to have their case decided by English law.

### B. Japan

In Japan, the predominant academic view is that the courts should apply of their own motion the foreign law as specified by the choice-of-law rules. This view is founded largely upon the idealism of conflict of laws, which since the time of Friedrich Carl von Savigny is to treat domestic and foreign laws equally.

The case law suggests that this view has had strong influence upon practice<sup>3</sup> but it is not always followed.<sup>4</sup> Moreover, according to some practitioners' observations, the Japanese courts often assume that the

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<sup>1</sup> Other issues arising from the treatment of foreign law include who selects the expert witnesses, what are the roles and status of expert witnesses, how expert's evidence is assessed, what approach is taken to interpret evidence on the content of the foreign law and whether appeals on points of foreign law are permissible. The consideration of those issues is beyond the scope of this article as they are not as suitable to illustrate the dichotomy of idealism versus pragmatism.

<sup>2</sup> The theme of idealism versus pragmatism is inspired from the colloquium theme "Into the Grove of Japanese Law: Perspectives and Paradigms", which was explained as follows: "The theme of the colloquium borrows from Akutagawa Ryunosuke's famous novel, *Yabu-no Naka* [*Into the Grove*] (later popularised in the movie *Rashomon*). The book details how a particular event was interpreted differently through the eyes of the various characters. This diversity of perspectives is certainly true in the field of Japanese law, and accordingly the colloquium organisers invite scholars to share their own interpretations on the nature and functioning of Japanese law."

<sup>3</sup> Eg The Osaka High Court 6 April 1962.

<sup>4</sup> Eg The Osaka District Court 12 April 1960.

foreign law is the same as Japanese law in the outcome of its application, especially on commercial law issues.<sup>5</sup>

### III. WHO HAS THE RESPONSIBILITY TO ASCERTAIN THE CONTENT OF THE APPLICABLE FOREIGN LAW

The question here is, where a foreign law is to be applied, whether the court is entrusted to ascertain its content or whether the parties (or a party) have the responsibility to prove it.

#### A. Japan

The Code of Civil Procedure used to provide<sup>6</sup> that the content of the applicable foreign law, along with the local customary law and commercial customary law, must be proved by the parties, although the courts were also allowed to conduct research themselves. This provision was deleted on the ground that the rule was self-evident and unnecessary.<sup>7</sup>

Despite this history, it has since become the leading academic view that the maxim *jura novit curia* (the court knows the law) applies also to foreign laws. While this maxim is certainly true with the domestic law, when it was extended to foreign laws, the idealism of conflict of laws has gone too far, to the point of dogmatism. Under this doctrine, the courts are expected to ascertain the content of the foreign law by conducting research themselves even if the parties provide no evidence.

In practice, the Japanese courts generally try to live up to this expectation but since the time and resources available to them are limited, they must also be pragmatic. Thus the courts take no more responsibility than to make their best effort under the constraint of time and resources. They also usually request the parties to provide assistance. The parties usually oblige<sup>8</sup> since it is in their own interests to have their interpretation of the foreign law accepted. In a few extreme cases, the courts dismissed the claim on the ground that the claimants failed to prove that the applicable foreign law recognised the basis of their claim.<sup>9</sup>

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<sup>5</sup> See eg Fujita, *Nichibei Kokusai Soshō no Jitsumo to Ronten (Transnational Litigation: US/Japan – Points and Authorities)* (Japan: Nihon Hyoronsha, 1998) at 309.

<sup>6</sup> Art 219 (prior to the amendments in 1926).

<sup>7</sup> *Minji Soshō ho kaisei iinkai giji sokkiroku* (Transcript of the committee meetings on the revision of the Code of Civil Procedure) at 524; Katou, *Kaisei Minji Soshō ho an gaisetsu* (The outline of the draft of the revised Code of Civil Procedure) at 87 (1937).

<sup>8</sup> International Trade Law Group of the Tokyo Bar Association, *Kokusai Soshō no Q&A (Q&A on International Litigation)* (1996) at 43.

<sup>9</sup> Eg The Fukuoka District Court 22 January 1962; The Osaka High Court 6 April 1962.

### B. England

In England, as a general rule, the party who pleads a foreign law is responsible to prove its content. While it may be too simplistic to see this as a straight manifestation of pragmatism, there is at least no dogmatic suggestion that the maxim *jura novit curia* (the court knows the law) should be applied to foreign laws.

