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International Banking Activities, Applicable Law and Jurisdiction

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I. Banking Activities and Applicable Law

A. Introduction

The question arises as to the applicability of the law of a particular country in transactions between a bank in Japan and an overseas client, and in transactions between a client in Japan and an overseas bank. There are, in turn, questions as to the governing law when a branch in Japan is the branch of a foreign bank and when a foreign branch is a branch of a Japanese bank and whether or not the former branch should be considered as a bank situated

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in Japan and the latter branch as one situated abroad. These are secondary questions which will be discussed within the context of the first question raised in the beginning. Similarly, the question of whether or not the foreign branch of a Japanese company is considered to be an overseas client, and whether or not the Japanese branch of a foreign company is considered to be a Japanese client is one which falls within this secondary question.

The word "transactions" in this context consists, among other things, of activities related to accepting deposits, transferring funds, loans (secured by guarantees or securities), underwriting bonds and debentures (domestic and foreign) issued abroad, underwriting foreign bonds (foreign and domestic) issued in Japan, interbank transactions, and issuing letters of credit. Transactions such as the purchase of immovables by a bank are not included within this classification. This article deals exclusively with a discussion of credit and debt relations in which the bank is at least one of the parties thereto.

B. The Will of the Parties

The "Law Concerning Application of Laws" (hereinafter referred to as the "Law") is the Japanese law which determines the appropriately applicable law for bank transactions. Similarly with legislation in many foreign countries, the law first stipulates that the will of the parties concerned must be respected, and that the law should conform to the intent of the parties (Art. 7, Par. 1). "The will of the parties" manifests itself in three ways: expressed, implied and assumed to exist (Hypothetische Parteiwille), corresponding to that order of priority. When the will which is assumed to exist was first discussed in early days in West Germany, it had reference to the hypothetical will of the parties, believing that they would have chosen the proper law if they had had the choice. The situation has now changed, and the will which is assumed to exist is now understood by scholars in West Germany as meaning that

this will expresses a way of determining the proper law to be applied in accordance with a comparison and adjustment of the interests of the parties.¹⁾ It is inappropriate, therefore, to translate this *Hypothetische Parteiwille* as "hypothetic will", because it has ceased to become hypothetic. But this interpretation is slightly extreme, and is likely to invite misunderstanding. My own interpretation of the hypothetic will in Japan is somewhat different. The expressed or implied will was not often found in the past, because there was no clear indication of its existence. But even so, we should not arrive at a hasty conclusion without considering all the facts. Rather, we should regard the will which is assumed to exist as a sort of rule for recognizing the need to conform to the actual conditions, in which the normal or natural will of the parties in relation to concrete issues is important.

For instance, the parties may feel that they should commit themselves to the laws to which they have been accustomed by nature through just ordinary living and to the laws, to which they have been accustomed, related to business. In relation to business activities, their thoughts will center mainly around the person or entity which carries on the business. Such a concept could indeed be regarded as conforming adequately to the positive law which primarily refers to will. Figuratively speaking, the hypothetic will is a bridge spanning the Corinth Canal dividing Paragraphs 1 and 2 of Article 7 of the Law. When it is impossible to ascertain the will of the parties despite all efforts, the laws of the country in which a business transaction takes place should govern (Art. 7, Par. 2 of the Law).

1) It is clearly stated in Kegel, *Die Bankgeschäfte im deutschen internationalen Privatrecht* (Gedächtnisschrift für Rudolf Schmidt, 1966, S. 216, 220). In addition, since Canaris, *Bankvertragsrecht*, 1975, S. 1218, 1275, fully follows Kegel, he may be regarded as a disciple of the interest-comparison-and-adjustment school.

C. Japanese Judicial Precedents

There are a number of judicial precedents related to issues concerning the proper law to be applied to bank transactions.

