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International Succession and Will

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I. Fact

Client holds dual citizenship in the UK and Canada. He lives in Japan with his wife as a domiciled foreigner. The client holds real estate properties and bank deposit in Japan, the UK and Canada. He wishes to prepare a will in English and Japanese.

II. Issues

1. It is not clear laws of which country shall be the governing law of the client's will.
2. It is also not clear what kind of will the client shall create.

III. Summary of Conclusion

1. If the country with which the client is most closely connected is the UK, the laws of Japan shall be specified as the governing law of the formation and effect of will for movable property and succession. As for the will for immovable property, the laws of the location of the immovable property are considered as the governing law.

Under the assumption that Canada is the country with which the client is most closely connected, and there is no uniform code on will at the federal state level, if there is a regulation which stipulates the regional law applied to the client, such law shall be considered as the governing law. In case where there is no regulation, the laws of region with which the client is most closely connected shall be considered as the governing law. In such case, due to the provisions of the international private law of Canada, the laws of Japan shall be the governing law of a will for movable properties and the laws of the location of each immovable property shall be the governing law of a will for immovable property.

2. As the laws of Japan are considered as the governing law of the forms of will, the client shall create a notary deed will, which does not require probate by court, in Japan.

IV. Analysis

1. International Court of Jurisdiction

A. Introduction

International court of jurisdiction is a sovereign country's authority to conduct a trial on international matters under its own civil court system¹. International court of jurisdiction is one of the requirements of lawsuit under the laws of legal procedure. Since the location where the lawsuit shall be filed is decided based on the judgment of the international court of jurisdiction, the matter of international court of jurisdiction affects the result of the lawsuit. In another word, the governing law of this case is decided based on the international private law of the forum, and the judicial procedure is basically decided by the law of the forum². As mentioned, the matter of international court of jurisdiction takes preferences over the other matters of international private law because the governing law cannot be specified unless the country which has international court of jurisdiction is specified.

The matter of international court of jurisdiction shall be analyzed at the time of the formation of will because the validity of will can be questioned at the time of its execution. A conclusive quiet title action through a lawsuit shall be considered at the time of creation of will.

B. International Court of Jurisdiction

In Japan, there is no provision which clearly stipulates the matter of international court of jurisdiction with respect to the cases such as division of assets, selection of administrator for inheritance property, probate of a will. Therefore, such matter needs to be analyzed reasonably³. In order to secure the feasibility, some claim that not only the jurisdiction of the area where the ancestor has its address (or habitual residence) at the time of the formation of the will, but the jurisdiction of the area where the assets are located are also admitted. Others claim that the jurisdiction of the area where the will is located shall be admitted, from the perspective of adequacy and quickness of trial, with respect to the case whose proceedings cannot be conducted without a written will such as the probate of a will⁴.

In this case, the client has his family in Japan and he is living in Japan as a domiciled

¹ Shoichi Kidana etc. "Theory of International Private Law (Fifth Edition)" (Yuhikaku Books, 2007) p.282

² Shoichi Kidana etc., p.293

³ Shoichi Kidana etc., p.288

⁴ Hiroshi Matsuoka "Introduction of International Relations Law (Third Edition)" (Yuhikaku, 2012) p.338

foreigner. Given the above facts, the area where the client will pass away and the area where his is located is likely to be Japan. In addition, most of his properties including real estate and bank deposit are also likely to be kept in Japan. Due to the above reasons, the below analysis will be made based on the assumption that the international court of jurisdiction is admitted to a court in Japan.

2. Governing Law

A. Introduction

After analyzing the matter of international court of jurisdiction, the matter of governing law, the question of which country's law is applied, shall be discussed. Article 37 of the "Act on General Rules for Application of Laws (the Act)", the Japanese international private law, stipulates that "the formation and effect of a will shall be governed by the national law of a testator at the time of the formation". The formation and effect hereby means the formation and effect of will, as a declaration of intent. On the other hand, as the matter of forms of will is governed by the Act Concerning Laws Governing Forms of Will (the "Will Act"), the matter of formation of will does not include the matter of forms of will⁵. In this case, the national law of a testator may be either English Laws or the Laws of Canada. In addition, as the governing law of succession is the national law of the ancestor (Article 36 of the Act), the analysis of the national law is required from this point of view.

B. Habitual Residence

Where an ancestor has two or more nationalities, the ancestor's national law shall be the law of the country of his/her nationality where he/she has habitual residence, or, the law of the country with which the party is most closely connected if there is no such country of his/her nationality where the party has habitual residence (Article 38(1) of the Act). In another word, whether the testator has its habitual residence inside of the country of his/her nationality is firstly analyzed for the selection of the governing law of dual nationality holder.

