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# International Cooperation in the Field of Obtaining Evidence: National Report of Japan\*

**KUDO Toshitaka**

- I . Base of cooperation with other countries on obtaining evidence
- II . Common practical problems
- III . The most controversial issue: discovery requested by U.S. courts
- IV . Epilogue

## **I . Base of cooperation with other countries on obtaining evidence**

Japan is a contracting state to the Convention of 1 March 1954 on Civil Procedure (hereinafter “CCP”), but has not signed any other regional treaty or multinational convention on taking evidence abroad, including the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.

### **A. Request from a contracting state to the CCP**

For a contracting state to the CCP, letters of request from its judicial authority are the way to seek judicial assistance in obtaining evidence in Japan (CCP Art. 8). Upon ratification of

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the CCP in 1970, Japan enacted the national law to implement the Convention (hereinafter “CCP Implementation Act”),<sup>1)</sup> which designates the Minister of Foreign Affairs as the authority to receive requests for assistance from foreign courts (Art. 2).

## B. Request from a non-contracting state to the CCP

(i) If a non-contracting state to the CCP has a bilateral agreement with Japan,<sup>2)</sup> which includes examination of evidence in matters of judicial assistance, the request for taking evidence in Japan must be processed along with the agreement. Most of these agreements are based on exchanged diplomatic *notes verbales*, which provide very basic structures only, at best no more than CCP.

(ii) If a non-contracting state to the CCP does not have a bilateral agreement,<sup>3)</sup> the Japanese authority decides on acceptance/rejection of the assistance request on a case-by-case basis.

In both the cases of (i) and (ii), the Act on Assistance Based on Commission by Foreign Courts (hereinafter “Act on Assistance”)<sup>4)</sup> provides a judicial assistance process for taking evidence in Japan.

The process is almost the same as that in the CCP Implementation Act. The Act on Assistance Article 1-2(1) prescribes requirements of the request for judicial assistance: (i) the request shall be made through the diplomatic channel; (ii) the request shall be made in writing specifying the manner in which the evidence is taken, etc.; (iii) the Japanese translation shall be appended to the request and related documents; (iv) the foreign state will guarantee the expenses incurred; (v) the request shall be governed by the principle of reciprocity.

Through the diplomatic channel, the letter of request is forwarded to the Administrative Bureau of the Supreme Court of Japan and then assigned to the District Court that has jurisdiction over the requested method of taking evidence (Art. 1(2)). If all the requirements are found to be met, the District Court executes the request according to the Japanese Civil Procedure Code (Art. 3).

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1) Act on Special Provisions Concerning Civil Procedure Attendant upon Implementation of the “Convention on Civil Procedure” and Another Convention, Act No. 115 of June 5, 1970.

2) For example, Brazil, India, Thailand, etc.

3) For example, Singapore, Peru, etc.

4) Act No. 63 of 1905.

### C. United States and United Kingdom

In addition to the diplomatic agreement, the United States, non-contracting state to the CCP, has a Consular Convention with Japan (hereinafter “Consular Treaty”),<sup>5)</sup> which provides that a consular officer may “take depositions, on behalf of the courts or other judicial tribunals or authorities of the sending state, voluntarily given” (Art. 17(e) (ii)) under oath if necessary (Art. 17(e) (iii)), and “obtain copies of or extracts from documents of public registry” (Art. 17(f)). Therefore, U.S. courts may choose the judicial assistance or the Consular Treaty as a route to take evidence in Japan.

The United Kingdom, also a non-contracting state to the CCP, has a Consular Convention with Japan.<sup>6)</sup> The Convention’s Article 25 entitles a consular officer to “take evidence voluntarily given, orally or in writing, provided that this is in accordance with the law of the sending State and not inconsistent with the law of the receiving State.” However, no consular officer actually takes evidence at the British Embassy or Consulate in Japan; that is a matter of U.K. national law.

## II. Common practical problems

CCP Article 8 provides that a court of the contracting state may request the authority of another contracting state “to obtain evidence,” in the form of a letter of request. The Japanese national law, CCP Implementation Act Article 3, also simply prescribes that the Japanese court shall conduct “examination of evidence” as judicial assistance. Although it seems theoretically possible that Japanese courts could conduct any type of examination of evidence (i.e., inspection, document production, etc.) upon request, only examinations of witnesses have been conducted in actual judicial assistance cases.

