100 Years of the Hague Conference of Private International Law and Japan – Past and Future

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1 The Hague Conference of Private International Law as a "European Club"

The Hague Conference of Private International Law ("the Hague Conference") started its activity for the purpose of unifying private international laws in 1893. After being rejected once, Japan was accepted in this organization at its fourth session in 1904. The amendment of the unequal treaties concluded in 1858 with Western powers[(1)] was the first priority of the Meiji Government's diplomacy. It took until 1911 until the amendment of these unequal treaties was completed. Hence it must have been a great pleasure for the Japanese Government at that time to be a member of this organization with equal status to European countries.[(2)]

Japan was the only non-European member of the organization at this time and was so until 1951, when this organization was reestablished based on the Statute of the Hague Conference on Private International Law.[(3)] In other words, for more than fifty years, the Hague Conference was a European institution. Although it gradually became international, even in 1981 the number of non-European countries as member states was 9[(4)] out of 29 member states.

As of 2004 it has 64 member states, but active member states are dominantly European : "active" in the sense that the countries ratified many Conventions adopted by the Hague Conference. For example, the list of the top 5 countries is

as follows :

	The Netherlands	France	Luxemburg	Portugal/ Switzerland	Spain
Ratification	25	19	18	16	15
Signature	5	4	7	6	4
Denunciation				1 (Switzerland)	

On the other hand, the contribution from Asian member states including Japan has been minor.

	Japan	HK	Macau	China	Korea
Ratification	6	5	6		
Signature				1	
Accession				2	1

2 Impact of EU treaties on the Hague Conference

(1) The Amsterdam Teary

After the Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Related Acts[5] (the Amsterdam Treaty) was adopted, the situation changed.

Through § 2, 15[6]of the Amsterdam Treaty, §§ 61-69 were inserted into the Treaty Establishing the European Community.[7] § 61 states "In order to establish progressively an area of freedom, security and justice, the Council shall adopt ... (c) measures in the field of judicial cooperation in civil matters as provided for in Article 65."

§65 reads,

"Measures in the field of judicial cooperation in civil matters ***having cross-border implications***, to be taken in accordance with Article 67 and in so far as ***necessary for the proper functioning of the internal market, shall include :***

(a) improving and simplifying :

— the system for cross-border service of judicial and extrajudicial docu-

ments,

— cooperation in the taking of evidence,

— the recognition and enforcement of decisions in civil and commercial cases, including decisions I extrajudicial cases;

(b) ***promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction;*** (Emphasis added by the author)

(c) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States."

A provision with the almost same text is contained in the Draft of the EU Constitution.[8]

Hence comprehensive legislative power in the field of conflict of laws is granted to the Community.

(2) Legislative Power of the Community and its Legal Basis

Opinions on which provision is the legal basis of the legislative power are divided. The one states that § 95 should be the basis, while the other says § 65. The opinion for § 95 criticized another opinion that the title 4, which contains § 65, "Visas, Asylum, Immigration and other Policies related to Free Movement of Persons" implies that the scope of § 65 is more restricted than that of § 95.[9] Since Paragraph 1 of § 95 requires the adoption of ***the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market*** (emphasis added).

A further criticism is that § 65 is not applicable to Denmark, while § 95 applies also to Denmark. However Paragraph 2 of § 95 excludes "the provisions relating to the free movement of persons" from the measures to be taken by the Council. It would mean that an important part of conflict of laws would be left out from the legislative power of the Commission, and is not persuasive. On the other hand, the opinion for § 65 tries to enlarge the scope of this provision through flexible interpretation of § 14, paragraph 2.[10]

In any case, Member States of the EU do not need any more the mechanism of

multilateral conventions to unify the rules on conflict of laws concerning the issues raised among Contracting States.

(3) Conflict of Law Issues between Member States and Non-Member States

How about conflict of laws issues, which arise between a Member State and a non-Member State? Does each Member State still need multilateral conventions to unify the rules of conflict of laws concerning the issues between Member States and non-Member States?

The text of the chapeau of § 65, Paragraph 1, "Measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken in accordance with Article 67 and ***in so far as necessary for the proper functioning of the internal market, shall include*** ... " (Emphasis added), leads to the interpretation that no such multilateral convention is necessary. Since if Member States have different conflict of law rules in relation to third countries, "proper functioning of the internal market" is not achievable. If conflict of law rules in relation to Japan in Germany and France are different, the internal market would not function properly. Thus it is logical to say that the Community now also has legislative power over the conflict of laws in relation to third countries. Such understanding can be supported by the rule established in a judgment of the European Court of Justice on European Road Transport Agreement (ERTA).[11] According to this rule, the Community has exclusive competence to conclude international agreements in the field where the Community has already created legal norms.[12]

(4) Possible Options of the EU in relation to the Hague Conference

Thus the European Community will have exclusive legislative jurisdiction in the field of conflict of laws, not only among its Member States, but also in relation to third countries. Under such circumstances, the Community has the following options.