Habitual residence hereby means the area where a person obviously has taken up or is going to take up its residence for a reasonable period. Although the habitual residence is not a legal concept but a factual concept, it shall not be decided merely based on the fact of inhabitancy. It shall reflect the length or history of inhabitance, domicile of his/her

⁵ "Commentary of International Private Law (Volume 2)" (Yuhikaku, 2011) p.215

family etc.⁶

In this case, the client has a dual nationality in the UK and Canada but has its residence in Japan together with his wife as a domiciled foreigner. Given the above fact, it can be concluded that the client has no habitual residence in neither the UK nor Canada. Therefore, as the national law of the client cannot be specified based on his habitual residence, the governing law shall be the law of the country with which the client is most closely connected.

C. Law of the country most closely connected

Governing law shall be judged specifically and concretely based on the analysis of various factors from the past, present and future. The matters to be considered include locational factors such as residence, place of education, place of work, place of birth, and cultural and social factors such as languages and religion⁷. In the case where the national law of double nationality holder was discussed with respect to the custody right of his child, the court judged that A's habitual residence is neither of his home countries, and that the law of the country with which he is most closely connected is the English Law on the basis that there is an agreement between the mother, who is French, and the father, who is British, that the father is going to foster and take care of their child, which is also accepted by the child, and the child is currently living together with his father, and that the father wishes to move into Kenya, which is an English speaking country, together with the child and give the child an education as British⁸.

In this case, given the above factors, it will be analyzed whether the UK or Canada is the country with which the client is most closely connected, and the law of the country with which the client is most closely connected is considered as governing law of this case as his national law.

D. When the UK is the country most closely connected

(1) Assumption of Analysis

First of all, the analysis will be conducted on the assumption that the country with which the client is most closely connected among his country of nationality is the UK.

⁶ Hiroshi Matsuoka "Introduction of International Relations Law (Third Edition)" (Yuhikaku, 2012) p.44

⁷ Mao Uematsu "Governing Law of Divorce Between Wife and Husband Who Do Not Have Same National Law" (Julist, No. 1085) (1996.3.1) p.112

⁸ Decision of Mito Family Court on March 4, 1991

The formation and effect of will are governed by the national law of the testator at the time of its formation (Article 37(1) of the Act). As the UK consists of three different legal jurisdictions, Jurisdiction of England and Wales, Jurisdiction of Scotland and Jurisdiction of North Ireland, it seemingly is “where a party concerned has nationality in a country where different laws are applied in different regions” (Article 38(3) of the Act). However, if there is a unified code concerning the matter which is the objective of the different regional laws, such country is not considered as a country where different laws are applied in different regions and the governing law is specified under Article 38(1) of the Act⁹. In the UK, “Wills Act 1837”, which is applied to the matter of will nationwide, excludes the country from the country where different laws are applied in different regions.

As long as the client does not have its habitual residence in either the UK nor Canada, and the UK is assumed to be the country with which the client is most closely connected, the national law of the client is the English Law (Article 38(1) of the Act) and the English Law is the governing law of the formation and effect of the will created by the client.

(2) Governing Law of Will and Succession

a. Division of Succession and Unionism of Succession

Some countries divide succession of movable and immovable property and apply the division of succession, which applies the laws of residence of the ancestor for succession of movable property and applies the laws of the location of the property for immovable property. Others apply the unionism of succession, which applies the national law of the ancestor for succession of all properties¹⁰.

Japan applies the unionism of succession, as “Inheritance shall be governed by the national law of the decedent.” (Article 36 of the Act). As mentioned above, as the national law of ancestor is applied to the matter of succession, the application of renvoi (Article 41 of the Act) shall be analyzed. Renvoi is to apply the law of the forum or laws of third party as governing law, based on the provisions of the international private law which is specified by the international private law of the forum¹¹.

⁹ “Commentary of International Private Law (Volume 2)” (Yuhikaku, 2011) p.188 - 189

¹⁰ “Commentary of International Private Law (Volume 2)” (Yuhikaku, 2011) p.188 - 189

¹¹ “Commentary of International Private Law (Volume 2)” (Yuhikaku, 2011) p.309

In addition, the national law of the ancestor is the national law of the ancestor at the time of his death¹². Since the English law is assumed to be the laws of the country with which the client is most closely connected, the national law of the client is the English law. As mentioned above, renvoi shall be considered based on the international private law of the UK in relation with the client whose national law is the English law.

(3) Regulation under English Law

a. Governing Law of the formation and effect of will for movable property

Under the Act, the English law shall be the governing law for the client's succession of movable property (Article 36 of the Act). On the other hand, the English Law stipulates that a will for succession of movable property shall comply with the laws of the testator's domicile at the time of his / her death (Wills Act 1963, s2 (1)(c)). Domicile, whose minimum composition element is housing for permanent residence although there is no clear definition, is determined in consideration of his/her intention to reside in the area permanently¹³.