For non-contracting states to the CCP, the scope of judicial assistance depends on each bilateral agreement with Japan, if any. As with CCP Implementation Act cases, only examinations of witnesses have been actually conducted. Therefore, practically speaking, only a witness examination is available for judicial assistance. Other types of taking evidence (e.g.,

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5) Consular Convention between the United States of America and Japan, signed at Tokyo March 22, 1963 and protocol, 518 U.N.T.S. 179.

6) Consular Convention between the United Kingdom of Great Britain and Northern Ireland and Japan, signed at Tokyo 4 May, 1964, Cmnd. 2833.

document production<sup>7)</sup>) will not be conducted.

Unlike ordinary domestic litigation, examination of witnesses in judicial assistance is closed to the public.<sup>8)</sup> Only parties and their attorneys admitted in Japan can participate in the examination.<sup>9)</sup> Foreign attorneys (typically, attorneys representing the original case in the U.S.) may observe the examination, but it is up to the discretion of the court assigned to the assistance case.<sup>10)</sup>

The examination of witnesses in judicial assistance is processed under the Japanese Code of Civil Procedure (hereinafter “JCCP”), which provides testimonial privilege rules in Article 197(1). In the recent judicial assistance case, the Japanese Supreme Court held that a journalist has privilege to conceal confidential sources in the testimony, by the construction of “matters concerning technical or professional secrets” in JCCP Article 197(1) (iii).<sup>11)</sup> What if a witness claims testimonial privilege not recognized under Japanese Law? Some Japanese scholars recommend that the court should not compel the witness to testify, but just report his/her privilege claim in the testimony transcript.<sup>12)</sup>

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7) Ministry of Foreign Affairs of Japan’s website expressly states document production is not within the scope of judicial assistance. [[http://www.mofa.go.jp/mofaj/ca/cp/page25\\_001296.html](http://www.mofa.go.jp/mofaj/ca/cp/page25_001296.html)] (last modified Mar. 20, 2018)

8) This closed-door examination is same as examination of evidence out of court under JCCP Article 185(1).

9) In Japanese Law, a registered foreign lawyer is permitted to provide legal services concerning the laws of the state of primary qualification (Act on Special Measures concerning the Handling of Legal Services by Foreign Lawyers, art.3(1)). However, the “legal services” does not include activities in the courts of Japan.

10) Civil Division, Administrative Bureau of the Supreme Court of Japan, *Kokusai minji jiken tetsuzuki handbukku*, 60 (2013); Yoshimasa Furuta, *Kokusai minji soshouhou nyumon*, 155 (2012) shows an example which the court permitted the foreign attorney to communicate with the Japanese attorney while examination of witness for judicial assistance was in session.

11) Sup. Ct. Oct. 30, 2006 (60-8 Minshu 2647).

12) Takao Sawaki, Case comment on the international case, 574 *Juristo* 125 (1974); Hideyuki Kobayashi, *Kokusai shihou kyoujyo in Kokusai minji soshouhou no riron*, 255, 311 (Takao Sawaki & Yoshimitsu Aoyama eds., 1987); Takeo Kosugi, *America no ‘discovery’ no nihon deno jissi wo megueru mondaiten in Kokusai minjisoshouhou (zaisanhou kankei)*, 247 (Akira Takakuwa & Masato Dogauchi eds., 2002).

### III. The most controversial issue: discovery requested by U.S. courts

#### A. Deposition

##### 1. Location of deposition

The U.S. Federal Rules of Civil Procedure (hereinafter “FRCP”) Rule 30(b)(1) tasks the party taking a deposition with providing all other parties written notice stating the time and place for taking the deposition. This clause authorizes a party taking a deposition to unilaterally choose the place, which is subject to the granting of a protective order by the court pursuant to FRCP Rule 26(c)(2) designating a different place.

