CASES AND ISSUES IN JAPANESE PRIVATE INTERNATIONAL LAW

LAW APPLICABLE TO CHOICE-OF-COURT AGREEMENTS

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Introduction

There can hardly be any disagreement that the procedural effects of choice-of-court agreements are determined by the law of the forum (*i.e.*, the law of the place where an action has been brought, whether it is pursuant to or in breach of the choice-of-court agreement). Neither can there be any doubt that effect may be given only to validly formed choice-of-court agreements, and only in accordance with their meaning and scope. Opinion may differ, however, as to what law is applicable to determine the formation, validity and interpretation of choice-of-court agreements. Should they also be governed by the law of the forum or should they be submitted to choice-of-law analysis? If the latter is correct, exactly what are the issues which should be submitted to choice-of-law analysis? Is it permissible to subject any of such issues to the law of the forum at all? What should be the choice-of-law analysis for choice-of-court agreements? And, in the final analysis, how should the law in this area be developed? The present article will discuss these questions through the examination of Japanese law.

I. The Leading Case

In Japan, the leading case on international choice-of-court agreements is widely known as the *Chisadane* case, the only case in which the Supreme Court has had an opportunity to consider such agreements. At first instance, the Kobe District Court found that the choice-of-court agreement in that case had been validly formed without addressing the question what law should be applied to determine the valid formation of a choice-of-court agreement.[1] The parties did not argue the point but a few of the published comments on the case debated the question, one of them arguing that the valid formation of a choice-of-court agreement should be determined by the governing law of the contract in which the agreement was contained.[2] On appeal, the Osaka High Court, presumably con-

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[1] Kobe District Court, Judgment, July 18, 1963, H.J. (342) 29 [1963].

[2] Hisashi Tanikawa, "Case Comment" *Juristo* [Jurist], Vol. 350 (1966), p. 135. *Cf.* Yutaka Kubota, "Case Comment," *Juristo* [Jurist], No. 295 (1964), p. 91 (who argued in favor of the application of the law of the forum).

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scious of the scholarly debate, devoted a paragraph to this question and held:[3]

> In determining whether a choice-of-court agreement has been validly formed, the question which precedes is under what law it should be determined. [...] It might be thought that the valid formation of the agreement itself should first be determined under the governing law of the contract in which it is contained [...] but since choice-of-court agreements are agreements concerning a procedural conduct and the question relates to the exclusion of the judicial power of the forum, the governing law of the validity of the present choice-of-court agreement is not the governing law of the contract in which it is contained but the international civil procedure law of Japan, Japan being the forum in which this question is being considered.

On a further appeal, the Supreme Court observed, "the lower court gave the ruling that the international civil procedure law of Japan was applicable only in the context of responding to the contention ... that the choice-of-court agreement had the effect of excluding the court's jurisdiction in the instant case."[4] What was meant by the Court in this passage is not entirely clear. It might be intended as a full endorsement of the quoted statement of the High Court; however, it could also be read more narrowly as indicating that the Supreme Court had re-interpreted the High Court's statement as relating only to the procedural effect rather than to the formation and validity of choice-of-court agreements. The Supreme Court's intention is further obscured by the fact that the quoted remark was not made in the context of discussing formation or validity but, was made in passing, where it gave a short shrift to the appellant's contention that the choice-of-court agreement in the instant case did not cover a tort claim arising out of the breach of the contract.

Although the Supreme Court in *Chisadane* did not articulate its own view on what should be the governing law of various issues of choice-of-court agreements, the Court did set forth the following principles (hereinafter, "the *Chisadane* principles"): (i) regarding the formal validity of an international choice-of-court agreement, it is not necessary for both offer and acceptance to be delivered by means of a signed document but it is sufficient if the chosen courts are expressly specified in a document made by either or both of the parties and the existence and content of the agreement are clear; (ii) under the civil procedure law of Japan, effect will in principle be given to a foreign choice-of-court agreement excluding the jurisdiction of the Japanese courts, if the case does not belong to the realm of exclusive jurisdiction of the Japanese courts, and if the chosen foreign courts would have juris-

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[3] Osaka High Court, Judgment, December 15, 1969, 29 Minshu (10) 1585 [1975].