### III. ADMISSIBLE EVIDENCE FOR PROVING THE CONTENT OF THE APPLICABLE FOREIGN LAW

#### A. England

Here, it is the English courts which are saddled with dogmatism. In England, as a general rule, the content of the applicable foreign law is proved through the use of expert witnesses. The court is only entitled to consult the sources of law which have been referred to by the expert witnesses.<sup>10</sup> If the expert refers to particular parts of a foreign law report, statute, or commentary, the court may not have regard to other parts.<sup>11</sup> Its rationale is said to be that the extraneous material may be outdated or inaccurate.<sup>12</sup> However, whether such a categorical exclusion is wise is questionable since it would also exclude a lot of useful evidence. The common law systems generally have stricter rules on admissibility of evidence than civil law systems because of the history of jury trial. As the question of foreign law was originally decided by the jury,<sup>13</sup> it is probable that the strict restriction on the admissible evidence to prove foreign law is also based on the system of jury trial. But the question of foreign law is now a matter for the judge<sup>14</sup> and jury trials have become rare in civil cases.<sup>15</sup> It is worth noting that in a recent case,<sup>16</sup> the Court of Appeal said it hoped to be permitted to take judicial notice of decisions of foreign courts and academic writings.

#### B. Japan

In Japan, the courts are pragmatic on this issue. They can look at sources as wide ranging as possible and assess their reliability individually on a case by case basis. Thus they may consult textbooks, case reports, legislation,

<sup>10</sup> *Bumper Development v Commissioner of Police of Metropolis* [1991] WLR 1362 at 1371.

<sup>11</sup> *Nelson v Bridport* (1845) 8 Beav 527 at 542.

<sup>12</sup> Fentiman, *Foreign Law in English Courts* (Oxford: Oxford Publishing, 1998) at 189.

<sup>13</sup> Hartley, "Pleading and Proof of Foreign Law: The Major European Systems Compared" (1996) 45 ICLQ 271 at 284.

<sup>14</sup> Section 69(5) of the Supreme Court Act 1981.

<sup>15</sup> See s 69(1) of the Supreme Court Act 1981.

<sup>16</sup> *Morgan Grenfell & Co Ltd v SACE* [2001] EWCA Civ 1932 at para 53.

and expert witnesses, and submit inquiries to various institutions such as universities and the embassy of the given foreign country.<sup>17</sup>

#### IV. FAILURE TO ASCERTAIN THE CONTENT OF THE APPLICABLE FOREIGN LAW

Under the constraint of time and resources, the content of the applicable foreign law may not be ascertained. Then, the question arises as to how the case should be dealt with.

##### A. *England*

In England, if the judge is not persuaded that the foreign law is different from English law, English law is applied.<sup>18</sup> This solution may be seen as pragmatic since, needless to say, the English courts are best at interpreting their own domestic law.

##### B. *Japan*

In Japan, to easily give up applying the foreign law and apply the domestic law is considered to be contrary to the idealism of conflict of laws, namely to treat the domestic and foreign laws equally. A variety of solutions has been suggested by the academics, including the application of what the court considers to be the reasonable rules, the application of what is believed to be the most similar legal system to the applicable foreign law, and the application of the law of another country which is also closely connected to the dispute. Most of those approaches have been adopted by the courts in different cases.

##### C. *The Real Difference*

The comparison just made on this issue between the English and Japanese solutions follows the conventional treatment of this issue. It is, however, misleading. This is because while the Japanese courts often declare that the content of the applicable foreign law could not be ascertained,<sup>19</sup> the English courts rarely say so. The Japanese courts, after making such a declaration,

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<sup>17</sup> See *eg* Tokyo Family Court 13 June 1963; Kouhu District Court 29 October 1976.

<sup>18</sup> *Macmillan Inc v Bishopsgate Investment Trust plc and Others (No 4)* [1999] CLC 417 at para 10.

<sup>19</sup> *Supra*, n 12 at 186-188.

often proceed to infer the content of the foreign law<sup>20</sup> in various ways not dissimilar to the ways in which the English courts would do so without making such a pronouncement.<sup>21</sup>

It is possible to suggest a number of reasons why the Japanese courts are more likely than the English courts to say that the content of the applicable foreign law could not be ascertained.

Firstly, Japanese courts often find themselves having to apply foreign laws without any evidence on their content because they are supposed to apply the foreign law of its own motion even if neither party seeks to prove the content of the foreign law. The English courts, on the other hand, do not apply a foreign law unless either or both of the parties plead its application. The parties will not plead foreign law unless they are able to provide the court with some evidence on the content of the foreign law. Even if the evidence is not sufficient in itself, the experts usually submit its interpretation, so that the courts are left only with the task of evaluating the interpretations of the experts.

Secondly, most Japanese cases concerning failure to ascertain the content of the applicable foreign law involved the application of North Korean law, which is an obscure legal system.<sup>22</sup> By comparison, the courts of England, being in Europe, are less likely to have to deal with obscure legal systems.

Thirdly, while the amount of information on foreign law available to Japanese courts is restricted by the scarcity of the Japanese translation of foreign law materials, English courts have the benefit of a wide availability of experts in foreign laws who can speak English and are willing to testify before the courts.