Even though there are no statutory criteria on the location, case law has established a general rule for a corporate party’s deposition: “the deposition of a corporation by its agents and officers should ordinarily be taken at its principal place of business.”<sup>13)</sup> However, this general rule is overridden when the plaintiff establishes “any peculiar circumstances” to justify his/her request to depose in an alternate location.<sup>14)</sup>

In many district court decisions, the rule is recognized as a presumption that allocates the burden of establishing the “peculiar circumstances” to a deposing party.<sup>15)</sup> Generally speaking, the key factors are cost, convenience, and litigation efficiency.

On the other hand, several decisions have held that the rule is not a genuine presumption, but “merely a decision rule that facilitates determination when other relevant factors do not favor one side over the other.”<sup>16)</sup> Moreover, in *Custom Form Mfg., Inc. v. Omron Corp.*,<sup>17)</sup> in which a Japanese corporation is one of several foreign defendants, the court held that foreign corporations doing business in the U.S. should be subject to its jurisdiction, thereby not considering the rule as a presumption.<sup>18)</sup>

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13) Wright, Miller, Kane, Marcus & Steinman, *Federal Practice and Procedure: Civil 2d*, § 2112 (3rd ed.); *Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979); *Thomas v. Intern. Business Machs.*, 48 F.3d 478, 483 (10th Cir. 1995).

14) *Salter v. Upjohn Co.*, 593 F.2d 649, 651–52 (5th Cir.1979).

15) *Federal Deposit Insurance Co. v. La Antillana, S.A.*, No. 88 Civ. 2670, 1990 WL 155727, \*1 (S.D.N.Y. 1990); *Sears v. American Entertainment Group, Inc.*, No. 94 C 165, 1995 WL 66411, \*1 (N.D.Ill. 1995); *Morin v. Nationwide Fed. Credit Union*, 229 F.R.D. 362, 363 (D. Conn. 2005).

16) *Mill-Run Tours v. Khashoggi*, 124 F.R.D. 547, 550 (S.D.N.Y. 1989); *Bank of New York v. Meridien BIAO Bank Tanzania Ltd.*, 171 F.R.D. 135, 155 (S.D.N.Y.1997).

17) 196 F.R.D. 333 (N.D. Ind. 2000).

## 2. Deposition in the U.S. or abroad?

For a deposition in a foreign country, FRCP Rule 28(b)(1) provides the following routes: (i) through a treaty or convention; (ii) through a letter of request (formerly called “letter rogatory”); (iii) on notice, before a person authorized to administer oaths either by federal law or by the law in the place of examination; or (iv) before a person commissioned by the court to administer any necessary oath and take testimony.

It appears that the general rule discussed in the previous section is applicable to foreign corporations’ directors and employees, too.<sup>19)</sup> The next question is, what kind of factors constitute “peculiar circumstances?” *In re Vitamin Antitrust Litigation*<sup>20)</sup> cited several factors identified in previous cases: (i) the burden to the parties of holding the depositions in the U.S. relative to the burden of holding the depositions abroad, including the burdens imposed on the witnesses and the parties’ counsel; (ii) the court’s ability to supervise depositions in the contested location; (iii) whether depositions would be impeded by any legal or procedural barriers in another nation; and (iv) any potential affront to the sovereignty of a foreign nation where a deposition is sought to be held within its borders.<sup>21)</sup>

Among these factors, (ii) and (iv) are frequently applied to justify depositions in the U.S. As to (ii), an on-going deposition dispute, or the high likelihood of a dispute, justifies the need for judicial supervision. Even though means of communication are many and varied, referees and judges tend to assume that deposition in a foreign country will prevent effective judicial supervision.<sup>22)</sup> As to (iv), illegitimacy of depositions in the foreign country can be a strong rationale for deposing the foreign company employee or executive in the U.S.<sup>23)</sup>

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18) *Id.* at 336. *See also*, *New Medium Technologies LLC v. Barco N.V.*, 242 F.R.D. 460, 466-67 (N.D. Ill. 2007).

19) *Six West Retail Acquisition v. Sony Theatre Management Corp.*, 203 F.R.D. 98, 107 (S.D.N.Y.2001); *In re Outsidewall Tire Litigation*, 267 F.R.D. 466, 470 (E.D. Va. 2010).

20) 2001 WL 35814436 (D.C., 2001).

21) *Id.* at\*4.