[4] Supreme Court, Judgment, November 28, 1975, 29 Minshu (10) 1554 [1975]. English translation is available at *Japanese Annual of International Law*, No. 20 (1976) p. 106.

diction in the case; and (iii) effect may, however, be denied to a choice-of-court agreement if it is "extremely unreasonable and contrary to the law of public policy" (hereinafter, "the public policy test").

II Background

1. Subsequent Decisions of the Japanese Lower Courts

The lower courts in Japan regularly recite and follow the *Chisadane* principles. They generally do not discuss what should be the governing law of various issues of choice-of-court agreements.[5] In a few cases, the courts did declare that the valid formation and effect of choice-of-court agreements were subject to the international civil procedure law of Japan before going on to recite the *Chisadane* principles.[6] But it must be noted that those principles leave open a number of issues of choice-of-court agreements.

Firstly, the *Chisadane* principles do not specifically deal with the substantive validity of a choice-of-court agreement vitiated by mistake, fraud, duress and the like. In a case where this issue arose, the Tokyo District Court[7] refused to apply Philippine law which was the governing law of the contract containing the choice-of-court agreement. The court instead found it appropriate to determine the validity of choice-of-court agreements by the international civil procedure law of Japan. The court upheld validity without spelling out the specific norms it applied, neither articulating the precise content of the international civil procedure law of Japan concerning substantive validity nor applying the Civil Code which contains provisions dealing with the manifestation of intention tainted by mistake, fraud and duress.

The issue of formation, as distinguished from validity, of choice-of-court agreements is also not specifically dealt with by the *Chisadane* principles. The

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[5] *E.g.* Kyoto District Court, Judgment, January 29, 2015, 2015WLJPCA01296002; Tokyo District Court, Judgment, September 24, 2008, 2008WLJPCA09248005; Tokyo District Court, Judgment, April 11, 2008, H.T. (1276) 332 [2008]; Tokyo High Court, Judgment, November 28, 2000 (*United Airlines* case) H.J. (1743) 137 [2001]; and Osaka District Court, Judgment, January 24, 1992, H.T. (804) 179 [1993].

[6] *E.g.* Tokyo District Court, Judgment, April 19, 2013, 2013WLJPCA04198001 and Tokyo District Court, Judgment, January 14, 2014, H.T. (1407) 340 [2015]. The former expressly refused to apply Swiss law, the governing law of the contract containing the choice-of-court agreement. See also Tokyo District Court, Judgment, June 19, 2006 (2006WLJPCA06190004) for a statement more specifically directed to validity.

[7] Tokyo District Court, Judgment, June 19, 2006 (2006WLJPCA06190004). The court devoted a section of its judgment to the analysis of validity before it proceeded to another section on effect in which it recited and followed the *Chisadane* principles.

lower courts generally reach their conclusions on formation through factual appreciation.[8] Thus, in a case featuring a choice-of-court agreement in an employment contract, the Tokyo High Court found the core of the problem was whether the employee understood the terms of the contract prepared by the employer. Noting that the contract was not written in particularly difficult English and that the employee was given opportunities to ask questions about the terms, the court found that the employment contract had been formed and concluded from that finding that the choice-of-court agreement had also been formed.[9] The court did not discuss the governing law of the formation of choice-of-court agreements. In another case, the Osaka District Court made no mention of the applicable law when it held that the choice-of-court agreement, which was contained in a lease contract, could not be found to exist on the ground that the contract was deceitful as it had been concluded for the purpose of avoiding tax.[10]

The issue of interpretation, too, is omitted from the principles laid out by the Supreme Court in *Chisadane*. The Court did find that the agreement in the instant case 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 and exclude other fora. However, the Court did not formulate rules for distinguishing exclusive from non-exclusive 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 lower courts have been relying on factual appreciation and their own sense of reasonableness in interpreting choice-of-court agreements. Thus, in one 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.[11] The scope of choice-of-court agreements has been interpreted in the same way. Thus, in one case, the Tokyo High Court found it "extremely unreasonable" to interpret that the choice-of-court agreement in an employment contract with respect to "all claims, complaints, causes of action, and disputes relating any way to the conditions of employment" should not cover disputes arising after dismissal.[12] In another case, the Tokyo District Court held that a choice-of-court

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[8] See *e.g.* the *United Airlines* case, *supra* note 5 and Tokyo District Court, Judgment, October 28, 2011, H.J. (2157) 60 [2012].

