



**Conducting Discovery in Japan:
Depositions, Letter Rogatory, and Production of Documents**

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In the course of litigation, you may find the need to conduct discovery in Japan. The unique problem with conducting depositions in Japan, or requesting production of documents in Japan, however, is that you cannot simply go to Japan and conduct discovery, because it could be considered a violation of Japan's judicial sovereignty. You also cannot rely on the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. Unlike the U.K., France, Germany, Italy, China, Australia, and many other countries, Japan is not a party to this Hague Convention. Therefore, you need to look to other ways of conducting discovery in Japan. Below we will examine the ways to take depositions, to obtain testimony through a letter rogatory, and to request production of documents in Japan.

Depositions

Depositions are permitted only in certain circumstances under the U.S.-Japan Consular Convention of 1963 (the "Treaty"). The Treaty is a bilateral treaty between the U.S. and Japan that governs judicial assistance between the two countries. Article 17(e)(ii) of the Treaty 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." Under the Treaty, depositions are permitted only if they are "voluntarily given."

If you look closely at the terms of Article 17(e)(ii), the Treaty only seems to provide authority for what a consular officer can do in connection with depositions. It does not seem to prohibit other ways of taking depositions. However, according to the U.S. Department of State's website (Japan Judicial Assistance, http://travel.state.gov/law/judicial/judicial_678.html), the Government of Japan strictly interprets the terms of the Article. The Government of Japan advises that "it opposes deviations from these conditions, and that it would consider any action beyond the strictures of the U.S.-Japan understanding to be a violation of its judicial sovereignty."

Under Japan's strict interpretation of the Treaty, depositions in Japan must be taken at either the U.S. Embassy in Tokyo or the U.S. Consulate in Osaka-Kobe (Depositions in Japan, <http://japan.usembassy.gov/e/acs/tacs-7116.html>). Deposition rooms are available only at these two locations. There are no deposition rooms at the U.S. Consulates in Fukuoka, Naha, or Sapporo, and depositions are rarely taken at these U.S. Consulates. It is not permissible for the deposition to be held at the offices of the deponent's company, offices of a law firm, rooms of a hotel, or any other location in Japan. It is the requesting party's responsibility to reserve a deposition room. There is a flat fee that must be paid before a deposition can be scheduled, and there are additional fees going forward. Depositions typically must be scheduled approximately six months in advance. Much to the inconvenience of the parties, deposition rooms are often fully booked for several months.

After you reserve a deposition room, you must carefully plan in advance. It is the parties' responsibility to make necessary logistical arrangements. You must schedule the appearance of deponents. You must make arrangements for court reporters, stenographers, or interpreters. You must obtain a Special Deposition visa to enter Japan and participate in the deposition. This Special Deposition visa must be applied for at least two weeks before departure for Japan. You cannot take a deposition via telephone or videoconference, absent specific authorization from the Japanese Ministry of Foreign Affairs. Thus, all participants must be physically present at the deposition. While Japan once allowed a live video-teleconference deposition (see *U.S. v. Nippon Paper Industries, Co., Ltd.*, Order (D. Mass., July 28, 1998)), the Government made clear that this should not be considered a precedent. Videotaping of the deposition is permitted. The U.S. Embassy or the U.S. Consulate does not, though, provide you with tapes, taping equipment, or equipment operators. You must make all arrangements with the video-taking service providers. To bring equipment to the deposition room, you must make prior arrangements with the U.S. Embassy or the U.S. Consulate.

Once you are in the deposition room to take the deposition, the presiding consular officer will typically administer oaths to the deponent, interpreters, and stenographers. The consular officer will then usually withdraw. The requesting counsel will then start the actual questions. The deposition must occur during the hours of 8:30 a.m. to 1:00 p.m., and 2:00 p.m. to 4:00 p.m. All participants must vacate the deposition room between 1:00 p.m. and 2:00 p.m. The deposition room at the U.S. Embassy seats approximately eight persons.

Article 17(e)(ii) of the Treaty provides that a consular officer may take depositions "in accordance with the laws of the sending state." Thus, U.S. law applies to the depositions. U.S.-qualified attorneys can participate in the depositions, and the deponent may claim privileges under U.S. law.

Letter Rogatory

Under the Treaty, depositions can be taken only if they are "voluntarily given." There may be cases, though, where the deponent does not agree to "voluntarily give" a deposition. In such a case, the requesting party could consider requesting the U.S. court to issue a court order known as a "letter rogatory." A letter rogatory is a request from a court in one country for assistance from a court in another country. It can be used to compel a Japanese witness to appear before a Japanese judge and give testimony. Letters rogatory are not, however, a very popular method of obtaining testimony from a witness. The execution of letters rogatory by Japanese courts can be time-consuming, taking six months to a year to execute in some cases.

Once a letter rogatory is issued, it will be transmitted through diplomatic channels. The letter rogatory must attach a Japanese translation of the letter rogatory and all of its attachments. It will ultimately end up in the Japanese district court that has jurisdiction over the witness. Then the Japanese district court will compel the witness to appear before a Japanese judge to respond to written questions annexed to the letter rogatory. The judge will question the witness in accordance with procedures called a "witness examination (*shounin jinmon*)" under Japanese law. After questioning the witness, the Japanese judge will prepare an official document as a record of the "witness examination." This document will be in Japanese and will include the testimony given by the witness. The Japanese court will then send the document back to the U.S. court.

Japanese law applies to the procedures in connection with the execution of letters rogatory. Only Japanese-qualified attorneys (*bengoshi*) can represent clients in the courts. U.S. attorneys are generally not permitted to sit in the attorney seats. They can only sit in the visitor seats. On a case-by-case basis, however, the Japanese judge may permit U.S. attorneys to participate in the procedures. For these procedures, U.S. attorneys do not need to obtain Special Deposition visas. The witness may claim "right to refuse testimony (*shougen kyozetsu ken*)" under Japanese law. The "right to refuse testimony" is

witness' right to refuse testimony on matters specified under law, such as "matters concerning technical or professional secrets." Typically, "technical secrets" would include technology-related know-how, and "professional secrets" would include product cost and customer lists. If the witness claims privileges under U.S. law, the Japanese courts will likely make a record of such claim and defer to the U.S. courts.

Production of Documents

In the U.S., you can compel production of documents even from a third party if you have a subpoena. You cannot, however, do that for a third party in Japan. Doing so could be considered a violation of Japan's judicial sovereignty.

So again, you must look into the Treaty. Article 17(1)(f) of the Treaty provides that a consular officer may "obtain copies of or extracts from documents of public registry." Under the Treaty, the consular officer can only obtain documents of public registry. The consular officer cannot obtain other documents, such as those in the hands of a third party.

Now, you might try using the letter rogatory. In the past, various parties have tried using the letters rogatory to compel production of documents in Japan. Unfortunately, this usually does not work. This is due to provisions of the Civil Procedures Code of Japan. Under the Code, the Japanese judge who assists the execution of the letter rogatory has the authority to examine a witness, but does not have the authority to order production of documents. In accordance with the Code, the Japanese judge will likely not allow a request for production of documents even if so written in the letter rogatory. As a result, the only way to obtain documents in Japan from a third party in Japan would be to ask that third party to "voluntarily" produce the documents.

Conclusion

Conducting discovery in Japan is not easy and litigants should not expect to obtain nearly the same quantity or quality of information from Japan. However, if you know the available discovery devices and the special procedures to take advantage of those devices, discovery may not be lost. Only if you understand the distinct rules and limitations, will you be able to effectively and smoothly conduct discovery in Japan.

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