22) *For example*, *Mill-Run Tours v. Khashoggi*, 124 F.R.D. 547, 551 (S.D.N.Y. 1989); *Hyde & Drath v. Baker*, 24 F.3d 1162, 1166 (9th Cir.1994); *Armsey v. Medshares Management Services, Inc.*, 184 F.R.D. 569, 571 (W.D.Va.1998); *In re Outsidewall Tire Litigation*, 267 F.R.D. 466, 470 (E.D. Va. 2010); *In re Outsidewall Tire Litigation*, 267 F.R.D. 466, 470 (E.D. Va. 2010).

### 3. Deposing a Japanese corporation: in the U.S., Japan, or a third country?

U.S.-Japan civil litigation cases often include discovery disputes on a deponent who resides and works in Japan. Typically, a U.S. party seeks deposition in the U.S., and then the Japanese company files a protective order to set the deposition location in Japan. There are several reported district court decisions on this issue. Decisions have designated locations in the U.S., Japan, and a third country, depending on the facts of the case.

#### a. Decisions ordering deposition in the U.S.

##### (A) *In re Honda American Motor Co., Inc. Dealership Relations Litigation*<sup>24)</sup>

The Japanese corporation, Honda Motor Co. Ltd. moved to quash notice seeking depositions in Baltimore, Maryland, and requested a protective order. The movant insisted that depositions in the U.S. of Japanese nationals residing in Japan would be an affront to Japanese sovereignty.

The motion was denied, except for a retired employee. The court held that “Discovery requests implicate foreign sovereignty only in certain contexts. . . . To the extent Japanese sovereignty is implicated by the compulsory deposition of its nationals in the U.S., it is limited due to the lack of intrusiveness of the discovery requested.”<sup>25)</sup>

In this case, the court found the depositions in Baltimore appropriate, pointing out the following factors: (i) the plaintiffs’ request did not call for discovery activities (e.g., depositions) in Japan; (ii) the named Japanese nationals conducted extensive business in the U.S. for many years; (iii) U.S. concerns with its own judicial sovereignty outweighs Japan’s, because the case involves questions on U.S. economic regulation and policy; (iv) the travel costs of deposing Honda’s four managing agents in Baltimore would be far less than if all parties and their attorneys were required to travel to Japan; and (v) most of the relevant documents were being held at a depository in Baltimore.<sup>26)</sup>

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23) See *Fausto v. Credigy Svcs. Corp.*, 251 F.R.D. 427, 430–31 (N.D.Cal.2008) (finding legal impossibility to depose in Brazil); *In re Outsidewall*, 267 F.R.D. 470 (holding the possible effect of Dubai law and the likelihood of deposition disputes requiring judicial intervention may well suffice to overcome the presumption.).

24) 168 F.R.D. 535 (D.Md.1996).

25) *Id.* at 538-39.

26) *Id.* at 539-40.

(B) *Custom Form Mfg., Inc. v. Omron Corp.*<sup>27)</sup>

In a product liability lawsuit, the plaintiff filed a motion to compel depositions of the defendants' employees in either Indiana or Illinois. The defendants asserted that any depositions of its employees should take place in Japan or, alternatively, Hawaii.

The court granted the motion, holding the depositions should take place in the U.S. At the outset, the court disagreed that Japanese judicial sovereignty was being infringed, citing *In re Honda*. The court also cited the difficulty to resolve discovery disputes arising in a foreign country.<sup>28)</sup> With respect to which U.S. location, the court expressed a preference for Indiana or Illinois, stating "Hawaii . . . is a location that has nothing to do with this case, it is inconvenient, and it would add considerably to the travel and lodging expenses of all parties."<sup>29)</sup>

(C) *In re Vitamin Antitrust Litigation*<sup>30)</sup>

The plaintiffs filed a motion to compel the foreign defendants, including Japanese corporations, to produce witnesses and officers, directors, and agents for depositions in Washington, D.C., under FRCP Rule 30(b)(6). The defendants argued the general rule governing the location of depositions: that absent "special circumstances," corporate deponents are deposed at the corporation's principal place of business. The defendant Japanese corporations, Daiichi Pharmaceutical Co. Ltd., and Eisai Co., Ltd., argued that, in accordance with the FRCP, depositions may be taken in Japan at the conference room in the U.S. Embassy or Consulate in Japan.