Fourthly, the English and Japanese courts have different perceptions of law because of their common law and civil law heritage. When the Japanese lawyers think of law, they would picture in their mind statutory provisions with commentaries. While the commentaries may show different interpretations of the same provisions, they would often indicate the leading opinion. When the English lawyers think of law, many of them would think

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<sup>20</sup> See *eg Chiba Matsudo Shihan* 11 August 1965; Tokyo Family Court 28 March 1974; Sapporo Family Court 23 July 1974; Tokyo Family Court 27 December 1974; Nagoya Family Court 30 November 1983. Criticism for this approach, see Kanda “*Jyunkyo Gaikoku ho no humei wo megutte*” (*On the failure to ascertain the content of the applicable foreign law*) 107 (1990) *Hogaku Kyokai Zasshi* 999 at 1035, 1039.

<sup>21</sup> See *eg Macmillan Inc v Bishopsgate Investment Trust plc and Others (No 4)* [1999] CLC 417 at para 22.

<sup>22</sup> *Eg* Nagoya District Court 29 May 1954 (North Korean law on divorce); Tokyo District Court 28 September 1954 (North Korean law on divorce); Tokyo Family Court 13 June 1963 (North Korean law on adoption); Shizuoka District Court 12 February 1971 (North Korean Law on divorce, division of property upon divorce and the designation of the holder of the parental rights upon divorce); Kouhu District Court 29 October 1976 (North Korean law on divorce and the designation of the holder of the parental rights); Nagano Family Court 12 March 1982 (North Korean law on succession).

of court decisions. The English judgments, because of their length and the involvement of opinions of more than one judge, are susceptible to different interpretations, each of which may be supported by different cases. The English lawyers would, therefore, naturally be less optimistic than the Japanese counterparts about ascertaining the definitive interpretation of law. They may, therefore, feel it is less necessary to pronounce that the content of the foreign law could not be ascertained before proceeding to infer what the foreign law is.

Fifthly, since the common law develops empirically with each case filling the gap left by the precedents, the English courts may not see a gap in the information available on the foreign law with much alarm. On the other hand, the Japanese courts would see such a gap with great concern since the civil law systems assume that a statute covers the whole area of law within its scope of application and most of the gaps are supposed to be filled by *mutatis mutandis* applications.

Another reason (which is not actually the main reason but is most relevant to the theme of this article) is this. In certain types of cases, the English courts have discretion to decline to hear cases under the principle known as *forum non conveniens*. If the applicable foreign law is likely to be very different from English law, the English courts will take that into account and exercise the discretion, especially in the cases involving complex legal issues.<sup>23</sup> It is based on the pragmatic consideration that a foreign law is best applied by the courts of that foreign country. The Japanese courts also have discretion to decline international jurisdiction by taking into account exceptional circumstances<sup>24</sup> and there seems to be no good reason why they could not do so by taking into account the fact that the applicable law is an obscure foreign law.<sup>25</sup> But in fact there appears to be no case in which the courts have actually done so, at least expressly. This is presumably because in Japan there is an entrenched dogmatic notion that the choice of law is a separate process from the determination of international jurisdiction and the former should not influence the latter.

## V. RECAPITULATION

The Japanese approach is heavily influenced by academic debate, although the courts seem often unable or unwilling to follow academic guidance. The English approach, on the other hand, is based on the courts' own experience developed from numerous international cases. As a consequence, the English approach may be characterised by procedural pragmatism, in

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<sup>23</sup> Dicey and Morris, *Conflict of Laws* (London: Sweet & Maxwell, 2001) at para 12-024 and the cases cited therein, *eg Spiliada Maritime Corp v Cansulex Ltd (The Spiliada)* [1987] AC 478.

<sup>24</sup> *Eg* The Supreme Court, 11 November 1997.

<sup>25</sup> Kanda "Jyunkyo Gaikoku ho no humei wo megutte" (*On the failure to ascertain the content of the applicable foreign law*) 107 (1990) *Hogaku Kyokai Zasshi* 999 at 1030, 1036.

particular willingness to promote speedy and efficient proceedings. The Japanese approach, on the other hand, may be characterised by the idealism of conflict of laws, *ie* to treat the domestic and foreign laws equally. The idealism has gone too far, to the point of dogmatism when the maxim *jura novit curia* (the court knows the law) is extended to foreign laws. Under the constraint of time and resources, the Japanese courts have to somehow reconcile the dogmatism with pragmatism. One caveat to add is that the English courts do not have the monopoly of pragmatism as we have seen in the context of admissible evidence. While dogmatism is a negative attribute, both idealism and pragmatism are positive attributes and the best balance for each issue involved should be sought between the two.