

**Civil Law Discovery in Japan:
A Comparison of Japanese and U.S. Methods of Evidence Collection
in Civil Litigation**

Craig P. Wagnild*

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I. INTRODUCTION

In Japan, just as in the United States, preparation for civil litigation necessarily involves the collection and examination of evidence and data. However, fundamental differences exist in both the way trials are conducted in Japan and the methods by which evidence may be procured.¹ Though Japan has no system of pretrial discovery equivalent to

* Craig P. Wagnild received his B.S. magna cum laude from Willamette University in 1989. He received his J.D. from Willamette University College of Law in 1995, where he served as Articles Editor for the Willamette Bulletin of International Law and Policy. He spent a semester studying law in Japan at Temple University School of Law Japan in 1994, and completed the coursework for an LL.M. in Japanese Law at University of Washington School of Law in 1996. Mr. Wagnild has spent over four and a half years in Japan and is fluent in written and spoken Japanese. He is a member of the Washington, Hawaii, and American Bar Associations, and presently practices civil litigation at the law firm of Bays, Deaver, Lung, Rose & Baba in Honolulu, Hawaii.

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¹ Itsuko Mori, *The Difference Between U.S. Discovery and Japanese Taking of Evidence*, 23 INT'L LAW. 3, 3 (1989) (discussing difficulties presented by the differing methods of gathering evidence in Japan and the U.S.).

that of the United States,² it is inaccurate to say that no means of discovery or evidence collection exists. Inquiry into Japanese discovery methods is frustrated by the lack of any formalized rule system equivalent to the Federal Rules of Civil Procedure,³ and by the common impression found in scholarly articles that Japan has no means of discovery.⁴ The methods of evidence collection that do exist in Japan are mostly designed to be used after “trial” commences, and differ so drastically from the procedures available under the U.S. discovery system that many seem to feel such practices are not appropriately termed “discovery.” However, discovery in the United States is not limited to pretrial application by the Federal Rules of Civil Procedure, and similarly some of the formal Japanese methods of evidence procurement can and are used before trial. In addition, informal evidence and document collection is commonly conducted by Japanese attorneys.⁵ It may therefore be said that while systematic differences profoundly influence the form and extent of discovery practice in Japan, Japanese attorneys do “discover” evidence, including documents, witnesses, and physical evidence, for use in civil trials.

The focus of this inquiry into the Japanese system of evidence collection is centered on addressing the following three inquiries: 1) What methods of evidence procurement exist in Japan; 2) Why evidence collection in Japan differs from U.S. pre-trial discovery; and 3) How Japan’s restrictive discovery system affects transnational litigation. The general assumption of American attorneys that the “[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper

² *Id.* at 4.

³ See generally Yoshio Ohara, *Judicial Assistance to be Afforded by Japan for Proceedings in the United States*, 23 INT’L LAW. 10 (1989) (contrasting court-oriented Japanese evidence examination with the party-oriented discovery system employed in the United States).

⁴ H. Michael Hartmann, *Discovery and Related Motion Practice*, 349 PLI/Pat 245, 250 (1992) (comparing U.S. discovery procedures with those of England, Germany, and Japan, and noting particularly the highly restrictive nature of evidence gathering in Japan); see also Lucille M. Ponte, *Guilt by Association in United States Products Liability Cases: Are the European Community and Japan Likely to Develop Similar Cause-in-Fact Approaches to Defendant Identification?*, 15 LOY. L.A. INT’L & COMP. L.J. 629, 630 (1993); James A. Forstner, *Patent Litigation in Japan, China, and Korea*, 366 PLI/Pat 13, 15 (1993).

⁵ TAKAAKI HATTORI & DAN FENNO HENDERSON, CIVIL PROCEDURE IN JAPAN § 6.02 n.5 (1988) (noting (in a footnote) that Japanese procedural rules encourage parties to conduct pretrial investigation by providing for the interviewing of witnesses and examination of evidence).

litigation,” as stated by the U.S. Supreme Court in *Hickman v. Taylor*,⁶ has not been internationally accepted. The process and form of litigation in Japan has largely dispensed with the need for extensive discovery by individual attorneys. The discovery that does exist is quite limited and involves the court as an integral part of the process. Frustration and chronic delay in Japanese litigation resulted in increasing calls in Japan for reformation of the Japanese Code of Civil Procedure, particularly relating to provisions for the collection of evidence.⁷ In response to these calls, sweeping amendments to the Code of Civil Procedure were recently passed and have begun to change the way discovery is conducted in Japan.