[9] The *United Airlines* case, *supra* note 5. The court devoted a section of its judgment to the analysis of formation before it proceeded to another section on effect in which it recited and followed the *Chisadane* principles.

[10] Osaka District Court, Judgment, January 24, 1992, *supra* note 5.

[11] Tokyo District Court, Judgment, September 24, 2008, *supra* note 5.

[12] The *United Airlines* case, *supra* note 5.

agreement in a franchise contract covered claims in both contract and tort in accordance with what it found to be the "reasonable and purposive interpretation of the language and intent" of the agreement. To come to that conclusion, the court made no reference to French law which had been chosen as the governing law of the franchise agreement.[13] Only in one case, the court alluded to the possibility of interpreting a choice-of-court agreement under the law governing the contract in which it was contained but did not discuss the correctness of that approach.[14]

As seen in the forgoing analysis, Japanese courts generally decide the cases by applying the *Chisadane* principles. With respect to the issues not specifically covered by those principles, they generally do not engage in choice-of-law analysis. Instead, they solve them through factual appreciation or by relying on their own sense of reasonableness.

An interesting contrast may be made with arbitration agreements. In the *Ringling Circus* case,[15] an action was brought in Japan in the alleged breach of an arbitration agreement. The Supreme Court found it appropriate to determine the governing law of the valid formation and effects of arbitration agreements primarily by the will of the parties in accordance with the Japanese choice-of-law rules for contracts. On the facts of the case, it applied the law of New York (comprising the federal arbitration law) to determine the scope of the arbitration agreement.

2. Amendment of the Japanese Code of Civil Procedure

The Japanese Code of Civil Procedure (hereinafter, "CCP") was amended with effect from 1 April 2012 to codify the rules of international jurisdiction for the first time in its history. As far as choice-of-court agreements are concerned, the following provisions were made in Article 3-7 of the CCP:

> (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).

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[13] Tokyo District Court, Judgment, April 11, 2008, *supra* note 5.

[14] Tokyo District Court, Judgment, June 4, 2010, 2010WLJPCA06048007.

[15] Supreme Court, Judgment, September 4, 1997, 51 Minshu (8) 3657 [1997].

(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.

(5) The agreement provided in Paragraph (1) having as its object a future dispute arising 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 business operator in Japan or in a foreign country.

(6) The agreement provided in Paragraph (1) having as its object a future civil dispute 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.

The extent to which the Supreme Court ruling in *Chisadane* has survived the amendment of the CCP is a matter of interpretation.

With respect to formal validity, Article 3-7(2) has confirmed the writing requirement. The component of the *Chisadane* principles which is concerned with formal validity has arguably survived as furnishing the precise meaning to the writing requirement.

The prerequisites for giving effect to exclusive foreign choice-of-court agreements as enunciated in the *Chisadane* principles have been enshrined in Article 3-7(4) as well as Article 3-10 of the CCP which provides that Article 3-7, among other provisions, has no application where, with respect to the action in question, the exclusive jurisdiction of the Japanese courts is prescribed by legislation.

The public policy test contained in the *Chisadane* principles was not given statutory footing but arguably has survived the amendment since no statutory basis would need to be found to safeguard the fundamental legal value of Japan. Thus, the public policy test may be necessary to deny effect to an exclusive choice-of-court agreement, if it specifies a country whose judiciary is corrupted or biased, or if it is concluded to oust the application of Japanese rules of mandatory nature. The need to rely on it, however, has been greatly curtailed by the enactment of paragraphs 5 and 6 of Article 3-7. While the courts have been reluctant to find the violation of public policy until several years ago,[16] there have been several more recent cases in which the courts found violations.[17] These were cases involving consumer contracts or individual employment relations.[18] They fell outside the temporal scope of application of Article 3-7[19] but they would today be decided under paragraphs 5 and 6 of that article. It is not hard to believe that the findings of violation in those decisions were influenced by the Act for the amendment of the CCP whose promulgation preceded those decisions.