The court granted the motion and ordered the depositions to be taken in Washington D.C. As to whether the deposition of a foreign corporation should occur in the U.S. or abroad, the court cited factors identified in previous cases. With respect to the Japanese defendants in the case, the court found the expense and burden, and the court's ability to supervise depositions favored the U.S. location. As to legal or procedural barriers in Japan, The court also held that the limited size and availability of the conference rooms in the U.S. Consulate and Embassy in Japan constituted legal or procedural barriers.<sup>31)</sup> Finally, the court cited *In re Honda* to refute any concerns of sovereignty infringement.<sup>32)</sup>

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27) 196 F.R.D. 333 (N.D. Ind. 2000).

28) *Id.* at 336-37.

29) *Id.* at 338.

30) 2001 WL 35814436 (D.C., 2001).

31) *Id.* at \*6.

b. Decisions ordering deposition in Japan

(A) *Chris–Craft Indus. Products, Inc. v. Kuraray Co., Ltd.*<sup>33)</sup>

The plaintiffs noticed depositions of employees of the defendant Japanese corporation and its subsidiary in New York. The depositions were observed to take place in Illinois; therefore, the defendants moved for a protective order seeking depositions in Japan and New York.

The court granted the motion in part, ordering depositions of the defendant's employees to take place in Osaka, Japan, while depositions of the subsidiary employees be in New York. Recognizing the general rule on location of corporation depositions, the court held that the plaintiff failed to show circumstances to justify depositions in Illinois. Rather, the court found depositions in Illinois would create an undue burden, due to the deponents' lost work time and expenses given the timing of the corporate fiscal year.<sup>34)</sup>

(B) *Six W. Retail Acquisition v. Sony Theatre Mgmt. Corp.*<sup>35)</sup>

A New York corporation sued the Sony Theatre Management Co. and its affiliates alleging breach of contract and antitrust claims. A dispute arose over the propriety of depositions of three high-ranking executives of Sony. Based on the general rule on location of depositions, the court granted the plaintiff's motion to compel, holding that the depositions of the two executives residing in Japan shall take place in the country of residence, rather than in New York. The court relied on the following factors:

(i) Choice of Forum

"Six West has not argued that it was constrained to litigate this case only in New York. Therefore, the presumption that deponents be examined in their district of residence is fully applicable."<sup>36)</sup>

(ii) Cost

"Both parties are well-equipped to bear the costs associated with this deposition. . . . Moreover, the increase in the overall cost of litigation will be equally significant, no matter where the depositions take place."<sup>37)</sup>

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32) *Id.* at \*10-11.

33) 184 F.R.D. 605 (N.D. Ill. 1999).

34) *Id.* at 607-08.

35) 203 F.R.D. 98, 107 (S.D.N.Y. 2001).

36) *Id.* at 107.

(iii) Convenience

“Mr. Idei and Mr. Kawai both work and reside in Japan. Both are high-ranking executives of a major corporation, whose busy schedules would obviously be disrupted by a trip to the United States. Their absence at work would also adversely affect the defendants’ affairs. . . . Plaintiff’s counsel will be placed under some burden if required to travel to Japan for an opportunity to question these witnesses. Nevertheless, Six West’s attorneys, seasoned litigators from a law firm with nationwide offices, have substantial resources and experience to accomplish this. In any event, the convenience of counsel is less compelling than any hardship to the witnesses . . . . Altogether, then, the convenience factors favor taking depositions in Japan.”<sup>38)</sup>

(iv) Efficiency

“Considerations of efficient litigation cut slightly against taking depositions outside of New York. Judicial supervision of overseas depositions by telephone may be difficult. . . . However, there is little indication that such supervision is going to be necessary. While parties in this case have had their share of disagreements, these disputes have not been characterized by any ‘unusual degree of acrimony.’”<sup>39)</sup>

c. Decisions ordering deposition in a third country (or U.S. territory)

(A) *Gerber Scientific Intl., Inc. v. Roland DG Corp.*<sup>40)</sup>

A U.S. patentee filed an infringement lawsuit against Roland DGA Corp. and Roland DG Corp. (hereinafter “RDG”), which are Japanese corporations. Upon the plaintiff’s notice of depositions, RDG filed a motion for a protective order, insisting that depositions of its Japanese president and employees shall take place in Japan, or alternatively, in Taiwan.