While concerns regarding abuse and excessive cost make it unlikely that Japan will ever institute a full system of discovery rules as extensive as those in the United States,⁸ the New Japanese Code of Civil Procedure that went into effect on January 1, 1998 has both expanded the scope of discovery available and reversed a long-held presumption regarding discoverability of evidence.⁹ This trend toward expansion of existing procedures and the introduction of more extensive pretrial discovery methods may go a long way toward solving some of the current problems encountered in Japanese civil litigation. It may also aid U.S. attorneys’ efforts to conduct discovery in Japan for use in transnational civil litigation.

⁶ 329 U.S. 495, 507 (1947) (recognizing that the pretrial deposition-discovery system is one of the most significant innovations of the Federal Rules of Civil Procedure, and noting that under it parties may compel opponents to disgorge all facts in their possession).

⁷ Yukiko Hasebe, *Shōko Shūshūtetsuzuki no Arikata* [Existing Methods of Evidence Gathering], 1028 JURISTO 103, 103 (1993) (discussing the need for reformation of existing laws in the form of expanding procedures for the collection of evidence to respond to problems of delay and frustration).

⁸ At the time of drafting the new Japanese Code of Civil Procedure in the early 1990s, some academics and attorneys in Japan advocated an American-style “discovery” system. Japanese industry and the Japanese government were strongly opposed to what was considered an overly-burdensome and easily abused system, and therefore a general discovery rule was quickly abandoned. Yasuhei Taniguchi, *The 1996 Code of Civil Procedure of Japan – A Procedure for the Coming Century?*, 45 AM. J. COMP. L. 767, 776 (1997).

⁹ See Toshiro M. Mochizuki, Recent Development, *Baby Step or Giant Leap?: Parties’ Expanded Access to Documentary Evidence Under the New Japanese Code of Civil Procedure*, 40 HARV. INT’L L.J. 285, 286 (1999), for an exceptional discussion of the changes brought about in the new Japanese Code of Civil Procedure.

II. COLLECTING EVIDENCE IN JAPAN

Compared to the United States, which employs one of the most extensive discovery systems in the world, Japan's rules governing the collection of evidence seem woefully inadequate.¹⁰ Modeled after German civil procedure rules, most evidence production in Japan takes place at trial.¹¹ Authority and control over the gathering of evidentiary facts is vested in the court,¹² with the judge assuming the primary responsibility for taking and receiving evidence.¹³ Japanese attorneys have no real power to compel the production of evidence or to elicit testimony from either adverse parties or third parties, and must therefore rely on voluntary cooperation or seek intervention by the court.¹⁴ This is in stark contrast to U.S. discovery, which is conducted mostly by the parties themselves with only minimal court supervision.¹⁵

Despite the apparent lack of formal rules empowering attorneys to compel the production of evidence, upon taking a case, Japanese attorneys will immediately attempt to collect as much evidence as possible before trial.¹⁶ Before discussing the various means of evidence collection

¹⁰ See generally Thomas S. Mackey, *Litigation Involving Damages to U.S. Plaintiffs Caused by Private Corporate Japanese Defendants*, 5 TRANSNAT'L LAW. 131 (1992) (discussing the difficulties involved in transnational litigation between countries employing expansive discovery practices and civil law countries like Japan, where judges tend to control evidence production).

¹¹ Ohara, *supra* note 3, at 19. The concept of "trial" in Japan, however, differs remarkably from the U.S. understanding of a trial as a concentrated hearing and adjudication of the entire case. In Japan, a trial commences shortly after the filing of a complaint, and consists of a series of hearings once every few months.

¹² Mori, *supra* note 1, at 3 (explaining why the role of attorneys in gathering facts for use in Japanese court proceedings is limited).

¹³ Mackey, *supra* note 10, at 150.

¹⁴ Mori, *supra* note 1, at 3.

¹⁵ STEPHEN C. YEAZELL ET AL., CIVIL PROCEDURE 542 (4th ed. 1996). The degree of autonomy extended to attorneys to conduct pretrial discovery in the U.S. was expanded in 1993 when Rule 26 of the Federal Rules of Civil Procedure was re-written to include mandatory disclosure of witnesses, evidence, computations, insurance agreements, etc. with opposing parties. See generally David D. Siegal, *The Recent (Dec. 1, 1993) Changes in the Federal Rules of Civil Procedure: Background, the Question of Retroactivity, and a Word About Mandatory Disclosure*, reprinted in 151 F.R.D. 147 (1994), for a summary discussion of mandatory discovery under the Federal Rules.