1. One such precedent deals with the transfer of an unnamed time deposit of a South Korean citizen in a Korean bank to a Japanese who sued the bank. The Tokyo District Court ruled on July 11, 1967¹⁾ that it was immaterial to conclude from the fact that both parties to the time deposit were Korean that they designated the South Korean law as the proper forum. The Japanese law was held to be the proper law to be applied, since Japan was the place where the transaction was performed.

2. Another precedent deals with the pledge of a time deposit as collateral. This was a case in which a Chinese resident in Japan, who had acquired a credit based on an order of assignment by a court of a time deposit in a Thai bank, sued the Japan branch of the Thai bank where it was deposited. The branch argued that the money could not be collected, since the Hong Kong branch of this bank had pledged the deposit before the assignment order had been issued. The Tokyo District Court ruled on April 5, 1972²⁾ that, although the proper law related to the pledge is principally that of the place of the time deposit, the Japan branch of a foreign bank is concerned with serving residents in Japan as its main customers. In addition, this time deposit contract was concluded in Tokyo, based upon the yen currency, and used the printed letters of a certificate, which even though written in English, the implication was that the parties intended that the Japanese law was to be designated. The

1) Financial Law No. 485, p. 33.

2) Kaminshu Vol. 23, Nos. 1-4, p. 180 and Judicial Precedents No. 653, p. 111.

Tokyo High Court ruled on December 19, 1974¹⁾ (appeal instance) and the First Petty Bench of the Supreme Court ruled on April 20, 1978²⁾ (re-appeal instance), both supporting the judgment of the court of first instance.

3. Another precedent deals with a contract related to collection of bills. This was a case in which a Japanese company had attempted to collect bills successively through a Japanese bank, a Paris branch of a U.S. bank, and a Paris branch of a French bank, and then filed a claim for damages against the French bank, after the collection of the bills had failed. The Tokyo District Court ruled on May 27, 1950³⁾ that "the contract to collect bills came finally into effect at the conclusion of the third contract between the Paris branch of the U.S. bank and the Paris branch of the French bank, and that, as a consequence, it could not be concluded that the French law was specifically excluded. Hence it was reasonable to conclude that it was the will of the parties to be governed by the French law."

4. Another precedent deals with the proper law to be applied in cases of bonds and debentures. This was a case in which a Japanese living in Japan, who had acquired franc-denominated debentures which the Tokyo Municipal Government issued through a French bank, sued the Tokyo Municipal Government. The former Supreme Court (Daishin-in) ruled on December 27, 1934⁴⁾ that since there was no mention of the proper forum to adjudicate a claim based on the bond, the proper law applicable to such bonds was the French law, and whether the sum paid should fluctuate or not, in accordance with the fluctuation in the franc, was an issue which had to be adjudicated according to the French law.

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- 1) Kaminshu Vol. 25, Nos. 9-12, p. 1042, Judicial Precedents No. 802, p. 214.
 - 2) Minshu Vol. 32, No. 3, p. 616, Financial Law No. 862, p. 26.
 - 3) Kaminshu Vol. 21, Nos. 3 and 4, p. 500, Financial Law No. 580, p. 24.
 - 4) Minshu Vol. 13, p. 2386.

5. And finally, another precedent deals with letters of credit. This was a case in which an American company, which had purchased Adzuki beans differing from the offered quality, sued a Japanese company, the seller, and a Japanese bank which was the payee of the letter of credit that had guaranteed compensation for damages caused by the defects. The Sapporo District Court ruled on March 29, 1974¹⁾ that where the proper law has not been designated by the parties, the Japanese law should govern under Article 9 of the Law, since the Japanese corporation issued a notification of subscription by cable from Sapporo regarding the basic contract and the contract related to compensation.

D. Some of the Problems Involved

1. There is no provision in either the existing Bank Transactions Agreement or the surety clause at the end thereof in connection with the proper law to be applied. The same is true with the English translation of the text published by the Federation of Bankers Association of Japan. Except in rare cases in which managements are prudent and have exercised a high degree of care, the individual contracts executed at various banks and Japanese branches of foreign banks are designed primarily for domestic business, and as a consequence, they have adopted the Federation's form (or its English translation) without modification. The same situation exists with reference to transferrable deposits and certificates of deposit (including the English text).