In this case, as mentioned above, the English law shall be the governing law based on the Act. However, since the client lives in Japan as a domiciled foreigner together with his wife, the client is considered to be domiciled in Japan under the international private law of the English law, which is the national law of the client. Renvoi (Article 41 of the Act) shall be applied to this case and the laws of Japan are considered as the governing law of this case.

Therefore, the client can create a will on the assumption that the laws of Japan are the governing law of this case (Article 37(1) of the Act), and the governing law of succession of movable property is also the laws of Japan (Article 36 of the Act). As the testator is able to dispose all or part of its property as long as it does not violate the provision of distributive share under the laws of Japan (Article 964 of the Civil Code), the client is able to dispose its bank deposit in Japan, the UK and Canada in his will.

Generally speaking, bank deposit located in a branch of foreign bank shall be refunded first and included into the testator's property to be divided. However, under the English law, the decedent's estate is not directly transferred from the ancestor to the heirs, but is first transferred to the executor of will and managed and settled by the executor, and

¹² "Commentary of International Private Law (Volume 2)" (Yuhikaku, 2011) p.210

¹³ Dicey (2006) The Conflict of Laws Vol. 1, Sweet and Maxwell, p.123.

then the remainder property is either distributed or transferred to the heirs¹⁴.

b. Governing Law of the formation and effect of will for immovable property

Under the Act, succession of movable and immovable property is governed by the English Act (Article 36 of the Act). Under the English Law, a will for succession of immovable property is governed by the laws of the location of the immovable property¹⁵. As for the immovable properties located in Japan, renvoi applies as the English Law specifies the laws of Japan as the governing law. Immovable properties located in the UK are governed by the English Law and the immovable properties located in Canada are governed by the laws of Canada.

E. When Canada is the country most closely connected

(1) Assumption of Analysis

Second of all, the analysis will be conducted on the assumption that the country with which the client is most closely connected among his country of nationality is Canada. In addition, it is also assumed that there is no unified code on will in Canada unlike the “Wills Act 1837” in the UK. Under such regulation, it falls under the category of “where a party concerned has nationality in a country where different laws are applied in different regions” (Article 38 (3) of the Act).

(2) Governing Law of Will and Succession

Under the above assumptions, both will (Article 37(1) of the Act) and succession (Article 36 of the Act) are governed by the “national law” of the client under the Act. Since Canada is federal state and different laws are applied in different regions, unlike the case where a party has dual nationality in countries which has unified legal system¹⁶, special matters need to be considered.

If there is a “regulation” which specifies to which domestic jurisdiction the party belongs in the person’s home country, the governing law shall be decided based on such regulation (Article 38(3) of the Act). If there is no “regulation” exists, the governing law is directly specified based on the international private law of Japan and the law of the region with which the party is most closely connected is considered as the national law of the party (Article 38(3) of the Act). The region with which the party is most closely

¹⁴ Yoshio Tameike “International Private Law Seminar (Second Edition)” (Yuhikaku, 1999) p.501

¹⁵ Nelson v Bridport (1846)8 Beav. 547.

¹⁶ According to Article 38(1) of the Act, among the countries the client has his nationality, the law of the country with which the client is most closely connected shall be the national law of the client.

connected shall be specified, without creating uniform rules, based on the place of birth and place of past and present residence of the party, and the place of the party's families' residence etc.¹⁷

In this case, the governing law shall be analyzed in the above mentioned order. If there is a "regulation" which stipulates the legal jurisdiction of the party, the governing law shall be the laws of the region which is specified by the "regulation", and if there is no "regulation", the region with which the party is most closely connected shall be specified based on the above consideration and the laws applied in such region shall be the "national law" of the testator with respect to the specification of the governing law of will and succession.

Since both Canada and the UK apply common law, the governing laws of the succession of movable property and immovable property are different. If the governing law is specified by "regulation" or based on the laws applied in the region with which the party is most closely connected, renvoi applies to all movable properties and immovable properties located in either Japan or the UK. As for movable properties, the laws of Japan are considered as the governing law. As for the immovable properties, the laws of Japan and the English Law are respectively considered as the governing law.

3. Form of will

A. Will Act

The matter of forms of will is not included into the matter of the formation and effect of will stipulated under the Act (Article 43(2) of the Act), but the validity of will is governed by the Will Act. This Act was enacted in 1964 based on the Conflicts of Laws relating to the Form of Testamentary Dispositions adopted at the Hague Conference on Private International Law in 1961. According to the Will Act, wills are formally valid as long as its formality complies with any one of the laws of the formation of will, the national laws of the testator at the point of his death, the laws of the testator's address, the laws of the testator's habitual residence, and as for wills for immovable property, the laws of the location of immovable property (Article 2 of the Will Act).