3. Japanese Scholarly Debate

Scholarly debate on the law applicable to choice-of-court agreements can be traced back to two contrasting views expressed in the published comments on the first instance ruling in *Chisadane*. One author said:[20]

> A choice-of-court agreement is a kind of contract and there is a question under what law its valid formation must be determined. [...] If we are to follow the normal choice-of-law analysis, there is nothing in the instant contract [in which the choice-of-court agreement is contained] which connects the contract to Japanese law. But I suppose that the formation of the choice-of-court agreement should be determined by Japanese law as the

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[16] In the corresponding period, there was only one known case (Tokyo District Court, Judgment, September 13, 1999, *Kaijiho Kenkyukaishi* [Maritime Law Research Journal], Vol. 154 (2000), p. 89) in which public policy was found to be violated.

[17] Tokyo High Court, Judgment, June 28, 2012, LEX/DB 25504140; Tokyo District Court, Judgment, November 14, 2012, LEX/DB 25483568; Osaka High Court, Judgment, February 20, 2014, H.J. (2225) 77 [2014]; and the Tokyo High Court, Judgment, November 17, 2014, H.T. (1409) 200 [2015].

[18] Among the cases mentioned in the preceding footnote, the cases of the Tokyo High Court were consumer contract cases and the Osaka High Court case involved consumer contracts. The Tokyo District Court case concerned individual employment relations.

[19] This provision has application to choice-of-court agreements concluded on or after April 1, 2012.

[20] Kubota, *supra* note 2, p. 91.

> law of the forum. Because the question is whether an agreement purporting to conclusively exclude the jurisdiction of the Japanese courts has been validly formed, it should be determined by Japanese law.

Another commentator raised doubt against this view. While apparently admitting that the permissibility of choice-of-court agreements is a matter for the law of the forum, he argued:[21]

> Even if it is a procedural agreement, [the valid formation of] a choice-of-court agreement itself should, as a preliminary question, be determined by the governing law of the contract [in which it is contained]. Accordingly, the agreement in the instant case should be determined by Dutch law.

For quite a while, the view favoring the application of the international civil procedure law of the forum held sway,[22] principally on the reasoning that choice-of-court agreements are procedural agreements. More recently, however, the perspective that respects the parties' choice of law with a view, *inter alia*, to protecting the parties' expectations is gaining ground.[23]

III. Analysis

1. Procedural and Non-procedural Issues of Choice-of-court Agreements

It cannot be denied that a choice-of-court agreement is an agreement of procedural character in the sense that it has procedural dimensions. The fact that an agreement has a procedural character, however, does not warrant the assumption

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[21] Tanikawa, *supra* note 2, p. 135.

[22] *E.g.* Makoto Hiratsuka, "Case Comment," *Showa 45-nendo Jyuyou Hanrei Kaisetsu (Jurisuto Rinzi Zokan)* [Review on Important Cases of the Year 1970 (Jurist Special Issues)] (1971), p. 217; Yoshio Tameike, "Case Comment," *Kaijiho Hanrei Hyakusen* [Selected Court Cases on Maritime Law] (1973), p. 203; Sueo Ikehara, "Kokusai Saiban Kankatsuken" [International Adjudicatory Jurisdiction], *Shin Jitsumu Minjisosho Koza* [New Courses on Practice of Civil Litigation] (1982), p. 36; Satoshi Watanabe, "Case Comment," *Kokusaishiho Hanrei Hyakusen* [Selected Court Cases on Private International Law] (2007), p. 177.