Granting the motion in part, the court ordered the depositions to be taken in Taiwan, stating as follows:

“RDG argues that the general presumption is that witnesses should be deposed near their residence or principal place of business. Courts have recognized that this is especially true with respect to defendants. . . . The factors of cost and convenience weigh in favor of

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37) *Id.*

38) *Id.* at 108.

39) *Id.*

40) 2012 WL 13019000 (D. Connecticut, 2012).

conducting the depositions abroad. Although the court will have limited ability to oversee any issues that may arise during the depositions, counsel have had few problems thus far in the several depositions that have taken place. Finally, the court recognizes that the deponents do not currently have any plans to travel to the United States. The plaintiff has failed to show the requisite “peculiar” circumstances warranting taking the depositions in question in California. . . . The court also concludes, however, that conducting the depositions at issue in Taipei, Taiwan, presents minimal inconvenience to the witnesses and avoids the procedural and legal impediments to conducting the depositions in Japan.”<sup>41)</sup>

(B) *Yaskawa Elec. Corp. v. Kollmorgen Corp.*<sup>42)</sup>

Japanese companies brought action for infringement of its U.S. patent, against alleged infringers incorporated in the U.S. The defendants sought to depose inventors on the patent in Chicago, Illinois, where the lawsuit was pending. The plaintiff sought a protective order, requesting that the depositions take place in Japan or Guam.

The court granted the protective order, holding that the depositions in the U.S. territory Guam would avoid the cost of using consular facilities in Japan and afford American judicial supervision. The decision found expense and burden factors supportive, stating “[T]he convenience of counsel is a factor . . . but it cannot weigh much compared to the inconvenience to the nonparty witnesses.”<sup>43)</sup>

#### 4. Deposition in Japan

Again, FRCP Rule 28(b) (1) provides the following routes for deposition in a foreign country: (i) treaty or convention; (ii) letter rogatory; (iii) on notice, before a person authorized to administer oaths by law; or (iv) before a person commissioned by the court to administer any necessary oath and take testimony.

From the viewpoint of Japanese law, (i) corresponds to the U.S.–Japan Consular Treaty, mentioned below in (a). (ii) is the judicial assistance to which the Act on Assistance applies. In this route, a Japanese court implements a request for deposition in the same way as the examination of witnesses under the JCCP. (iii) is initiated by a direct notice from a party to its adversary. The legality is discussed in Japan, as mentioned below in (b). (iv) is deemed

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41) *Id.* at \*2.

42) 201 F.R.D. 443 (N.D. Ill. 2001).

43) *Id.* at 445.

illegal by Japanese law, because U.S. courts directly conduct their judicial procedure in a way that conflicts with Japanese territorial sovereignty.

(a) Consular Treaty route

As mentioned above in I.C, the U.S. consular officer may take depositions under oath, upon order or commission from courts of the U.S., as long as testimony is “voluntarily given” (Consular Treaty Art. 17(1) (e) (ii)). We should be aware that the U.S. court or consular officer does not have authority to issue a subpoena; the deponent’s appearance is totally voluntary.<sup>44)</sup>

In actual practice, a consular officer leaves immediately after the administration of the oath. Parties conduct subsequent deposition in conformity with U.S. procedural law, and in English. The party who requested the deposition must prepare any necessary staff and materials: a court reporter, recording equipment, an interpreter for the deponent who does not speak English, etc. Deposition by written questions (FRCP Rule 31) is usually not taken, but is possible depending on coordination with the U.S. Embassy or Consulate General.<sup>45)</sup>

(b) Deposition NOT in compliance with the Consular Treaty

Reportedly, in some cases, American attorneys take depositions in the conference room at the hotel or the law firm in Japan, without a judge or consular officer attending. This practice is explained by the crowded nature of the reserved deposition rooms at the U.S. Embassy at Tokyo and Consulate at Osaka, and the necessity of a special deposition visa for foreign attorneys living outside of Japan.

