Optional Choice-of-Court Agreements under Japanese Law

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This report will examine the formation and effects of optional choice-of-court agreements under Japanese law. It will first outline the rules for choice-of-court agreements in general before proceeding to examine optional choice-of-court agreements in detail. It will conclude with an analysis of asymmetrical choice-of-court agreements, a type of choice-of-court agreements which combine both exclusive and optional aspects.

1. Choice-of-court agreements in general

Japanese law is generally in favour of enforcing the parties' agreements about jurisdiction. That policy is enshrined in paragraphs 1 through 4 of Article 3-7 of the Code of Civil Procedure (hereinafter, "CCP"). It reads:[1]

> (1) The parties may decide by agreement the country in which they may file an action.
> (2) The agreement provided in the preceding paragraph shall have no effect unless it is in writing and is concerned with an action arising from specific legal relationships.
> (3) For the purpose of the preceding paragraph, an agreement is deemed to be in writing if it is recorded in an electromagnetic record (viz. a record made in an electronic form, a magnetic form, or any other form unrecognizable to human perception, which is used for information processing by computers).
> (4) An agreement to file an action exclusively with the courts of a particular foreign country may not be invoked if those courts are legally or factually unable to exercise jurisdiction.

There are special rules for consumer contracts and individual employment relations. Consumers and employees are categorically deemed to be the weaker parties. A choice-of-court agreements having as its object a dispute which may arise in connection with such a contract or relation has effect only in limited circumstances set forth in paragraphs 5 and 6 of Article 3-7 of the CCP. Those provisions read:

> (5) The agreement provided in Paragraph (1) having as its object disputes which may arise in connection with a consumer contract shall have effect only in the circumstances set forth below:
> (i) where it is an agreement which allows an action to be filed in the country where the consumer was domiciled at the time of the conclusion of the contract (If the agreement purports to allow an action to be filed exclusively in that country, it shall be without prejudice to the right to file in other countries except in the cases provided in the following sub-paragraph.); or
> (ii) where the consumer filed an action in the country specified by the agreement or where the consumer invoked the agreement in response to an action brought by the trader in Japan or in a foreign country.

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[1] There is no official English translation of Japanese law. All the translation of Japanese legislation in this article is the work of the present author.

(6) The agreement provided in Paragraph (1) having as its object civil disputes which may arise over individual employment relations shall have effect only in the circumstances set forth below:

(i) where it is an agreement which was concluded when the employment contract was terminated and stipulates that an action may be brought in the country in which the labor was being supplied at the time of the conclusion of the agreement (If the agreement purports to allow an action to be filed exclusively in that country, it shall be without prejudice to the right to file in other countries except in the cases provided in the following sub-paragraph.); or

(ii) where the employee filed an action in the country specified by the agreement or where the employee invoked the agreement in response to an action brought by the employer in Japan or in a foreign country.

Almost all heads of jurisdiction of the CCP are subject to Article 3–9 of the CCP, which provides for dismissal of proceedings when there are special circumstances.[2] It reads:

Even where the Japanese courts have jurisdiction over an action (except where the action has been brought on the basis of an exclusive choice-of-court agreement in favour of the Japanese courts), the court may dismiss the whole or part of the proceedings if, taking into account the nature of the case, the burden on the defendant to answer the claim, the location of evidence and any other factors, the court finds that there are special circumstances by reason of which hearing and determining the case in Japan would impair fairness between the parties or hinder the proper and efficient conduct of hearings.

It should be noted that an exclusive choice-of-court agreement constitutes the only exception to the application of this provision. It also demonstrates the strong policy in favour of the enforcement of such a choice-of-court agreement.

2. Optional choice-of-court agreements

Whereas an exclusive choice-of-court agreement purports to give jurisdiction to the courts chosen and oust the jurisdiction of the other courts, an optional choice-of-court agreement only purports to confer jurisdiction on the courts chosen.

