

Deposition in Japan for U.S.-based International Arbitration

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I. Introduction

A deposition is a “witness’s sworn out-of-court testimony” (Legal Information Institute “Wex, Deposition”). In U.S.-based litigation, a deposition is available as part of the discovery procedure. In the United States, a deposition is also available in arbitration. Arbitral tribunals seated in the United States may order a deposition of a witness if s/he is under the control of a party (C. SALOMON and S. FRIEDRICH, *Obtaining and Submitting Evidence in International Arbitration in the United States*, *The American Review of International Arbitration* (2013), *The American Review of International Arbitration*, p. 574).

However, like most civil law countries, Japan does not have pre-trial discovery procedures which allow for depositions to be conducted. This presents an obstacle when conducting depositions in Japan for U.S.-based matters, whether in connection with litigation or arbitration proceedings.

II. Deposition in Japan for U.S.-based Litigation

A deposition in Japan is conducted by a U.S. consul when it is taken for use in a U.S.-based litigation. The Consular Convention between Japan and the United States of America authorizes a U.S. consular officer to conduct depositions in Japan for U.S.-based litigation (22 March 1963, 15 U.S.T. 768 (hereinafter “Consular Convention”), article 17 (1)(e)(ii)).

Other deposition methods by U.S.-licensed attorneys are considered to be unavailable (Embassy of Japan in the United States “To Attend Deposition Taking By U.S. Consul”, (hereinafter “Embassy of Japan Website”))

A. A Voluntary Deposition by a Consular Officer Is Available

Article 17 (1)(e)(ii) of the Consular Convention provides that “[a consular officer may] take depositions, on behalf of the courts or other judicial tribunals or authorities of the sending state, voluntarily given”.

The Government of Japan strictly interprets that such a deposition is available only if (1) it is conducted on U.S. consular premises; and (2) pursuant to a U.S. court order or commission. Since only a consular officer has the authority to take a deposition and U.S. attorneys are merely allowed to play a supplemental role, all direct or cross- examinations by U.S. attorneys must be presided over by a consular officer (Bureau of Consular Affairs of the U.S. Department of State “Legal Consideration, International Judicial Assistance, Japan, Taking Voluntary Depositions of Willing Witnesses”, last updated 15 November 2013, (hereinafter “DOS Website”).

Non-Japanese participants, including U.S.-licensed attorneys, are required to obtain a Japanese Special Deposition Visa, unless they are (1) an Attorney at Foreign Law in Japan, which is authorized to provide legal services based on the laws of its home jurisdiction (Act on Special Measures concerning the Handling of Legal Services by Foreign Lawyers, Law No. 69 of 2014 (Japan), article 3); (2) a permanent resident of Japan; or (3) a spouse of the one of the above (DOS Website).

B. Other Deposition Methods Are Unavailable in Japan

The Government of Japan takes a position that other deposition methods are unavailable for U.S.-based litigation (Embassy of Japan Website).

First, taking a deposition in Japan for the use of U.S. court proceedings constitutes an indirect exercise of foreign judicial authority in the territory of Japan, even if the deposition is conducted on a voluntary basis. Accordingly, such a deposition is considered as a violation of Japan’s sovereignty unless Japan grants special authorization through the Consular Convention (Y. FUJITA, *Transnational Litigation—Conflicts of Laws*, in Z. Kitagawa (ed.), *Doing Business in Japan*, part

5-14, section 14.07 (Matthew Bender, 2015), para. (5)(e)(i)).

Second, Japan is not a member of the Hague Convention on the Taking Evidence of Abroad in Civil or Commercial Matters, which provides procedures for taking evidence abroad upon the request of judicial authorities of state parties. The Hague Convention procedures are of no use to a party to a U.S.-based litigation seeking to take a deposition in Japan.

III. Deposition in Japan for U.S.-based International Arbitration

However, it is unclear whether this outcome applies to a deposition in Japan for a U.S.-based *arbitration*.

A. It Is Unclear Whether the Consular Convention Covers Depositions for Arbitration

It is uncertain whether the deposition procedure under the Consular Convention is available for the use of U.S.-based arbitration.

Article 17(1)(e)(ii) of the Consular Convention provides that a U.S. consular officer may “*take depositions, on behalf of the **courts or other judicial tribunals or authorities** of the sending state, voluntarily given*” (emphasis added).

It can be argued that an international arbitration tribunal does not meet the definition of any “*courts or other judicial tribunals or authorities*”, because its jurisdiction is based on an arbitration agreement between private parties, and the tribunal does not exercise “judicial” authority, even if it issues a final and binding decision. This potential interpretation, however, to the author’s knowledge, has never been tested or the subject of a Japanese court decision.

B. It Is Unclear Whether Taking a Deposition for U.S.-Based Arbitration Violates Japan’s Sovereignty

The same applies to the issue whether a deposition in aid of U.S.-based arbitration violates Japan’s sovereignty. International arbitration does not arise from an exercise of State power, but from private parties’ arbitration agreement.

In cases where tribunals of U.S.-based international arbitration seek judicial assistance of a U.S. court for taking depositions in Japan, the enforcement proceeding may be seen as an exercise of the U.S. courts’ power in the territory of

Japan. However, such practice is uncommon.

IV. Conclusion

As stated above, it is understood that the Consular Convention provides the only deposition method available in Japan in aid of U.S.-based litigation. However, in the arbitration context, no clear answer has been given as to which method is available to conduct a deposition in Japan for the use of U.S.-based arbitration.

I hope this blog to provide a basis of further discussions as to this topic.

**The opinions in this blog post are irrelevant to those of the Permanent Court of Arbitration.*