It appears that the Japanese Government finds that such an informal deposition violates Japanese law regulating lawyers and judicial assistance.<sup>46)</sup> However, Japanese scholars and practitioners argue over the legality. The positive view stresses that the private nature of the practice does not threaten Japan’s sovereignty.<sup>47)</sup> On the other hand, the negative view points out that the testimony is taken under oath with penalty of perjury, to be used at the judicial proceeding in the U.S.; nevertheless, testimony voluntarily taken without oath would be legal just as a private statement.<sup>48)</sup>

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44) Therefore, from a Japanese point of view, deponent’s non-attendance should not invoke discovery sanctions. If the invoked sanction led to the judgment against the Japanese party, Japanese court would not recognize it. See 3(3).

45) U.S. Embassy and Consulates in Japan website [<https://jp.usembassy.gov/u-s-citizen-services/attorneys/depositions-in-japan/#vol>] (last visited Sep. 23, 2018).

## B. Discovery methods other than deposition

The Consular Treaty does not provide document production as a method for taking evidence by a consular officer, nor does the Act on Assistance for the diplomatic agreement route. FRCP Rule 37(b) sets forth sanctions for failure to obey a discovery order: striking pleadings, default judgment, contempt of court, etc. Most Japanese scholars think that a discovery order by the U.S. court is not enforceable in Japan because of conflict with Japanese sovereignty.<sup>49)</sup>

On the other hand, there are a few reported U.S. cases in which a discovery order against a Japanese defendant was argued. Although the order was rendered in these cases, it is not clear how the order was actually enforced in Japan. It appears these decisions do not have significant impacts on current U.S.–Japan cross-border practice, maybe because these opinions were trial-court-level decisions nearly 20 years ago, and not necessarily well-founded.

(i) *Minnesota Mining & Mfg. Co., Inc. v. Nippon Carbide Indus. Co., Inc.*<sup>50)</sup>

In this case, 3M, the U.S. patentee brought a patent infringement action and moved to compel inspection of the defendant's plant and manufacturing process in Japan. The court granted the motion, stating as follows:

“[W]hile we appreciate NCI's offer to allow 3M to inspect its plant pursuant to Japanese procedures, NCI can offer no guarantee that the Japanese Courts will permit the inspection

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46) “Japanese authorities have informed the United States that Articles 3 and 72 of the Japanese Lawyer Law may prohibit the taking of depositions in Japan outside the procedures established for taking consular depositions under Article 17 of the U.S. Japan bilateral Consular Convention by private attorneys not admitted to practice law in Japan.”

“The Japanese Ministry of Foreign Affairs has advised the U.S. Embassy in Tokyo that it considers the conducting of information interviews by in Japan to constitute formal evidence gathering and therefore to be subject to the Japanese law on international investigative assistance.”

U.S. Department of States website [<https://travel.state.gov/content/travel/en/legal/Judicial-Assistance-Country-Information/Japan.html>] (last visited Sep. 23, 2018).

47) Naoki Matsumoto, *Nippon deno Deposition*, 20-10 *Kokusai Shoujihuomu* 128 (1992); Masato Dogauchi, in *Kokusai torihiki hou* 78 (Akira Takakuwa & Kenjiro Egashira eds, 2nd ed., 1993).

48) Kosugi, *supra* note 12 at 244-45, Furuta, *supra* note 10, at 158.

49) Ichiro Kasuga, *Shouko shushu oyobi shouko sirabe niokeru kokusai shihou kyoujyo*, in *Hanrei Minjihou no riron (ge)*, 462 (1995); Kosugi, *supra* note 12 at 247-48; Hideyuki Kobayashi, *Kokusai shihou kyoujyo*, in Sawaki & Aoyama, *supra* note 12, 315. *But see*, Nozomi Tada, *Kokusai minji shoukokyoujyo hou no kenkyu*, 80 (2000).

50) 171 F.R.D. 246 (D. Minn. 1997).

that 3M proposes, let alone that an inspection could be completed prior to February 16, 1997, when six of the seven McGrath Patents will expire. ...

More importantly, even if an inspection that was supervised by the Japanese Courts, ...there is no certainty that a Japanese Court would allow 3M to inspect those aspects of NCI's process that are germane to the issues in this proceeding which are not involved in the action being pursued in Japan.