[23] *E.g.* Kazuhiko Yamamoto, "Kokusai Minji Soshoho" [International Civil Procedure Law], in Hideo Saito *et al.* eds., *Chukai Minji Soshoho* [Commentary on Civil Procedure Law], Volume 5 (2nd ed., 1991), p. 403; Tsunehisa Yamada, "Kokusai Saibankankatsu no Goui" [Agreement on International Jurisdiction], *Dokkyou Hougaku* [Dokkyou Law Review], Vol. 48 (1999), p. 126; Tadashi Kanzaki, "Goi ni yoru Kankatsuken" [Jurisdiction based on Agreement] in Akira Takakuwa and Masato Dogauchi eds., *Kokusai Minji Soshoho* [International Civil Procedure Law] (2002), p. 140; Takuya Shima, "Case Comment," *Juristo* [Jurist], No. 1454 (2013), p. 120; Shiho Kato, "Case Comment," *Juristo* [Jurist], No. 1462 (2014), p. 129.

that each and every issue pertaining to it is a procedural issue since the agreement may also have non-procedural dimensions. As put by Hartley:[24]

> [A] choice-of-court agreement has a hybrid nature. On the one hand, it is a private-law contract: to this extent it falls under the law of contract; on the other hand, it has procedural (jurisdictional) consequences: to this extent, it falls under the law of procedure. In order to be valid, it must comply with the normal requirements for a private-law contract. If it is not valid as a contract, it can have no jurisdictional effects. However, once it is decided that it is valid, we then move from the law of contract to that of procedure to determine what its effects are [...].

It is, therefore, unhelpful to pin a procedural label on choice-of-court agreements. For the purpose of deciding applicable laws, a better approach would be to consider which issues are procedural and which are not. The rationale of the maxim *forum regit processum* (the law of the forum governs procedure) should be understood to lie in the significant implications which the procedural issues have for the exercise of judicial power. Accordingly, only the issues which have such implications should be characterized as procedural.

Among the number of issues pertaining to choice-of-court agreements, their effects of conferring or depriving jurisdiction are obviously procedural.[25] The permissibility of giving such procedural effects, too, has significant implications for the exercise of judicial power and, therefore, should be seen as procedural. The issues of permissibility are numerous, including whether agreements choosing the courts situated remotely from the facts of the case may be given effect and whether *ex ante* (before the event) choice-of-court agreements may be given effect. The formation and validity of choice-of-court agreements, on the other hand, have less direct implications for the exercise of judicial power and should be regarded as non-procedural issues, in view also of the fact that the lack of consent and the vitiating factors such as mistake, fraud and duress do not pertain specifically to choice-of-court agreements but can be relevant to any kind of contract. By the same token, the issues of interpretation should also be regarded as non-procedural. They include whether the parties' subjective intent prevails over the ob-

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[24] Trevor Hartley, *Choice-of-court Agreements under the European and International Instruments* (2013), para. 7.01. For similar observations by Japanese authors, see *e.g.* Katsumi Yamamoto, "Shouhisha Keiyakuhou to Minjitetsuzuhihou" [Consumer Contract Act and Civil Procedure Law], *Juristo* [Jurist], No. 1200 (2001), p. 106; Yamada, *supra* note 23, p. 123.

[25] Not all issues related to the effects of choice-of-court agreements are necessarily procedural issues. The recoverability of damages for their breach, for example, may be seen as a non-procedural issue: See Koji Takahashi, "Damages for Breach of a Choice-of-Court Agreement," *Yearbook of Private International Law*, Vol. 10 (2008), p. 67.

jective meaning of the words used, whether the facts after the conclusion of the agreement are admissible for construing agreements, and whether the ambiguity of a term should be interpreted against the interests of the party drafting the agreement (*contra proferentem*).

It follows from the foregoing analysis that the issues of formation, validity, and interpretation of choice-of-court agreements should be regarded as non-procedural issues. As such, they should be submitted to choice-of-law analysis. Such treatment can also be supported by the pragmatic consideration, noted earlier,[26] of respecting the parties' expectations. However, there is a caveat that must accompany this conclusion, as explained below.

