

Conflict of Laws Conventions and their Reception in National Legal Systems: National Report – Japan

Professor Naoshi TAKASUGI

Doshisha University Faculty of Law, Kyoto, Japan

INTRODUCTION

During the period of modernization in the late 19th century, Japan enacted many Codes including Civil Code, Commercial Code, Civil Procedure Code and mainly reflected the German system. The first Act on conflict of laws enacted in 1898 was also based on the German system.

After the Second World War, the new Constitution of Japan was enacted in 1947, which remains in effect to date, and made the Emperor a ‘symbol of the State and the unity of the people’. The Constitution and most of the other laws enacted then were strongly influenced by American Law, but the many existing laws in the private law area, including the Act on conflict of laws, were not amended.

The “Act on General Rules for Application of Laws”, which was enacted in 2006 and was in force from the beginning of 2007, replaced the old 1898 Act on conflict of laws. In the drafting process, a number of foreign laws and international Conventions were researched and carefully examined in light of the social reality of Japan and the promotion of legal harmonization. Consequently this Act is influenced by many legal materials such as the EC Rome Convention on contractual obligations, the EU Rome II Regulation on non-contractual obligations and the Hague Convention on matrimonial property regime.

In addition, some Hague Conventions are in force in Japan and are applied by the Japanese courts. Internationalism or universalism is one of the basic principles of the Constitution¹

¹ The preface of the Constitution says as follows. “We desire to occupy an honored place in an international society striving for the preservation of peace, and the banishment of tyranny and slavery, oppression and intolerance for all time from the earth. We recognize that all peoples of the world have the right to live in peace, free from fear and want. We believe that no nation is responsible to itself alone, but that laws of political morality are universal; and that obedience to such laws is incumbent upon all nations who would sustain their own sovereignty and justify their sovereign relationship with other nations.”

and the “treaties concluded by Japan and established laws of nations shall be faithfully observed” according to article 98(2) of the Constitution.

REPLY TO THE QUESTIONNAIRE

A. STATISTICAL QUESTIONS

Q1. Which Hague Conventions have been ratified by your country?

Japan has ratified the following six Hague Conventions so far.

- Convention of 1 March 1954 on civil procedure;
- Convention of 24 October 1956 on the law applicable to maintenance obligations towards children;
- Convention of 5 October 1961 on the Conflicts of Laws relating to the Form of Testamentary Dispositions;
- Convention of 5 October 1961 Abolishing the Requirement of Legalization for Foreign Public Documents;
- Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters; and
- Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations.

Q2. Which CIDIP Conventions have been ratified by your country?

Japan has ratified no CIDIP Conventions thus far.

Q3. Did your State participate and send delegations to the diplomatic conferences where these Conventions were adopted?

Regarding the Hague Conference, Japan has continued to send delegations since the Fourth Session held in 1904. As to the diplomatic conferences where CIDIP Conventions were adopted, no delegations were sent by Japan.

□

Q4. How many Hague and CIDIP Conventions have been signed but not ratified. Please enumerate them.

Japan has ratified all of the Hague Conventions that Japan has signed. There is no CIDIP Conventions that Japan has signed.

B. CONFLICTS CONVENTIONS AND DOMESTIC CONFLICTS LAW – A SUBSTANTIVE COMPARISON

Q5. Is the text of The Hague and CIDIP Conventions similar to norms in your domestic legislation?

There are some Hague Conventions whose texts are similar to domestic norms in Japan, in particular;

- Articles 3, 9 and 13 of the Hague Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes; and

- Articles 4 and 5 of the Hague Convention of 15 November 1965 on Jurisdiction, Applicable Law and Recognition of Decrees relating to Adoptions.

There are no CIDIP Conventions whose texts are similar to domestic norms in Japan.

Q6. Please explain similarities and differences.

6.1 Domestic conflicts norms in Japan

Most of the domestic conflicts norms in Japan are provided in the “Act on General Rules for Application of Laws”.