2.1 Effect of optional choice-of-court agreements

The effect of a choice-of-court agreements is a procedural matter and, in accordance with the maxim *forum regit processum*, is subject to the law of the forum. Where the issue is brought before a Japanese court, the following rules of Japanese law will be applied.

Article 3-7 of the CCP, outlined above, is applicable to optional choice-of-court agreements except for the following provisions: paragraph (4), the second half of (ii) of paragraph (5) and the second half of (ii) of paragraph (6). Article 3-9, too, is applicable.

It follows that the Japanese courts have jurisdiction by virtue of an optional choice-of-court agreement in their favour. An optional choice-of-court agreement in favour of foreign courts, on the other hand, does not deprive the Japanese courts of the jurisdiction which they have under the provisions

[2] For details, see Koji Takahashi, "The jurisdiction of Japanese courts in a comparative context" (2015) 11 Journal of Private International Law pp. 103, 104-110.

of the CCP. It remains so even if the option of suing in a nominated foreign court is actually exercised. The existence of such an agreement may, however, be given some weight in favour of the foreign proceedings when the Japanese court decides whether to dismiss the parallel proceedings of Japan under Article 3-9 of the CCP or under other theories for international lis pendens. It goes without saying that commencing proceedings in a court other than that nominated in an optional choice-of-court agreement does not constitute a breach of the agreement. So a judgment rendered by a foreign court is not denied recognition or enforcement in Japan solely on the ground that the court is other than that nominated in an optional choice-of-court agreement.

Article 3-9 does not make an exception for an optional choice-of-court agreement. Nevertheless, dismissal under that provision will be rare where Japanese courts are chosen by the parties because "fairness between the parties" would usually be promoted by respecting their agreement.[3]

2.2 Optional choice-of-court agreements involving presumptively weaker parties

The CCP contains special rules (paragraphs (5) and (6) of Article 3-7) which are meant to protect the consumers and employees as the presumptively weaker parties.

A choice-of-court agreement having as its object disputes which may arise in connection with a consumer contract is given effect in limited circumstances and, in most of such circumstances, only as an optional choice-of-court agreement. Thus, such an agreement may be relied upon by the consumer to file an action (the first half of paragraph (5)(ii)). It may also be relied on by the trader but only where it is an agreement which allows an action to be filed in the country where the consumer was domiciled at the time of the conclusion of the contract (paragraph (5)(i)). The traders cannot, however, rely on such an agreement to contest jurisdiction even if it purports to be an exclusive choice-of-court agreement (See the bracket of paragraph (5)(i)). Thus, where a Japanese trader and a consumer domiciled in State X have concluded an exclusive choice-of-court agreement in favour of the courts of X, if the consumer files an action in Japan, the trader cannot rely on it to contest the jurisdiction of the Japanese courts.

Again, a choice-of-court agreement having as its object civil disputes which may arise over individual employment relations is given effect in limited circumstances and, in most of such circumstances, only as an optional choice-of-court agreement. Thus, such an agreement may be relied upon by the employee to file an action (the first half of (ii) of paragraph (6)). Such an agreement may also be relied on by the employer but only where it is an agreement which was concluded when the employment contract was terminated and stipulates that an action may be brought in the country in which the labor was being supplied at that time (paragraph (6)(i)). The employers cannot, however, rely on such an agreement to contest jurisdiction even if it purports to be an exclusive choice-of-court agreement (See the bracket of paragraph (6)(i)). Thus, suppose that a Japanese employer and an employee supplying labour in State Y concluded an exclusive choice-of-court agreement in favour of the courts of Y at the time of terminating the employment contract. If the employee files an action in Japan to seek the payment of a severance allowance, the employer cannot rely on the agreement to contest the jurisdiction of the Japanese courts.

