

## Regulations for Pseudo Foreign Companies and Freedom of Business (Summary)

Hisashi ONOGI

Doctoral Course Student, Graduate School of Law and Politics, Osaka University

Article 821 of the Japanese Companies Act provides that “A Foreign Company that has its head office in Japan or whose main purpose is to conduct business in Japan may not carry out transactions continuously in Japan.” (first paragraph) and “A person who has carried out transactions in violation of the provisions of the preceding paragraph shall be liable, jointly and severally with the Foreign Company, to perform obligations that have arisen from such transactions to the counterparty.” (second paragraph). In other words, Japanese Companies Act has the general rule of the regulation for Pseudo Foreign Companies by forbidding them to pursue their business continuously in Japan.

However, the Treaties of Friendship, Commerce and Navigation (FCN), of which Japan is a party, provides that Nationals and companies of either party shall be granted the “Freedom of Business” within the territories of the other party by according them the national treatment with respect to engaging in all types of business activities. Focusing on the fact that the Article 821 of Japanese Companies Act has its general rule to forbid to carry out the continuous business in Japan, it seems the Article is against to the “Freedom of Business” granted by the FCN. However, it is not clear the relationship between the “Freedom of Business” and the Regulations for Pseudo Foreign companies.

On the other hand, in the European Union (EU), “Freedom of Establishment” shall be accorded to the nationals and companies of the EU member states in the territories of EU. Also, the European Court of Justice (ICJ) has clarified the four conditions to justify the Regulation which is against to the “Freedom of Establishment.”

With those backgrounds, this paper examines whether the Article 821 of Japanese Companies Act is contrary to the “Freedom of Business” under the FCNs and even if it is not, it also considers whether the way the Article regulates Pseudo Foreign Companies is reasonable by referring to the conditions clarified by the ICJ.

First, this paper examines Regulations for Pseudo Foreign Companies in Japan. It overviews the history of the Regulation in Japan from the time just before the Companies Act was enacted. At the end of this section, it points out that the risk, which some foreign

companies having carried out their business in Japan will not be able to engage in business activities unless they are re-established according to Japanese law, still exists.

Second, this paper refers to the Treaty of Friendship, Commerce and Navigation between the United States of America and Japan as a typical type of FCN which Japan concludes. In this section, it tries to clarify the meaning of “Freedom of Business.” Furthermore, it concludes that the Article 821 of Companies Act can be contrary to the “Freedom of Business” because the national treatment is not given to the companies of the contracting party if they are considered as Pseudo Foreign Companies according to the Article 821 which forbids them to carry out the business continuously.

Third, this paper mentions the “Freedom of Establishment” in the EU and the Inspire Art judgment of the ICJ which stated the four conditions to justify the regulations contrary to the “Freedom of Establishment.” By considering the functions of each condition, this paper argues that the three conditions out of four are not premised on the achievement of the common market, which is unique to the situation in EU, and should be considered more general criteria. Therefore, it is said that those three conditions could be applied to judge whether Article 821 of Companies Act is a reasonable regulation as an exception of “Freedom of Business,” though EU law and FCNs are completely different laws. In conclusion, this paper claims that Article 821 cannot be said as reasonable since it goes beyond what is necessary in order to attain the objective it pursues.