6.2 Matrimonial property regime

Article 26(2)² of the Act on matrimonial property regimes provides that the regime shall be governed by the law that the spouses select from among some laws, such as that of either spouse's nationality, habitual residence or the place where their immovables are situated, insofar as such selection is made in a writing signed and dated by the spouses. This provision is very similar to articles 3 and 9 of the Hague Convention³ on matrimonial property regimes. Article 26(3) and (4) of the Act inspired by article 9 of the Convention⁴ provides both the cases where a matrimonial property regime under a foreign law shall not be asserted against third parties and the cases where a ante-nuptial or pre-nuptial agreement made under a foreign law shall bind on any third party.

² Article 26 of the Act reads: "(1) The preceding Article shall apply with necessary modifications (*mutatis mutandis*) to the parties' matrimonial property regime.

(2) However, that regime shall be governed by the law that the spouses select from among the following laws where such selection is made in a writing signed and dated by the spouses. The selection has only prospective effect.

- (i) The law of the country of either spouse's nationality;
- (ii) The law of the place of either spouse's habitual residence; or
- (iii) Regarding immovables, the law of the place where they are situated.

(3) A matrimonial property regime governed by a foreign law shall not be asserted against third parties acting in good faith (*bona fides*) insofar as it concerns juristic acts performed in Japan or property situated in Japan. In the case where a regime shall not be applied, the matrimonial property regime created by Japanese law shall apply to the relations with such third parties.

(4) Notwithstanding the preceding paragraph, an ante- or pre-nuptial agreement concerning matrimonial property made under a foreign law according to paragraphs 1 and 2 shall be binding on any third party where the agreement is registered in Japan."

³ Article 3 of the Convention reads: "The matrimonial property regime is governed by the internal law designated by the spouses before marriage.

The spouses may designate only one of the following laws –

- (1) the law of any State of which either spouse is a national at the time of designation;
- (2) the law of the State in which either spouse has his habitual residence at the time of designation;
- (3) the law of the first State where one of the spouses establishes a new habitual residence after marriage.

The law thus designated applies to the whole of their property.

Nonetheless, the spouses, whether or not they have designated a law under the previous paragraphs, may designate with respect to all or some of the immovables, the law of the place where these immovables are situated. They may also provide that any immovables which may subsequently be acquired shall be governed by the law of the place where such immovables are situated."

Article 13 reads: "The designation of the applicable law by express stipulation shall comply with the form prescribed for marriage contracts, either by the internal law designated by the spouses, or by the internal law of the place where it is made. In any event, the designation shall be in writing, dated and signed by both spouses."

⁴ Article 9 of the Convention reads: "The effects of the matrimonial property regime on the legal relations between a spouse and a third party are governed by the law applicable to the matrimonial property regime in accordance with the Convention.

Nonetheless, the law of a Contracting State may provide that the law applicable to the matrimonial property regime may not be relied upon by a spouse against a third party where either that spouse or the third party has his habitual residence in its territory, unless

- (1) any requirements of publicity or registration specified by that law have been complied with, or
- (2) the legal relations between that spouse and the third party arose at a time when the third party either knew or should have known of the law applicable to the matrimonial property regime.

The law of a Contracting State where an immovable is situated may provide an analogous rule for the legal relations between a spouse and a third party as regards that immovable.

A Contracting State may specify by declaration the scope of the second and third paragraphs of this Article."

Article 26(1) of the Act provides the application of article 25⁵ with necessary modifications (*mutatis mutandis*), i.e. firstly the reference to the common national law of the spouses, secondly to the law of common habitual residence, and lastly to the law being most closely connected with the spouses if the spouses have not selected the applicable law. This provision is slightly different from articles 4 and 5 of the Convention.

6.3 Adoption

Article 31⁶ of the Act provides that adoption shall be governed by the national law of the adoptive parents, though article 4(1)⁷ of the Hague Convention on adoption provides that the authorities who have jurisdiction shall apply their internal law (forum law) to the conditions governing an adoption. According to article 3(1) of the Convention⁸, the jurisdiction is vested in the authorities of the State either where the adopter habitually resides, or of which the adopter is a national, so the applicable law shall be either the law of habitual residence of the national law of the adopter. This is the deference between the Act in Japan and the Convention.

In contrast, both article 31 of the Act and article 5(1) of the Convention⁹ require the application of the national law of the child relating to consents and consultations, apart from those with respect to an adopter, his family or his or her spouse.