These special rules are operationally neutral in terms of the nationality and domicile of the parties. Consequently, it can happen that they work against the interest of the traders and employers based in Japan. Thus, for example, where a Japanese souvenir shop files an action in Japan against its former customer from a foreign country, seeking the payment of the price for the souvenir it has sold to the

[3] e.g. The Kyoto District Court in its judgment on 29 January 2015 (2015WLJPCA01296002) refused to dismiss proceedings under Article 3-9 where there was a non-exclusive choice-of-court agreement in favour of the Japanese courts.

customer, the Japanese courts have no jurisdiction to hear the claim even if the shop relies on a choice-of-court agreement choosing the Japanese courts.

2.3 Distinguishing optional from exclusive choice-of-court agreements

Japanese law has no statutory provision laying out a test for distinguishing optional choice-of-court agreements from exclusive choice-of-court agreements. In the run up to the amendment of the CCP, the law makers considered the idea of deeming a foreign choice-of-court agreement to be an agreement to oust the jurisdiction of the Japanese courts unless there is a contrary agreement but rejected it as being contrary to the international business practice. They instead decided to leave the matter to the interpretation of agreements.[4]

The case law has produced no clear principles. The Japanese courts have the tendency of relying on factual appreciation and their own sense of reasonableness, rather than engaging in choice-of-law analysis, in interpreting choice-of-court agreements to see whether they are exclusive or optional.[5] Thus, in Chisadane,[6] the only case in which the Supreme Court has had an opportunity to consider international choice-of-court agreements, a bill of lading contained a choice-of-court agreement. It stipulated,[7] "All actions under this contract of carriage shall be brought before the court at Amsterdam and no other court shall have jurisdiction with regard to any other action unless the carrier brings such an action before a court of other jurisdiction or voluntarily accepts the jurisdiction of such court." The Supreme Court found that this agreement was an exclusive choice-of-court agreement on the reasoning that it clearly purported to leave intact the option of suing in one of the fora having jurisdiction in the case, namely Amsterdam, and exclude other fora. However, the Court did not formulate rules for distinguishing exclusive from optional choice-of-court agreements in general terms. Nor did the Court enunciate any canon of interpretation which should be applied to interpret choice-of-court agreements.

The tendency of the Japanese courts is to characterise a choice-of-court agreement as exclusive unless otherwise indicated. Thus, in a case featuring an agreement giving one of the parties the right to decide where to sue from a list of fora, the Tokyo District Court held it to be an exclusive choice-of-court agreement in accordance with what it perceived to be the obvious purport of the agreement as gleaned from the right of choice.[8] But the opposite characterization can be taken. Thus, in a case involving an agreement stating "… any dispute between the parties shall be submitted to the Commercial Court in Paris, France," the Tokyo District Court found it to be an optional choice-of-court agreement, noting that it did not purport to exclude the jurisdiction of other courts. The Court acknowledged that the Commercial Court in Paris would have jurisdiction over the dispute even without the agreement but held that it would not be inconsistent with interpreting the agreement as conferring jurisdiction on that court.[9] The Tokyo District Court adopted the contrary reasoning in another case which involved an

[4] Ministry of Justice, "*Kokusai Saiban Kankatsu Hôsei ni kansuru Chûkan Shian no Hosoku Setsumei* [Explanatory Notes on Interim Proposal concerning Legislation on International Jurisdiction]" (2009) p. 30 (in Japanese).

[5] e.g. Supreme Court, Judgment on the Chisadane case, November 28, 1975, 29 Minshu (10) 1554 [1975]; Tokyo District Court, Judgment, April 11, 2008, H.T. (1276) 332; Tokyo District Court, Judgment, September 24, 2008, 2008WLJPCA09248005; Tokyo District Court, Judgment, March 26, 2014, 2014WLJPCA03269011.

[6] Supreme Court, Judgment, supra note 5. An English translation of the judgment is available in the Japanese Annual of International Law, No. 20 (1976) p. 106.

[7] The original text of the choice-of-court agreement was in English. But the judgment, written in Japanese, only contains some English words from the agreement. The translation is a reconstruction by the present author using those English words.

