

## **The Point of Time for the Recognition of Foreign Judgments and the Conditions for Recognition (summary)**

**Mafumi KAMATANI**

Assistant, Faculty of Law, Kyushu University

### 1. Introduction

The legal basis for the recognition of foreign judgments in Japan is art. 118 of the Japanese Code of Civil Procedure (hereinafter JCCP) and art. 24 of the Japanese Code of Civil Execution (hereinafter JCCE). A foreign judgment is recognized when it fulfills the conditions laid out in art. 118 of JCCP. It is unanimously understood that no special procedure is required for the judgment to be recognized (so-called “automatic recognition”). In other words, fulfillment of these conditions suffices for recognition. However, the execution of a judgment does need a special procedure, i.e. an execution order, required by art. 24 of JCCE.

The point of time at which the conditions specified in art. 118 are fulfilled was not a problematic issue until Tokyo High Court rendered a judgment on Nov. 15th 1993. In this case, the Court rejected the recognition of an American judgment based on public policy, a condition for recognition in art. 118. According to the Court, the factual situation had changed after the American judgment was rendered, so that the recognition of this judgment given the change of circumstances would violate Japanese public policy. Since this judgment, many scholarly opinions have been published addressing the issue of when the conditions for the recognition of foreign judgments are fulfilled. Some say that these should be fulfilled when the judgment becomes valid in that country, because the recognition occurs at that time as an outcome of “automatic recognition”. Others say that these conditions should be fulfilled when the Japanese court considers the foreign judgment. According to the latter opinion, “automatic recognition” implies only the procedural aspect of the recognition of foreign judgments, but not the temporal aspect.

This article aims at analyzing the background of these opinions, compared to German scholarly opinions.

## 2. Arguments in Japan, especially before the judgment of Tokyo High Court

Before the above mentioned judgment of Tokyo High Court in 1993, there was some discussion on this issue. But this discussion referred to each condition. For example, when should the condition of the jurisdiction of the foreign court be fulfilled? When should the condition of reciprocity should be fulfilled? However, this discussion lacked an institutional viewpoint such as when a foreign judgment is recognized and what constitutes the foundation of the system of the recognition of foreign judgments. The point of time for the conditions laid out in art. 118 of JCCP depended on how to judge the character of these conditions, e.g. the fulfillment of the condition of public policy should be examined when the Japanese court deals with the recognition, since its criteria can change as time goes on.

Even if it was occasionally highlighted when the recognition occurred, there were no theoretical grounds offered. The opportunity for discussion of the theoretical grounds was provided as a result of the judgment of the Tokyo District Court on Dec. 22nd 1977 (*Kansaitekko* case). This judgment rejected the recognition of an American judgment for taking account of another Japanese judgment that had been rendered after this American judgment. The framework of this judgment was criticized by some scholars, for the judgment could be interpreted as saying that the Tokyo District Court put the point of time for the fulfillment of the conditions at the time at which it examined the conditions. They suggested that the recognition should have occurred earlier than the examination of these conditions in Japan. Other scholars supported the judgment of the court. However, no justification for this point of view was ever provided. Therefore the relationship between the two points of time, i. e. when the recognition occurs and when its conditions are fulfilled, was not clear or persuasive.

Under such circumstances, Tokyo High Court rendered the 1993 judgment. This judgment demanded that Japanese scholars shift their stand point from focusing on particular conditions for the recognition of foreign judgments to a more systematic and institutional perspective. Thus “when recognition occurs” is now discussed, as I mentioned above, in the context of “automatic recognition”. Some authors think under the system of “automatic recognition” that recognition should occur when a foreign judgment came into effect and the

conditions for recognition should be examined on the basis of the facts at that time. Others think even under the Japanese system of recognition that recognition should occur when the Japanese court consider the judgment and the conditions should be fulfilled at that time.