2. Overriding Mandatory Rules of the Forum

It is generally open to lawmakers to subject any non-procedural issues to overriding mandatory rules[27] of the forum which are applicable, to the exclusion of the otherwise applicable law.

The promotion of legal certainty can be a legitimate justification for creating overriding mandatory rules. The legitimacy is greater in the area of choice-of-court agreements, because such agreements are concluded with the aim of securing legal certainty. Furthermore, it is the reality that the content of law with regard to various issues of choice-of-court agreements tends to be obscure. The obscurity is due partly to uncertainty as to whether and to what extent the normal rules of contract law are applicable to choice-of-court agreements. Thus, it may not be clear whether the rule of a given legal system which says that a contract need not be concluded in writing extends to a choice-of-court agreement contained in a contract. Establishing clear rules as overriding mandatory rules would make it certain what choice-of-court agreements will be sufficient to confer or deprive jurisdiction in the given forum.

This does not mean, however, that laying down overriding mandatory rules would improve legal certainty with respect to all the non-procedural issues. Where, for example, a choice-of-court clause is contained in a standard form contract, since such a contract is concluded on a "take it or leave it" basis, subjecting the choice-of-court clause alone to the overriding mandatory rules of the forum may defeat the expectation of the parties if, as may often be the case, the standard form

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[26] See the text accompanying *supra* note 23.

[27] While it might be considered that procedural rules, too, possess the character of overriding mandatory rules, the distinction between procedural and non-procedural issues seems useful to be maintained since procedural issues are exclusively governed by the law of the forum, while non-procedural issues are subject to the law of the forum only to the extent it lays down overriding mandatory rules.

has been prepared with the law governing the contract in mind. Careful consideration should be given, with respect to each non-procedural issue, whether establishing clear rules as overriding mandatory rules would be more effective to promote legal certainty than respecting the parties' choice of law.

3. Observation and Rationalization of Current Japanese Law

From the viewpoint outlined above, the following observation and rationalization may be made of the current Japanese law.

Paragraph 1 of Article 3-7 provides for the procedural effects of choice-of-court agreements. The general permissibility of choice-of-court agreements is provided by this paragraph as well as by the public policy test of the *Chisadane* principle. The permissibility of exclusive choice-of-court agreements in favor of foreign courts is provided by paragraph 4 of Article 3-7 and Article 3-10. The permissibility of choice-of-court agreements in consumer contracts and individual employment relationships are provided respectively by paragraphs 5 and 6 of Article 3-7. These norms form part of the law of the forum and are applicable as such, since they deal with procedural issues. The enactment of paragraphs 5 and 6 of Article 3-7 has significantly improved legal certainty. Prior to the enactment, there had been inconsistent rulings under the public policy test[28] on the facts which would today result in consistent decisions under Article 3-7(5).

Paragraphs 2 and 3 of Article 3-7 provide for the formal validity of choice-of-court agreements, the exact meaning of which is furnished by the *Chisadane* principles. Although formal validity is a non-procedural issue, the application of these norms in all cases heard in Japan may be explained as the application of overriding mandatory rules.

The lower courts' general tendency of reciting and following the *Chisadane* principles is defensible, since those principles either concern procedural issues or constitute overriding mandatory rules and are, accordingly, applicable as a part of the law of the forum. The statement made in some lower court cases that the valid formation and effect of choice-of-court agreements are subject to the international civil procedure law of Japan seems, however, too broad to be supportable as it covers many issues which should be treated as non-procedural. In the same vein, the approach, implicit in some lower court cases, of determining formation, validity and interpretation solely by the court's own sense of reasonableness cannot

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[28] *E.g.* Tokyo High Court, Judgment, June 28, 2012, *supra* note 17, reversing Tokyo District Court, Judgment, February 14, 2012 (LEX/DB 25492239); and Tokyo High Court, Judgment, November 17, 2014, *supra* note 17, reversing Tokyo District Court, Judgment, January 14, 2014, *supra* note 6. Osaka High Court, Judgment, February 20, 2014, *supra* note 17, also reversed the judgment of first instance (not yet reported) which had reached a contrary outcome presumably through the public policy test.

be commended.