[8] Tokyo District Court, Judgment, September 24, 2008, supra note 5. Other decisions adopting the same characterisation include the Tokyo District Court, Judgment, February 28, 1994, H.T. (876) 268. Other decisions adopting the same characterisation include the Tokyo District Court, Judgment, February 28, 1994, H.T. (876) 268.

[9] Tokyo District Court, Judgment, March 26, 2014, *supra* note 5.

agreement choosing the Arbitration Court of Primorsk Region of the Russian Federation. The Court noted that the Russian court would have jurisdiction over the dispute even without the agreement and held that it would be reasonable to interpret the agreement as purporting to exclude the jurisdiction of other courts.[10]

The present author considers that Japanese law should be reformed to provide for a clear test for distinguishing optional from exclusive choice-of-court agreements. The uncertainty as to whether any specific choice-of-court agreement is optional or exclusive would result in time and expenses being wasted at the jurisdictional stage of the litigation.

It may be thought that the cause of uncertainty lies in the courts' tendency to treat this issue as a factual question. But treating it as a legal question would not promote certainty if a choice-of-law analysis were applied to ascertain the applicable law because there is uncertainty over what should be the choice-of-law rules for interpreting choice-of-court agreements.[11] Moreover, legal systems often fail to provide an unequivocal answer to the question how to distinguish between optional and exclusive choice-of-court agreements. Consequently, even if the court has managed to ascertain the applicable law through a choice-of-law analysis, it will often face the difficulty of actually applying that law.

The present author believes that a solution to this problem lies in establishing a clear test which is applicable regardless of the law governing the interpretation of choice-of-court agreements. It can, for example, be a rebuttable presumption in favor of exclusiveness as stipulated by Article 3(b) of the Hague Choice-of-Court Convention. Such a rule may be categorised as an overriding mandatory rule because it is a rule applicable irrespective of the law governing the interpretation of choice-of-court agreements. The promotion of certainty and predictability with respect to the interpretation of choice-of-court agreements merits to be pursued by enacting overriding mandatory rules since such agreements are invariably concluded with the aim of avoiding the uncertainty which would otherwise result from the application and interpretation of jurisdictional rules in general.

2.4 In intra-national cases

Optional choice-of-court agreements are not treated differently in intranational cases than in international cases. However, the tendency of the courts in intra-national cases is to deem a choice-of-court agreement to be optional unless the contrary intent is clear as in the cases where the agreement specifies one of the courts which would have jurisdiction even without the agreement.[12] It is opposite to the tendency in international cases (See 2.3 above). This is curious because, in the intra-national context, the courts have discretion to transfer the case to another otherwise competent court even if they are seised on the basis of an exclusive choice-of-court agreement (Article 17 of the CCP). Moreover, because of various procedural differences and the long distance involved, the consequence of ousting jurisdiction is arguably greater in the international context than in the intra-national context. In the latter context, the courts characterised a choice-of-court agreement as optional rather than exclusive on the reasoning that they were contained in a standard form of contract and/or that the weaker parties ought to

[10] Tokyo District Court, Judgment, March 27, 2015, H.T. (1421) 238.

[11] The present author believes that where a choice-of-court agreement is contained in a contract, it should, like other terms in the same contract, be submitted to the choice-of-law analysis for that contract, with the result that it becomes subject to the law governing the contract except in what will be a rare situation where the parties have chosen a different law specifically for the choice-of-court agreement. Other authors prefer submitting a choice-of-court agreement separately from the remainder of the contract to a choice-of-law analysis.

[12] e.g. Osaka High Court, February 21, 1990 H.T. (732) 270; Kobe District Court Amagasaki Branch, Judgment, October 14, 2011, H.J. (2133) 96. The latter even overrode the word exclusive used in the choice-of-court agreement.

be protected. There is in fact no such special rules for protecting consumers and employees in the intra-national context as paragraphs (5) and (6) of Article 3-7 which are only applicable in the international context. These provisions were inserted by the amendment to the CCP recently with effect from 1 April 2012. If the different treatments between the intra-national and international cases subsists, the presence and absence of special rules for protecting the weaker parties may furnish an explanation.