The related parties are in effect using contracts in which they have not exercised any precautions about the proper law. One might ask if they are fully cognizant of the way to determine the proper law? The answer is of course no. The situation is indeed alarming.

2. It is my feeling that the conclusions and arguments in all

1) Financial Law No. 736, p. 32, Judicial Precedents No. 750, p. 86.

of the judicial precedents which I have referred to above were inadequate and defective. So there is really nothing to learn from these. If a clearly expressed or implied will can be recognized, it is my opinion that it is appropriate to proceed in accordance with its existence, in which case there are really no problems. If it cannot be recognized, however, it is inappropriate to conclude summarily, and simply for that reason, that the law of the place where the transaction takes place shall govern. Further research on the "hypothetic will" is necessary in order to reach a sound conclusion.

Almost without exception, parties tend to think of laws in terms of their own countries and to express the desire to be governed by such laws, and not by the laws of a country which is strange to them. The natural person desires to be governed by the law of his own country; the juridical person by the law applicable to the place in which an office is located and in which business is transacted.

For the juridical person, therefore, the gist of the problem is the law of the place where the transaction takes place—a branch store or a branch office—and the address of the main office is not an important element in influencing judgment. The principal clients to be served when a foreign bank opens a branch in Japan and when a Japanese bank opens branches in overseas countries are obviously the people or organizations of those respective countries. It would, therefore, be natural to suppose that the laws of those respective countries would be accepted as well. Thus the judicial precedent set forth in C. 1. above is unreasonable, and the judicial precedents set forth in C. 2. and C. 3. could have been arrived at in more concise and comprehensive terms.

We next arrive at a problem which is related to the relative degree of hardships which a particular party would sustain, depending on application of the foreign law and application of the internal

law. We must distinguish those international transactions entered into by a nation and its public corporations and enterprises and those which are entered into by private enterprises. It is normal procedure for a private entity to comply with the law of the country where the opposite party, which is a nation or its public corporation or enterprise, is located. On the other hand, it is difficult to conceive of a case in which a particular nation must comply with the law of a foreign country where the counter party, a private company, is located.¹⁾ A private entity which has entered into a contract with a foreign nation will sustain hardships that inevitably result from the application of the law of such nation, and it must be presumed that both parties entered into the contract based on the belief that the law which will give rise to the least hardship shall prevail. If they had thought otherwise, they would have contracted in reference thereto.

Transactions at the business office of a juridical person are repeated on a continuous basis insofar as that juridical person is concerned, but foreign persons who happen to be in a foreign country perhaps temporarily, and who enter into transactions with that

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- 1) The presumption here is that there are occasions on which a foreign state is named in a civil suit, which at least justifies a hearing on precondition, by a company or other entity doing business in another country. Even a country may sometimes perform transactions which are not in the exercise of its sovereign power (*acta iure gestionis*), and it thus complies with matters related to trials in a foreign state. (For details, see p. 69 and p. 106 in the Civil Procedure Magazine No. 19. The Article is entitled, "Conditions for a Suit and Disputes thereabout within the suit", written by the author.)

The theories of Japanese jurists which deny the existence of *acta iure gestionis* and of the case in which a foreign state can be named in a civil suit, as mentioned above, cannot escape the criticism of stemming from lack of study of comparative law. Even in such a case, however, the problem of applying the law of the place of the transaction is another question, and must be considered in concrete terms in a different way.

particular juridical person, must be presumed to have intended that the law of that country would apply. This is necessarily so, since transactions of this nature are less numerous, perhaps taking place only once, and since this group of persons constitutes a small minority of the various customer groups. For that reason, it is reasonable to conclude that such customers intended that the law of their own country should not apply to this type of transaction and that the law of the country where a juridical person or a bank is located becomes the proper governing law.