⁵ Article 25 of the Act on effects of marriage reads: "Where the national law of the spouses is the same, the effects of the marriage shall be governed by that national law. Where that is not the case but where the law of the spouses' place of habitual residence is the same, that law shall govern. Where none of these cases apply, the effects of the marriage shall be governed by the law of the place with which the spouses are most closely connected."

⁶ Article 31 of the Act reads: "(1) Adoption shall be governed by the national law of the adoptive parents at the time of the adoption. Where the national law of the adopted child requires for adoption the agreement or consent of the adopted child or a third party, or the approval or any other decision by a public authority, this requirement must also be satisfied.

(2) Termination of the relationship between an adopted child and his or her natural family (relatives by consanguinity) and repudiation of an adoption shall be governed by the law designated in the first sentence of the preceding paragraph."

⁷ Article 4(1) of the Convention reads: "The authorities who have jurisdiction under the first paragraph of Article 3 shall, subject to the provisions of the first paragraph of Article 5, apply their internal law to the conditions governing an adoption."

⁸ Article 3(1) of the Convention reads: "Jurisdiction to grant an adoption is vested in -

a) the authorities of the State where the adopter habitually resides or, in the case of an adoption by spouses, the authorities of the State in which both habitually reside;

b) the authorities of the State of which the adopter is a national or, in the case of an adoption by spouses, the authorities of the State of which both are nationals."

⁹ Article 5(1) of the Convention reads: "The authorities who have jurisdiction under the first paragraph of Article 3 shall apply the national law of the child relating to consents and consultations, apart from those with respect to an adopter, his family or his or her spouse."

Q7. Has being a Party to any of the Conventions had an impact on domestic law?

The fact that Japan is a Party to a Convention has had an impact on domestic law.

Firstly, the self-executive provisions of the Convention to which Japan is a Party shall be applied directly by the domestic courts because those provisions are considered to be one of domestic legal sources and have the same effects as domestic law.

Secondly, many relevant domestic statutes shall be modified in order to be consistent with the Convention when Japan becomes a Party to it.

Lastly, the texts of the Conventions to which Japan is a Party shall be taken into considerations when any new relevant statutes will be adopted.

C. CONFLICTS BETWEEN CONFLICTS CONVENTIONS AND DOMESTIC LAW

Q8. Precedence of domestic law or international Conventions according to your Constitution.

There are no definite provisions relating to this matter. The prevailing opinion and practice considers that international Convention shall precede domestic law, based on Article 98(2) of the Constitution of Japan¹⁰.

Q9. How are inconsistencies between domestic law and the Conventions resolved?

There are no inconsistencies between domestic law and Conventions in theory because relevant domestic law shall be modified in order to be consistent with the Convention when Japan becomes a Party to it as above-mentioned. If any, the courts in Japan shall apply Conventions according to article 98(2) of the Constitution and the Diet shall amend or repeal the domestic law in conflict with the Convention.

¹⁰ Article 98 of the Constitution of Japan reads: "(1) This Constitution shall be the supreme law of the nation and no law, ordinance, imperial rescript or other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity. (2) The treaties concluded by Japan and established laws of nations shall be faithfully observed."

D. IMPLEMENTATION OF CONFLICTS CONVENTIONS

Q10. How has the implementation of the Conventions ratified by your country taken place.

According to the Article 98(2) of the Constitution of Japan, there does not need to be any special procedures to implement the Conventions ratified by Japan if the Conventions are self-executing in nature.

Q11. Cite jurisprudence applying the Hague Convention of 1980 on the Civil Aspects of International Child Abduction and the Hague Convention of 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption.

Because Japan has ratified neither the 1980 Convention on Child Abduction nor the 1993 Convention on Protection of Children, there is no jurisprudence applying these Conventions rendered by the Japanese courts.

Q12. Cite jurisprudence applying the CIDIP III Convention of 1984 on Conflicts of Law in Adoption of Minors and the CIDIP IV Convention of 1989 on International Restitution of Minors.

There is no jurisprudence applying the CIDIP Conventions, because Japan has not been a member of the CIDIP and has ratified no CIDIP Conventions.