The first option is to make its own Regulations in the fields to be covered by the Hague Conference, even if multilateral conventions exist. It is actually already happening. Although 14 Member States[13] of the EU ratified the Hague Conven-

tion on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial matters of Nov. 15, 1965, the Council Regulation (EC) No. 1348/2000 on the Service in the Member States of Judicial and Extrajudicial Documents in Civil or Commercial Matters[14] was adopted. This new Regulation (the Service Regulation) was based on the above mentioned § 65 inserted by the Amsterdam Treaty. The Regulation, which entered into force on 31 May 2001, is supplemented by the Government's declaration (2001 : 352) of Council Regulation (EC) No. 1348/2000 on the Service in the Member States of Judicial and Extrajudicial Documents in Civil or Commercial Matters. When a service is to take place in a Member State of the European Union which is also a member of the Hague Convention 15 November 1965, the Regulation prevails over the provisions contained in that Convention.

Another example is the introduction of the Council Regulation (EC) No. 1206/2001 of 28 May 2001 on Cooperation between the Courts of the Member States in the Taking of Evidence in Civil or Commercial Matters[15] (the Evidence Taking Regulation), after 11 Member States of the EU[16] ratified the Hague Convention on Evidence Taking. Again the Regulation exceeds the Convention (Article 21, paragraph 1 of the Evidence Taking Regulation). This option will be preferred, until conflict of laws on the European level is firmly established.

The second option is to propose new Conventions to the Hague Conference, taking already existing Community laws as models. This option means an effort to expand Community laws as global laws and would require enormous energy. It could develop conflict of laws at global level and be one of the best scenarios for the Hague Conference. However one could wonder if the Member States of the EU would be willing to spend so much time and energy for the interest of the Hague Conference. In addition to that, one should pay attention to possible reaction of the USA. With the expansion of a Community law into a global law, the judgments of the European Court of Justice on that Community law would become the case law to be referred to in order to interpret the global law. If the US-Government would welcome such transformation of the European Court from a regional court toward a global court, needs careful examination.

The third option is for the EU to obtain member status of the Hague Conference. This option needs further steps to be taken. First, the Article 2 of the Statutes of

the Hague Conference[17] must be amended, since it premises the member status of nation states only. Second, again here, the reaction of the USA would be crucial. Since the member status of the EU could mean further weakening the bargaining power of the USA.[18] The USA joined the Hague Conference in 1964. Since then it ratified three Conventions and signed two, while it denunciated one. The USA was not an active player at the Hague Conference. Will it become more active in future? To answer the question, one should pay attention to the fact that in the USA support of the private sector,[19] *inter alia* the American Bar Association is important in deciding to conclude multilateral conventions. In addition, in the USA, the fields where the Hague Conference has been active such as family law and recognition of foreign judgments and conflict of laws itself falls in the jurisdiction of state. Under such circumstances, careful analysis is indispensable in what field in conflict of laws the US Government could positively commit itself. This analysis also concerns a question why the world needs conflict of laws. It furthermore concerns the question what role in the international community the Hague Conference should play besides activities of UNCITRAL, UNIDROIT and other international organizations.

3 The Hague Conference and Japan

Although Japan joined the Hague Conference 100 years ago, Japan was not an active player. Under such circumstances where the EU does not need the Hague Conference as much as before,[20] and where the US Government's attitude could remain as reserved as so far, what could and should Japan do? I suggest four possibilities.

(1) Ratification of the existing Conventions

Japan could ratify more already existing Conventions adopted by the Hague Conference. Convention of 25 October 1980 on the Civil Aspects of International Child Abduction could be an option. However for Japan to ratify this Convention as one of the most successful projects of the Hague Conference, some difficulties must be pointed out : First, there is a lack of political incentive, since, according to a high-ranking government official,[21] in most of the cases where this Convention would apply Japan is the country from which children shall be returned. Sec-

ond, the judgments of the Japanese Court on jurisdiction over divorce and custody cases practically may spoil *de facto* the effect of the Convention. Japanese Courts have affirmed jurisdiction of the plaintiff's domicile under certain circumstances.[22] It means that once children are brought to Japan by a Japanese mother, for instance, the Japanese mother could successfully seek a judgment which appoints her as the custodian of her children. On the other hand, there are cases which would need the Convention.[23] Further discussion is desirable.