This same principle, however, cannot govern interbank transactions, giving rise to the interpretation that the law of the place of a particular bank (X bank in X country), which is to perform a contractual obligation that is to be compensated for and paid by another bank (Y bank in Y country), becomes the proper law. The reason is based on the need of the bank (X bank) to observe various laws and regulations (laws and regulations of X country) governing the content of a contract and the methods of performance. These are considerations which are more important than the other bank's (Y bank's) need to compensate for an obligation or to pay remuneration. Performance of the obligations by the bank personnel at X bank, barring special circumstances, must be acknowledged as stemming from the will of such personnel to carry on business based upon such laws and regulations.

The proper law to be applied in the case of the paying bank and the confirming bank related to a letter of credit should be studied from this point of view. There is no need, therefore, to depend upon Article 9 of the Law, as referred to in judicial precedent C. 5. above. There isn't time to study bank transactions by types, but based on the premise presented here,¹⁾ it may be possible to find the proper

1) Many of the conclusions here may be identical to those of Kegel, *supra*. But my viewpoint differs from his regarding the manner of grasping and applying the "hypothetic will", and I intend to con-

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law for each case without too much difficulty.¹⁾

II. Banking Activities and Jurisdiction in Case of Trial

A. Introduction

In the case of a dispute arising out of international banking activities, the question as to the proper jurisdictional authority or forum arises. The basic thinking of the law regarding this problem is that the will (agreement) of the parties also takes precedence. In case no agreement exists, then the proper court of jurisdiction is a matter of interpretation. In the absence of an agreement between the parties, the weight of authority in all countries is that a court of the country where the debtor resides has jurisdiction, which according to the internal law of civil procedure of the country has jurisdiction over the place of the residence of the debtor. But this is a rigid rule which operates to the disadvantage of the creditor, and as a consequence, there are arguments which address themselves to the possibility of making exceptions to this principle.

In Japan today, unrestricted private autonomy is allowed, as indicated by the expression: "If there is an agreement on jurisdiction, it will serve as the basis." But I wish to point out that there is a problem regarding the circumstances in which the effect of the agreement on jurisdiction can be finally and completely recognized. From the point of view of the comparative (international) law of civil procedure, the agreement on jurisdiction ceased to be a Zeus

sider it more from the viewpoint of the "will principle", which is anchored to the "Law Concerning Application of Laws", rather than from the viewpoint of the naked concept known as interest-comparison-and-adjustment.

- 1) For information on the relationship between the agreement on the applicable law and the proper jurisdiction in the case of a civil suit between parties of different countries, refer to Part II, Section D, Paragraph 2. hereof.

a long time ago.

B. Japanese Judicial Precedents

There are very limited judicial precedents referring to the matter of jurisdiction in cases of international civil suits. Let me describe those which do exist.

1. One precedent deals with the performance of contractual obligations of a Japan branch of a foreign bank. There was a Tokyo Appellate Court¹⁾ ruling of unknown date in which it was held that the Japanese court which has jurisdiction over the place of the branch of this foreign bank also has jurisdiction over the branch, according to the Japanese Law of Civil Procedure. The judicial precedents which I referred to in C. 1., 2., and 3. above are of similar content. There was also a case in which a foreign bank (Bank of Okinawa before reversion of that island to Japan) sued a surety residing in Nagoya in the Nagoya District Court. The Nagoya District Court²⁾ ruled that the proper jurisdiction was the jurisdiction over the residence of the guarantor.

2. In case the proper law is designated, there is a problem as to whether or not there can be an interpretation to the effect that the jurisdiction had been agreed upon to exist. Even though the proper law was specified, the Tokyo Appellate Court, which was cited above, did not accept such interpretation.

We can now distinguish two cases: one is the case in which an agreement regarding jurisdiction in an international civil suit can

1) Hōritsu Simbun No. 242, p. 7.