...the Court held that a District Court has discretion to make reasonableness determinations, "based on its knowledge of the case and of the claims and interests of the parties and the governments whose statutes and policies they invoke." *Id.* at 546, 107 S.Ct. at 2557 [author's note: *Société Nationale Industrielle Aérospatiale v. United States District Court*, 107 S.Ct. 2542, 2557 (1987)]. Given our substantial uncertainty that a resort to Japanese inspection procedures would prove effective, and our conviction that 3M will be prejudiced if an inspection is not undertaken before February 16 of this year, we conclude that 3M's inspection, as allowed by Rule 34, should now proceed. In making this determination, we are particularly mindful that the "on-the-spot" rulings of the Japanese Court, which are a primary reason for the Court's presence during the conduct of such an inspection, could well impair the legitimate purposes of the inspection, and could foster a direct conflict between our views of the discovery process..."<sup>51)</sup>

(ii) *In re Vitamins Antitrust Litigation*<sup>52)</sup>

The court accepted the special master's recommendations to compel discovery against foreign defendants including Eisai Co., Ltd. (hereinafter "ECL"), a company incorporated in Japan, holding as follows:

"First, the Court is not satisfied with ECL's quite reserved and contingent offer for voluntary discovery; the Court has now decided that plaintiffs' revised requests, the very ones ECL says must be further revised, are narrowly tailored and should be answered. Second, the Court is convinced, considering Japan's antipathy to even the Hague procedures, that plaintiffs' discovery requests would not be sufficiently specific to meet the requirements of the Japanese Civil Code. Therefore, despite the Court's respect for the principles of comity and Japan's sovereign interests in protecting its citizens from unduly burdensome discovery,

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51) *Id.* at 249-50.

52) 120 F. Supp. 2d 45 (D.D.C. 2000).

this Court cannot find that these concerns outweigh the need for prompt and efficient resolution of the jurisdictional questions in this case. Accordingly, the Court will adopt the Special Master's recommendation that jurisdictional discovery against ECL proceed under the Federal Rules."<sup>53)</sup>

### C. Recognition of the judgment using evidence obtained by illegal discovery in Japan

As described above, a U.S. court can theoretically impose discovery sanctions against a Japanese party, while Japanese law deems that the discovery order is not directly enforceable in Japan. What if the U.S. Court renders the judgment based on evidence obtained by the illegal discovery in Japan, or on discovery sanctions imposed on the non-obeying Japanese party?

JCCP Article 118 sets out requirements for foreign judgments to be recognized in Japan. One of the requirements is called the "public policy requirement"; that is, "the content of the judgment and the court proceeding are not contrary to public policy in Japan" (Art. 118(iii)). This requirement has criteria developed by case law. The mere fact that the foreign judgment is based on the system that Japan does not adopt is not always enough to invoke lack of the requirement. However, the court shall refuse recognition if it finds that the difference in system and its outcome are intolerable to the basic principles and philosophy of Japanese law.<sup>54)</sup>

Some Japanese legal scholars insist that U.S. judgments using testimony obtained by the informal deposition in Japan could violate the public policy requirement.<sup>55)</sup> Nevertheless, according to the general rule,<sup>56)</sup> the mere fact of the informal deposition would not always constitute the intolerable difference from public policy. There is no reported case in which recognition of the judgment based on informal deposition was discussed in a Japanese court.

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53) *Id.* at 56.

54) Sup. Ct. Jul. 11, 1997 (51-6 Minshu 273).

55) Kosugi, *supra* note 12, at 248.

56) Even if the foreign procedure doesn't harmonize with Japanese procedural public policy, Japanese court should not refuse recognition as long as the procedural disharmony did not affect outcome of the foreign judgment (Akira Takakuwa, Shogaiteki minjisoshoujiken niokeru soutatsu to shoukoshirabe. 37-4 Hosoujihou 821, 975 (1985)).

#### **IV. Epilogue**

Until more than a decade ago, U.S. extraterritorial discovery in Japan was a hot issue. However, there has been little development in judicial assistance on taking evidence over the last 10 years. This might be partly because East Asian countries have not yet established regional cooperation systems like the E.U., and arbitration is getting more popular for cross-border business disputes.