In this case, where the client lives in Japan, the will becomes valid as a will which comply with the "laws of formation of will (Article 2(1) of the Will Act)" as long as the

¹⁷ "Commentary of International Private Law (Volume 2)" (Yuhikaku, 2011) p.263

client follows the forms of will under the laws of Japan.

B. Forms of will under the laws of Japan

In Japan, a will does not come into effect unless it is created in a regimented format in order to accurately convey the intention of the testator and prevent falsification or forgery at a later point. There are two forms of will: ordinary format and special format. Ordinary format can be categorized into holograph will, notary deed will, and secret certificate will (Article 967 of the Civil Code), all of which require a regimented format. On the other hand, special format is used if the testator has no time or ability to create an ordinary will because he or she is near the end of its life (Article 976 to 979 of the Civil Code). In this case, the client still has time and ability to create an ordinary will.

(a) Holograph Will

To make a holograph will the testator must write the entire text, the date, and his/her name in his/her own hand and affix his/her seal (Article 968(1) of the Civil Code). It is the easiest type of wills to create and the testator can keep it a secret. However, a holograph will can be easily lost, forged or falsified, and it also can be considered as invalid due to the obscureness of the sentences. In addition, execution of holograph will requires probate by a family court (Article 1004 of the Civil Code). The language of the will does not have to be Japanese. A holograph will can be prepared in English¹⁸.

(b) Notary Deed Will

A will by notarized document shall be made in compliance with the following items: (i) no fewer than two witnesses shall be in attendance; (ii) the testator shall give oral instruction of the tenor of the will to a notary public; (iii) a notary public shall take dictation from the testator and read this aloud, or allow inspection, to the testator and witnesses; (iv) the testator and witnesses shall each sign, and affix his/her seal to, the certificate after having approved its accuracy; provided, however, that in the case where a testator is unable to sign, a notary public may sign on his/her behalf, with supplementary registration giving the reason for that; and (v) a notary public shall give supplementary registration to the effect that the certificate has been made in compliance with the formalities listed in each of the preceding items, sign this, and affix his/her seal (Article 969 of the Civil Code).

¹⁸ Supreme Court Decision on December 24, 1974

As a notary deed will is created in front of public notary and the public notary keeps the original of the will, it is less unlikely to be forged or falsified. Therefore, it does not require probate by a family court. In addition, since a public notary is involved in the process, the validity of the will is unlikely to be questioned. Although there are some problems that both the contents of the will need to be disclosed to the both witnesses and public notary and the proceedings are complicated, notary deed will is commonly-used nowadays. Since a notary deed can be prepared only in Japanese (Article 27 of the Notary Act), in case where a testator is unable to give oral instruction, the testator shall go to the notary public office together with a translator.

(c) Secret Certificate Will

Secret certificate will enables the testator to keep the contents a secret while the sealed will shall be submitted to a public notary and witnesses. A will by sealed and notarized document shall be made in compliance with the following formalities: (i) the testator shall sign, and affix his/her seal to, the certificate; (ii) the testator shall seal the certificate and, using the same stamp as that used for the certificate, affix his/her seal; (iii) the testator shall submit the sealed certificate before one notary public and not less than two witnesses, with a statement to the effect that it is his/her own will, giving the author's name and address; (iv) after having entered the date of submission of the certificate and the statement of the testator upon the sealed document, a notary public shall, together with the testator and witnesses, sign it and affix his/her seal (Article 970 of the Civil Code). As there is no formality for the will itself, the will can be created by someone else, typed or created in Braille. Secret certificate will can also be prepared in English.

In addition, even if the will does not meet the requirements for a secret certificate will, it can still be valid as a holograph will as long as it meets the requirements for a holograph will (Article 971 of the Civil Code).

V. Conclusion

As mentioned above, in relation to the will created by the client, the governing law shall be the laws of the country (either the UK or Canada) with which the client is most closely connected with. If the country with which the client is most closely connected is the UK, the English Law shall be specified as the governing law of the formation and effect of will for movable property and succession. However, due to the renvoi under the

English Law, the laws of Japan become the governing law. As for the will for immovable property, the governing law is the English Law, which stipulates the laws of the location of the immovable properties as the governing law.

Under the assumption that Canada is the country with which the client is most closely connected and there is no uniform code on will at the federal state level, if there is a regulation which stipulates the regional law applied to the client, such law shall be considered as the governing law. In case where there is no regulation, the laws of region with which the client is most closely connected shall be considered as the governing law. In such case, due to the provisions of the international private law of Canada, the laws of Japan where the client has its domicile shall be the governing law of the will for movable properties and the laws of the location of each immovable property shall be the governing law of the will for immovable property.

Under the laws of Japan, which is the governing law of the forms of will, multiple forms are allowed for a will. Among all, however, the client shall create a notary deed will, which does not require probate by court, in Japan.