(2) New Conventions for East Asia

Another possibility is to focus on Conventions suitable to the situation in Asia or East Asia. When one pays attention to the fact that most international marriages registered in Japan are between Japanese nationals and Chinese or Korean nationals.[24] Under such circumstances, the joint ratification of Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations by Japan, Korea and China could be constructive. For this goal, joint research by scholars from three countries could be started.

(3) Development of New Subjects and New Method

Traditionally important fields such as family law will gradually lose its significance in the activities of the Hague Conference due to the new legislative power of the EC. It seems crucial for the Hague Conference to develop new fields. In this since, the newest project of the Hague Conference, Convention on the Law Applicable to Certain Rights in respect of Securities held with an Intermediary is a successful example.

In 1956, the observers of the USA submitted a Memorandum urging that consideration be given to the use of uniform or morel laws as an alternative to the traditional conventions. They argued that this might lead to greater progress in terms of actual domestic implementation, citing the experiences in the USA and Canada as federal States. It was supported by the UK, but opposed by all other speakers[25] and the Secretary General of the Hague Conference. Since then the Convention method in the Hague was not challenged.[26] However in my view the model law method is worth reconsidering again. In such fields, which constantly evolve such as e-commerce, flexibility is desirable. The standard Convention

method would fix the rules and make later changes/modifications difficult.

(4) Organization of Educational Seminars

In contrast to Europe, the importance of the conflict of laws is not yet adequately recognized in other regions. Even in Japan, the conflict of laws was excluded from the subjects of the Japanese Bar Exam in 1996. Dissemination of the information on the conflict of laws seems necessary. For this purpose, the Hague Conference should organize together with governments and/or academic institutions educational events in order to make conflict of laws more familiar to more people.

Conclusion

Japan became a member of the Hague Conference as the first non-European country in 1904. Although Japan traditionally has been relatively reserved in its activities in the Hague, especially in terms of the number of Conventions ratified, the time has come for Japan to actively contribute to the Hague Conference. Because the EU will not need the Hague Conference as much as before and the USA will continue to adopt a cautious approach. This author is of the opinion that Japan could and should become more active and has suggested four possibilities. Further discussion for this purpose is desirable.

(1) USA, Russia, the Netherlands, UK and France.

(2) Hans Arnold, Japan und die Haager Konferenz für Internationales Privatrecht, JZ 1971, S. 19f, "Für Japan war es ein grosser Prestigegewinn, dass es als gleichberechtigter Partner der Mächte anerkannt wurde, die es noch wenige Jahre zuvor als unzumutbar abgelehnt hatten, ihre Angehörigen der japanischen Rechtsordnung zu unterstellen."

Georges A. L. Droz, La Conférence de la Haye de Droit International Privé en 1980 : Évolution et Perspectives, Receuils des Cours, vol., 1980, "A cette époque, la Conférence était compose essentiellement d'Etats européens, l'exeption du Japon dévenu member dès 1904, et qui montra aussitôt, en écrasant la flotte russe a Tsou-Shima, qu'il était digne d'entrer dans le cadre des pays a haut culture juridique..."

(3) This statute entered into force on July 15th 1955.

(4) Argentina, Australia, Canada, Egypt, USA, Japan, Surinam, Turkey, Venezuela.

(5) Signed on Oct.2, 1997, entered into force on May 1, 1999. Official Journal C 340, 10 November 1997.

(6) § 2, 15. The following title shall be inserted in Part Three :

Title 4a

VISAS, ASYLUM, IMMIGRATION AND OTHER POLICIES RELATED TO FREE MOVEMENT OF PERSONS

§ 73 m

Measures in the field of judicial cooperaqtion in civil matters having cross-border implications, to be taken in accordance with Article 73o and insofar as necessary for the proper functioning of the internal market, shall include :

improving and simplifying :

the system for cross-border service of judicial and extrajudicial documents; cooperation in the taking of evidence;

the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases;

promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction;

eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.

(7) Official Journal C 325 of 24 December 2002.

(8) Section 3 of the Draft Treaty establishing a Constitution for Europe (Official Journal C 169 of 18 July 2003), Section 3, Judicial Cooperation in Civil Matters, Article-170 :

The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.