3. Asymmetrical Choice-of-court Agreements

An asymmetrical choice-of-court agreement refers to a choice-of-court agreement that combines both exclusive and optional aspects.

3.1 Effect of an asymmetrical choice-of-court agreement

Where an asymmetrical choice-of-court agreement is validly formed, each aspect of such an agreement is given effect according to its purport. Thus, an exclusive aspect is given effect as if it were an exclusive choice-of-court agreement and an option aspect is given effect as if it were an optional choice-of-court agreement.

3.2 Formation and validity of an asymmetrical choice-of-court agreement

A question which seems more important is whether such an agreement is validly formed in spite of the lack of equilibrium between the interests of the parties. The choice-of-court agreement featured in the Chisadane case was in fact asymmetrical.[13] But the Supreme Court only looked at the exclusive aspect of this agreement when finding that it did not fall foul of the public policy test.

Where Japanese law governs the validity of a choice-of-court agreement in a consumer contract, the Consumer Contract Act would be applicable. It reads in Article 10:

> Any clause in a consumer contract which purports to restrict the rights or add to the obligations of the consumer as provided, through the application of the provisions unrelated to the public order, in the Civil Code, the Commercial Code or other statutes or statutory instruments shall be null and void if it unilaterally harms the interests of the consumer in contravention of the fundamental principle enshrined in Article 1(2) of the Civil Code.[14]

In no case has a choice-of-court agreement been found null and void under this provision. Such a likelihood would be slimmer now with the introduction of Article 3-7(5). Under the latter, the trader cannot rely on an exclusive choice-of-court agreement to contest the consumer's choice of forum. Besides, the trader can only rely on an optional choice-of-court agreement under the limited situation prescribed. The lack of equilibrium stemming from the text of an asymmetrical choice-of-court agreement would thus be drastically redressed. Consequently, it would hardly be possible to say that such an agreement would "unilaterally harms the interests of the consumer."

Where Japanese law governs the formation of a choice-of-court agreement in a standard form contract (whether or not it is a consumer contract falling within the scope of the Consumer Contract Act), it will become subject to the new Article 548-2 which is to be inserted in the Civil Code with effect from 1 April 2020. It provides:

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[13] See the text accompanying supra note 7.

[14] Article 1(2) of the Civil Code provides:
The exercise of rights and the performance of obligations shall be done in good faith.

(1) Those who have made an agreement to engage in a standard transaction (a transaction engaged in by a specific party with an opposite party drawn from the rank of many and unspecified persons, for both of whom the standardization of the whole or part of its content is reasonable) shall be deemed to have agreed to individual clauses contained in the standard form (the entirety of the clauses prepared by the specific party as the content of the contract in a standard transaction) if:

(i) they have agreed to make the standard form the content of their contract; or

(ii) the party who has prepared the standard form has indicated beforehand to the opposite party that it shall become the content of the contract.

(2) Notwithstanding the provision of the preceding paragraph, any clause falling within the description of the preceding paragraph which purports to restrict the rights or add to the obligations of the other party shall be deemed not to have been consented to if it is considered to harm the interests of that other party unilaterally in contravention of the fundamental principle enshrined in Article 1(2), having regard to the manners and actual circumstances of the standard transaction as well as the social norms relevant to the transaction.

This provision is applicable to, for example, a choice-of-court agreement in a standard form loan contract which purports to confer jurisdiction on the chosen courts and, only where the borrower acts as the plaintiff, oust the jurisdiction of the other courts. Where the contract is B to B (business to business), Article 3-7(5) of the CCP would not help redress the lack of equilibrium. Consequently, such an agreement will be considered to harm the interests of the borrower unilaterally. It remains to be seen whether the courts will consider that the fundamental principle enshrined in Article 1(2), *i.e.* the principle of good faith which permeates the Civil Code, is accordingly contravened. Since the notion of good faith is nebulous, the new provision may introduce an element of uncertainty into this area of law.