2) Judicial Precedents of the Third Petty Bench of the Supreme Court of July 15, 1975, Minshu Vol. 29, No. 6, p. 1029, Financial Law No. 765, p. 32.

be presumed to exist,¹⁾ and the other is one in which such an agreement cannot be presumed to exist.

C. The Proper Forum or Jurisdiction

1. When an agreement on jurisdiction exists, the question of whether or not it is effective is one to be determined by the court of the particular country where the complaint has been filed, based upon the (international) code of civil procedure of such country. Legal procedures are of course matters determined by courts as part of the sovereign power of a country. Any agreement on jurisdiction is one which inures within the scope or area of legal procedure, and thus the law of the jurisdiction (place) where the suit is brought (*lex fori*, or the International Code of Civil Procedure) should be applied. For example, if a Japanese court judges that there has been no agreement on effective jurisdiction based upon the Code of Civil Procedure of Japan, at least so far as Japan is concerned, the decision should be to the effect that there has been no agreement on jurisdiction. The cases which appear in the decisions of the Former Supreme Court (Daishin-in) ruling of October 18, 1916, Minroku Vol. 22, p. 1916, and Osaka Appellate Court ruling of unknown date, Hōritsu Shimbun No. 1116, p. 28, belong to the cases to which this

1) This agreement state: “. . . . regarding the dispute related. . . . , the court of . . . (city) of . . . (country) will be regarded as the court of jurisdiction.”, while the simple statement of “the court of . . . (country) will be regarded as the court of jurisdiction.” This is the only stipulation appearing in the documents, including contracts which have been prepared by amateurs or inexperienced jurists. One must, therefore, note that in many cases the distinctions between the so-called “international trial jurisdiction” and “internal trial jurisdiction” appearing in Professor Y. Aoyama’s “International Trial Jurisdiction” on p. 50 of the “Disputes on the Code of Civil Procedure” are ideological in nature. But since this does not mean, conversely, that cases falling within the latter statement that “the court of . . . (country) will be. . . .” do not exist, I believe that it is an overstatement to completely abandon this distinction.

theory was applied.

2. When designating the applicable law, the presumption is, and the proper construction would be, that the parties have by all means designated substantive law such as the Civil Code, the Commercial Code, the Law of Bills, or others. At least, insofar as the Continental laws are concerned, they are not permitted to designate a code of legal procedure which is different from the law of the place where suit is brought (*lex fori*).

The law of procedure of that particular jurisdiction must prevail. It follows, therefore, that, even if there has been a designation of the applicable law (agreement on the problem related to the substantive law), this does not mean that there has been an agreement on jurisdiction of the court in the country where such applicable law is to be applied. Thus, the judicial precedent mentioned in B. 2. above is correct. Conversely, if there is an agreement on jurisdiction, can it be construed in such a way that it could justifiably be concluded that the parties intended that the substantive law of the particular jurisdiction should prevail? The natural presumption is that the parties intended to designate, as the proper law, that law under which the court of their choice could examine the case in the most thorough manner. In principle, the answer to this question should be in the affirmative.¹⁾

3. The effect of an already-obtained agreement on jurisdiction cannot be denied on the grounds that it is doubtful that the ruling of the court can be easily executed or executed at all, or when there is no "mutual guarantee" (Code of Civil Procedure, Article 200, No. 4). But if there is no property which can be made the object of an attachment, it is obvious that this agreement cannot become effective as one of exclusive jurisdiction.

1) The conclusion in Stein-Jonas-Leipold, ZPO 1978, § 38 VI (S. 25) is of the same nature.

