

## Next Agenda for Lawmaking in the Arena of International Private Law and International Civil Litigation (summary)

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### I. Introduction

The past two decades have seen the promulgation of several significant legislations which have affected transnational business transactions and international business dispute resolution. Those legislations include the overall renovation of the Code of Civil Procedure (1996) and the conflict of laws rules (2006), as well as the enactment of statutes on sovereign immunity (2009) and international jurisdiction (2011). This paper addresses the areas that require further legislative updates.

### II. In the area of international private law

In business enterprises, predictability and stability of law is a critical element. To this end, it is desirable to declare black and white rules in advance by means of statute. Often times the Supreme Court of Japan will declare general rules to be followed by the lower courts. From the viewpoint of predictability and stability, this is insufficient as the case law can be further amended by the Supreme Court in lieu of advance notice, and the new case law will still be applicable to transactions closed before the new case law is declared. In Japan, our legislation does not provide any statutory rules for choice of laws regarding issues such as corporation, agency, assignment, assumption and trust. Inasmuch as we routinely encounter these issues in transnational transactions, it is desirable to have clear rules defined by legislation.

In addition, for certain types of transnational transactions, such as capital market and securitization, it is common practice to procure a legal opinion on enforceability of the deal. Because a lawyer can only opine on the law of his qualification, it is difficult to choose an appropriate lawyer without first identifying the applicable law. For example, persuasive views and judicial precedent are divided in Japan as to choice of law in relation to a principal - agent relationship. This uncertainty increases transaction cost as parties may have to procure legal opinions on the same issue from multiple layers in different jurisdictions.

### III. In the area of international litigation

In May 2011, the Japanese diet passed a new statute on international jurisdiction which makes the rules more transparent and stable. In my view, however, the new statute requires further reconsideration particularly in relation to the jurisdiction rules on registration lawsuits, consumer lawsuits and employment lawsuits, as well as the rules on international parallel litigation.

Currently service of process abroad takes substantial amount of time. In some cases, it may take 5 to 7 years to serve a single summons or complaint. The international judicial assistance under the Hague Service Convention also requires renovation. In addition, the Code of Civil Procedure should be amended to allow process agents, something which is currently not recognized under the law. We also require a clear standard as to whether service via direct mail from overseas, or personal service abroad, is effective for the purpose of Article 118 of the Code of Civil Procedure. Mechanisms for taking evidence abroad must be improved as well.

While the conflict of laws rules sometime mandate the application of foreign law by Japanese courts, there is no systematic support to ascertain the contents of foreign law. Japan needs an international framework whereby each government commits to respond to inquiries from foreign courts on issues of its law.

Article 118 of the Code of Civil Procedure requires reciprocity as a condition for the recognition of a foreign judgment. In practice, however, it is very difficult to predict reciprocity at the time when a transaction contract is concluded. This hinders the predictability and stability of the contract's enforceability. We should consider eliminating reciprocity as a requirement for the recognition of a foreign judgment.