To this end, laws of framework laws shall lay down measures aimed inter alia at ensuring:

the mutual recognition and enforcement between Member States of judgments and decisions in extrajudicial cases;

the cross-border service of judicial and extrajudicial documents;

the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction;

cooperation in the taking of evidence;

a high level of access to justice;

the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States;

the development of alternative methods of dispute settlement;

support for the training of the judiciary and judicial staff.

3. Notwithstanding paragraph 2, measures concerning family law with cross-border implications shall be laid down in a European law or framework law of the Council of Ministers. The Council of Ministers shall act unanimously after consulting the European Parliament.

The Council of Ministers, on a proposal from the Commission, may adopt a European decision determining those aspects of family law with cross-border implications which may be the subject of acts adopted by the ordinary legislative procedure. The Council of Ministers shall act unanimously after consulting the European Parliament.

(9) Jürgen Basedow, The Communitarization of the Conflict of Laws under the Treaty of Amsterdam, Common Market Law Review 37 (2000), 687-708, (696-699).

§ 95 states:

By way of derogation of Article 94 and save where otherwise provided in this Treaty, the following provisions shall apply for the achievement of the objectives set out in Article 14. The Council shall, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons.

(10) Michael Traest, Development of a European Private International Law and the Hague Conference, Yearbook of Private International Law, vol. 5 (2003) , pp. 223-259 (229-230).

§ 14 states :

The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992, in accordance with the

provisions of this Article and of Articles 15, 26, 47 (2), 49, 80, 93 and 95 and without prejudice to the other provisions of this Treaty.

2. The internal market shall comprise an area without frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.

(11) March 31, 1971 (22/70 [1971] ECR 263).

(12) A. (Teun) V. M. Struycken, Das Internationale Privatrecht der Europäischen Gemeinschaft im Verhältnis zu Drittstaaten und zur Haager Konferenze, ZeuP 2004, S. 281 ff.

(13) Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, UK.

(14) Official Journal L 160, 30/06/2000 P. 0037-0052.

(15) Official Journal L 174, 27/06/2001 P. 0001-0024.

(16) Denmark, Finland, France, Germany, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, UK

(17) Article 2

Members of the Hague Conference on Private International Law are the States which have already participated in one or more Sessions of the Conference and which accept the present Charter.

Any other States the participation of which is from a juridical point of view of importance for the work of the Conference may become Members. The admission of new Members shall be decided upon by the Governments of the participating States upon the proposal of one or more of them, by a majority of the votes cast, within a period of six months from the date on which that proposal is submitted to the Governments. The admission shall become definitive upon the acceptance of the present Statute by the State concerned.

(18) Kurt H. Nadelmann, Unification of Rules Choice of Law, Harvard International Law Review, vol. 15 (1974), pp. 213-237, once said, "governments of the Common Market group agreed to work on unification of the rules of private international law ... First priority went to contracts and torts... The choice of law rules of the instrument have no reciprocity requirement and become applicable even if the law to be applied is not that of a contracting state. The instrument may be characterized as a regional effort designed to have efforts outside the region as well ... Although done before behind closed doors, the drafting activities were no secret. Concern developed in non-Mar-

ket states and questions arose in other international organizations.", p. 228. Also see p. 229 et seq.

(19) Peter Pfund, Contributing to Progressive Development of Private International Law : The International process and the United States, Receuils des Cours vol. 249 (1994), pp. 9-144, p. 61-62.

(20) Jürgen Basedow, Was wird der Haager Konferenz für Internationales Privatrecht, FS Ferid (2001), S. 464ff.

(21) In an interview conducted by the author.

(22) Judgment of Japanese Supreme Court on June 24, 1996, Minshu vol. 50, No. 7, p. 1451. In this case, a Japanese husband took his daughter from Germany to Japan and sought a divorce judgment and to appoint him as her custodian. His appeal was successful. Also judgment of Tokyo District Court, Jan. 30, 2004, Hanreijiho No. 1854, p. 51.

(23) The case of the judgment of the Supreme Court on March 18th 2003 (Keishu vol. 57, No. 3, p. 371) is a criminal case, where Dutch father took his daughter from a hospital. If this Dutch father was not arrested and could successfully take his daughter to the Netherlands, it would be a typical case where the Convention would be applicable.

(24) http://www.mhlw.go.jp/toukei/saikin/hw/jinkou/suii02/marr2.html (last visited on May 14, 2005).

(25) The Switzerland reported their experience of federalism led to conclusions opposite to those drawn by the USA.

(26) John David McClean, The Contribution of the Hague Conference to the Development of Private International Law in Common Law Countries, Receuil des Cours vol. 233 (1992), pp. 271-303, (283-284).