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4. There are countries (for instance, West Germany, but excluding relations between merchants)¹⁾ similar to, or even stricter than, Japan²⁾ regarding the agreement on jurisdiction, in that it must by all means be made in writing. Thus, even if an agreement on jurisdiction of a particular court (for instance, the Nuremberg District Court) is not made in writing, the effect of such agreement cannot be recognized in such a country. In addition, in West Germany, even when individuals or small merchants sign a Bank Transactions Agreement (Allgemeine Geschäftsbedingungen), the agreement on jurisdiction mentioned in Article 26, Paragraph 2 of the Bank Transactions Agreement cannot be interpreted as having been made in writing.³⁾

5. According to Article 14 of the Japanese Bank Transactions Agreement, the customer and the bank shall agree that courts which have jurisdiction over the place of the main office or of a specific branch (not necessarily a trade office) will be the proper forum. The main office is designated, since that is the place where the legal adviser of the bank is based.⁴⁾ Since the same agreement, however, is used by other banks which are competitors, and in case of an agreement which the customers are forcibly made to accept without alteration, such reasoning is insufficiently weak to constitute substantial grounds for insisting upon the agreement on jurisdiction for all persons. Therefore, excluding persons who have transactions with the main office, and in cases where legal action is taken in relation to such transactions, the agreement on jurisdiction related

1) See West German Code of Civil Procedure, Art. 38, Par. 3 and 1.

2) See Code of Civil Procedure Art. 38, Par. 2.

3) Refer to Canaris aaO. S. 1260, 1275.

4) Refer to p. 187 of the Explanation of New Model of Bank Transactions Agreement, edited by the Laws and Regulations Subcommittee of the Federation of Bankers Association of Japan. In that book, the inconvenience of liaison between the trade office and the main office is also cited as a reason, but since this is only an internal condition, it is not worth considering.

to such transactions, the agreement on jurisdiction related to the main office in Article 14 cited above is construed as not being effective in case the clients are individuals or small merchants. (Consider the case in which an individual customer living in, and having business with a New York branch, or Ibusuki branch of a certain bank is sued by the main bank in Tokyo. The effect would be to apply such agreement in an abusive way and to raise a conclusive presumption of its invalidity).

The reason why Article 25, Paragraph 2 of the Code of Civil Procedure of Japan requires the agreement on jurisdiction to be in writing is the fact that it purports to protect persons who are lacking or weak in substantial defensive force in areas outside their own place of residence or other related place.¹⁾ I am, therefore, of the opinion that the mere signing of a Bank Transactions Agreement does not fulfill the requirements in that Article for the agreement on jurisdiction to be in writing.

The same concept applies in the case of a branch which is not a trade office. For instance, as is frequently the case, even when a branch (Seattle Branch or Fukuoka Branch) for supervising the trade office (New York Branch or Ibusuki Branch) is entered in the blank column of Article 14 of the Bank Transactions Agreement, I am of the opinion that the agreement that the court which has jurisdiction over this branch (in the preceding examples—Seattle Branch or Fukuoka Branch) shall be effective, except in cases where the customers are individuals or small merchants, and they have not been subjected to any substantial disadvantage.

If the name of the trade office is entered in the blank column,

1) On p. 60 of "Points of Disputes in Civil Suits", "Agreement of International Trial Jurisdiction" by Professor K. Ishiguro, he points out that there is no demand that the agreement on international civil suit jurisdiction be presented in writing, but I cannot agree.

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International Banking Activities, Applicable Law and Jurisdiction without raising the issue of whether the client is a merchant or not. But let us take the case of an individual client who resides in Hachioji and who used to transact business with a branch (Marunouchi Branch) close to his place of employment. He then is transferred to Lyon or Wakkanai. It is considerably doubtful whether or not suit could be brought, for instance, in the Tokyo Summary Court which has jurisdiction over the Marunouchi district. It is necessary to note that in case the clients are individuals or small merchants, the effect of the agreement on jurisdiction will be influenced by change in circumstances. A more equitable interpretation would be to hold that adherence to the agreement on jurisdiction is inadmissible, because application of such an agreement would be an abuse of rights—a breach of trust.