In the present discussion, the relationship between the point of time for the recognition and for the examination of these conditions has become much clearer, and deference about the way of thinking about the basis of the system of recognition of foreign judgments was brought to light as a problem how to interpret “automatic recognition”. How should we understand the Japanese system of recognition? When is a foreign judgment to be recognized? Scholars who argue that the recognition occurs when the foreign judgments becomes valid have utilized the concept of “automatic recognition”. However, this article suggests that their account remains unpersuasive, because the fact that recognition requires no special procedure is even accepted by the scholars who hold the opposite opinion. This group’s interpretation of “automatic recognition” would appear to preclude the possibility that recognition of the foreign judgment occurs when it becomes valid. To further analyze the situation in Japan, the arguments in Germany are referred to below, since both opinions cited the theories in Germany as their basis.

### 3. Arguments in Germany

Japanese scholars often cite German theories. This is also the case with regard to this issue. An important reason for this is that art. 118 of JCCP derived from the equivalent provision in German law, namely art. 328 of German Code of Civil Procedure (*Zivilprozeßordnung*; hereinafter ZPO). In Germany, it is unanimously accepted that recognition of foreign judgments occurs when it took effect in the country of origin. On the other hand, however, it is said in some cases that some conditions in art. 328 ZPO should be examined based on the facts at the point of time that the German court deals with them. These attitudes seem contradictory. How can these two positions be reconciled?

In Germany, besides the basic concept that “no special procedure is required”, there is another unanimously accepted concept namely that: “effects of a foreign judgments are extended into Germany through the recognition”. In other words,

no effect is allocated to foreign judgments by the German court. The concept of “automatic recognition” in Germany includes these two aspects. Hence it is logical to say that the recognition of foreign judgments occurs, when these judgments came into effect in that country and the conditions for the recognition should be also examined at that point of time.

However, despite this basic standpoint, in Germany it is also sometimes mentioned that the conditions for recognition should be fulfilled when the German court is confronted with a foreign judgment. There seem to be two reasons for this.

First, some scholars accept that under certain circumstances the recognition of foreign judgment occurs only after a German court examines the conditions; e.g. a foreign judgment that couldn't be recognized because the condition of jurisdiction was not fulfilled, can be recognized at the point of time when the rules of jurisdiction are revised and the condition is fulfilled. According to the concept mentioned above, through the recognition the effects of foreign judgments are extended into Germany. Some say the extension doesn't have to occur only when the foreign judgment came into effect, but can occur after the conditions became fulfilled. In this case, the conditions for the recognition are actually to be examined when the German court is confronted with the judgment.

Second, in Germany, the executive effect of foreign judgments is unanimously excluded from the effects of foreign judgments that are to be extended to Germany. The executive effect must be provided by a German court according to art. 723 ZPO and thus the examination of the conditions should be made by the German court. “Automatic recognition” does not apply to these cases. Therefore, when the conditions in art. 328 ZPO are applied as one condition of art. 723, these conditions can be required by the German court.

After all, the basic concept that “the effects of foreign judgments are extended into Germany through its recognition” plays an important part in the understanding of the German System of recognition. This article confirms here that it doesn't contradict the understanding of “automatic recognition”, to require the fulfillment of the conditions laid out in art. 328 ZPO.

#### 4. Remarks

Some Japanese scholars mentioned that under the Japanese system of recognition, recognition occurs when the foreign judgment came into effect in that country, but it was based only on the fact that no special procedure is required for recognition. In order to further substantiate their arguments, the concept generally accepted in Germany, “the effects of foreign judgments are extended into Germany through its recognition” should also be accepted.

Moreover, the German concept is that the recognition will *basically* occur when the foreign judgments became valid in that country. Some other Japanese scholars think a foreign judgment is to be recognized when a Japanese court is confronted with it. Although art.118 JCCP originated from art. 328 ZPO, Japanese scholars interpret art. 118 JCCP differently from how German scholars conceptualize art. 328 ZPO.

We need to analyse the origin of the understanding of “automatic recognition” in Germany in order to ascertain whether this difference of understanding has a rational basis.