Conclusion

In the current international legal environment where the jurisdictional rules prescribed by law often do not produce predictable results, a choice-of-court agreement is just about the only means available to private parties to secure legal certainty. The law should be crafted to support that goal. To promote legal certainty, Japanese law may be developed along the following lines.

Firstly, the issues of choice-of-court agreements which may be characterized as non-procedural (as considered above) should be submitted to choice-of-law analysis, so that the parties may choose the governing law. In this regard, the Supreme Court would do well to align choice-of-court agreements with arbitration agreements. The ratification of the Convention of 30 June 2005 on Choice of Court Agreements (hereinafter, the Hague Choice-of-Court Convention) would bring about the same effect as much as it submits substantive validity to choice-of-law analysis.[29]

Secondly, the rules applicable to procedural issues should be clarified, so that the vague and omnipotent notion of public policy has a reduced role. It may be useful to clarify, for example, the permissibility of choice-of-court agreements in certain contracts. Besides consumer and employment contracts, there are contracts which typically involve parties with unequal bargaining power, such as franchise contracts, agency contracts, and subcontracts for manufacturing. Should it be considered that choice-of-court agreements contained in such contracts ought to be given restrictive effects, laying down black-letter rules to prescribe the precise conditions for giving them effect, as do paragraphs 5 and 6 of Article 3-7 for consumer and employment contracts, would improve legal certainty.

Thirdly, consideration should be given to whether there are any non-procedural issues with respect to which establishing overriding mandatory rules would promote legal certainty. How to distinguish between exclusive and non-exclusive choice-of-court agreements, for example, is an issue of interpretation to which rules applicable through choice-of-law process will often fail to provide an unequivocal answer. This issue would benefit from having clear rules applicable as overriding mandatory rules of the forum. Various solutions are conceivable, including a rebuttable presumption in favor of exclusiveness as stipulated by the

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[29] Under Articles 5(1), 6(a), and 9(a), choice-of-court agreements may be given effect only if they are not null and void under the law of the State of the chosen court. The law in this context is understood to include choice-of-law rules. See Trevor Hartley and Masato Dogauchi, *Explanatory Report on the 2005 Hague Choice of Court Agreements Convention*, para. 125. *Available at* <http://www.hcch.net/index_en.php?act=publications.details&pid=3959>.

Hague Choice-of-Court Convention.[30]

Fourthly, the content of Japanese law as applicable through choice-of-law process to non-procedural issues should be clarified. In view of the frequency with which choice-of-court clauses are contained in standard form contracts, it would be particularly useful to clarify whether the rules for the formation of standard form contracts[31] encompass choice-of-court clauses.

Fifthly, it would be helpful to clarify the choice-of-law analysis for the non-procedural issues of choice-of-court agreements. It is submitted[32] 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,[33] 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.

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[30] Art. 3(b).

[31] The bill for amending the Japanese Civil Code contains such rules which, if the bill is passed, are to be inserted as Arts. 548-2 and 548-3 in the Code.

[32] For a full discussion, see Koji Takahashi, "Chyuusai Goui oyobi Kankatsu Goui no Dokuritsusei Gensoku: Jyunkyohou Kettei Process ni okeru Saikentou" [Autonomy of Arbitration Agreement and Choice-of-Court Agreement: Re-evaluation in Choice-of-Law Context], *Minsho-ho Zasshi* [Journal of Civil and Commercial Law], Vol. 147-3 (2012), p. 275.

[33] This position is not inconsistent with the Hague Choice-of-Court Convention, since the latter provides that the law (understood to include choice-of-law rules) of the State of the courts chosen is applicable (see *supra* note 29), leaving open the content of the choice-of-law rules. The Convention contains a provision on severability of choice-of-court agreements (Art. 3(d)), stating, "[t]he validity of the exclusive choice of court agreement cannot be contested solely on the ground that the contract is not valid." The severability principle should not, it is submitted, be understood to extend to the choice-of-law process.