6. The effect of the agreement on jurisdiction in Article 14 of the Bank Transactions Agreement does not cover guarantors, contrary to general presumptions, since, in the first place, the existing form of the Bank Transactions Agreement does not contain an agreement on jurisdiction between the bank and the guarantor.¹⁾

D. Some Related Problems on Applicable Forum and Law

What is to be done in the case where no agreement on the applicable forum exists, or where such an agreement is judged to be void? No established theory exists, but my opinion is as follows.

1. No problems exist when a suit is instituted against a branch of a bank in a court having jurisdiction in the country where that branch is located, and when a suit is instituted against a customer in a court of the country having jurisdiction over the place of

1) For details, read p. 4 of No. 858 of Financial Law on "Some Hidden Problem in the New Bank Transactions Agreement (1)" by this author.

residence of that client.¹⁾

2. Let us suppose that a bank situated in Japan (including a Japan branch of a foreign bank) lends money to a customer residing abroad, but the security or collateral is located in Japan. Whether a suit can be instituted or not in a (Japanese) court which has jurisdiction over the place where the security is located is a question to be interpreted in a positive sense. The Japanese court has jurisdiction (*in rem*) against the thing.²⁾ A similar conclusion should be drawn when the property of the customer is located in Japan, although no security exists in Japan. Such a conclusion would obviously be incorrect if the property is of negligible value (such as an umbrella left behind by the customer), or if property is sent to Japan in a way that might be characterized as trickery or chicanery. In case there is a subsidiary company of the customer in Japan, and in case the customer is a registered stockowner of the company, i.e., a share certificate is not issued, I would conclude that acknowledgment of the jurisdiction of the Japanese court would be justified.³⁾

3. If the customer lives abroad and the guarantor lives in Japan, bringing suit against the guarantor at his place of residence would be a natural consequence. But the demands against the principal debtor cannot be combined, since Article 21 of the Code of Civil Procedure specifically governs internal matters.⁴⁾

1) Riezler, *Internationales Zivilprozessrecht* 1949, S. 219, Aoyama, *supra*, Ikehara-Hiratsuka, "Trial Jurisdiction in International Suits" (*Practical Civil Code Lectures*, Vol. 6, p. 19).

2) Refer to Article 8 of the Code of Civil Procedure.

3) Refer to p. 124, "Territorial Principle", by this author in *Foundation of Bankruptcy and Composition Law*, edited by Miyawaki-Takeshita.

4) On p. 23 of Ikehara-Hiratsuka, *supra*, there is a statement that the defendant must respond to the action, and if there is jurisdiction over one action, a combined trial or joinder is possible, but I disagree with the logic of their contention. The defendant has deep

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4. If the customer who has signed a bank guaranty agreement resides or is domiciled in a foreign country at the time he requests and agrees to the bank guaranty, the right to claim damages by the bank must be exercised in that foreign country. A suit cannot be instituted in a domestic court, since the debt is discharged in the country of residence or domicile of the debtor. Article 516, Par. 1 of the Commercial Code cannot apply to such a case. It is important to point out that most bank guarantees completely ignore this point.

5. What should be the proper forum in cases involving disputes over deposits in banks situated in Japan, including Japan branches of foreign banks? By way of example, there may be a dispute as to whether or not slight fluctuations in the prime rate fall within the so-called "reasonable cause" mentioned in Article 3, Paragraph 1 of the Bank Transactions Agreement. These suits should be tried in Japan, even if the particular bank has a branch in the country where the customer resides.¹⁾

interest in the judgment, competency and integrity of the judge in the country where the trial will be held, since he is exposed to conditions where fairness, uniformity and speed of the trial up to the conclusion are uneven, and in addition, the conditions are quite different when viewed in terms of a comparison with the Japanese courts in Japan.

1) Page 19 of Ikehara-Hiratsuka, *supra*, and p. 51 of Aoyama, *supra*, may be construed as leading to the same conclusion.