¹⁶ HATTORI & HENDERSON, *supra* note 5, § 6.02 (explaining that the ultimate goal of gathering evidence and documents prior to trial in Japan is to facilitate reaching

available to Japanese attorneys and how they can be used, it is important to understand what information needs to be discovered and presented at trial in Japan.

A. *Evidence Requiring Discovery*

Not all facts asserted in a Japanese court need to be proven. Japanese law distinguishes between those facts that require proof and those that do not.¹⁷ Those facts that do not require proof can be divided into two categories: 1) facts admitted to or confessed to; and 2) notorious facts.¹⁸ Confessions bind the confessing party to accept stated facts as true and prevent the party from later alleging contrary facts.¹⁹ Notorious facts are those facts well-understood by the court without conducting an investigation. Notorious facts include both well-known facts, those which a person of ordinary knowledge and experience would know, and facts known to the court — those obvious to the judge as a result of his/her official experience.²⁰ Any non-notorious facts that have not been admitted or confessed to must be proven to the court by evidence. Based on the presented evidence, the court is charged with determining the existence or non-existence of all facts.²¹

It is a fundamental principle of civil litigation in Japan that each party must produce evidence to prove his/her allegations (referred to as the “adversary principle”).²² A party who does not completely deny facts alleged by the opposing party may be deemed to have admitted them.²³

an out-of-court settlement).

¹⁷ *Id.* § 7.05(1).

¹⁸ MINSOHŌ [Code of civil procedure], Law No. 109 of 1986, art. 179 (1st ed. Eiwataiyaku Nihon no Minji Soshōhō Dōkisosoku [English-Japanese Parallel Version of Japan’s Civil Procedure Code and Rules] 2000) (Japan) (“Facts admitted to in court by the parties and obvious facts need not be proven.”).

¹⁹ HATTORI & HENDERSON, *supra* note 5, § 7.05(2)(a) (explaining further that the judge is also bound by any confession of essential facts, i.e., constituent facts indispensable to the disputed right or legal relation).

²⁰ *Id.* § 7.05(3).

²¹ *Id.* § 7.05(1); *see also* MINSOHŌ, art. 247.

²² HATTORI & HENDERSON, *supra* note 5, § 7.05(4)(b) (also called the “autonomy principle,” this rule of law holds that the court may not take evidence, unless it is tendered by a party or an exception applies).

²³ *Id.* § 7.05(2)(b). The Federal Rules of Civil Procedure also provide that a

Furthermore, failure to appear at a hearing may also result in being deemed to have admitted to all facts asserted at that hearing.²⁴ In proving allegations, there are few restrictions on the admissibility of evidence, providing relevancy exists.²⁵ In addition, almost anyone can be examined as a witness,²⁶ limited only in certain circumstances where privacy or technical secret conflicts arise.²⁷ All testimony and evidence is presented at trial to the judge,²⁸ who can refuse to examine evidence he/she deems unnecessary, or would cause undue delay.²⁹

failure to deny an adverse party's allegation is considered an admission of that allegation. FED. R. CIV. P. 8(d).

²⁴ HATTORI & HENDERSON, *supra* note 5, § 7.05(2)(b) (noting, however, that if the absentee has denied the facts in prior pleadings, his/her written claims are deemed to have been orally stated at the hearing). The Code of Civil Procedure, article 183, provides for the examination of evidence where one party does not appear on the appointed date, confirming that the court may take and consider evidence in the absence of a party as an alternative to simply deeming a fact admitted. MINSOHŌ, art. 183. Furthermore, a party may withdraw a "constructive admission" and contest facts deemed admitted because of his/her absence. See HATTORI & HENDERSON, *supra* note 5, § 7.05(2)(b) n.359 (citing Takagi v. Nakagawa, 10 MINSHŪ 865 (Gr. Ct. Cass., Nov. 4, 1931)).

²⁵ HATTORI & HENDERSON, *supra* note 5, § 7.05(4)(a).

²⁶ MINSOHŌ, art. 190 (Duty to be witness) ("Except as otherwise provided, the court may examine any person as a witness.").

²⁷ *Id.* art. 197:

1. A witness may refuse to testify in the following cases:
 - i. In cases under Article 191, paragraph 1;
 - ii. In cases where the witness is questioned as to the knowledge of facts which, such witness, who is or was, a doctor, dentist, pharmacist, pharmacy, mid-wife, lawyer (including foreign law business lawyer), patent agent, advocate, notary or an occupant of a post connected with religion, prayer or worship, has obtained in the exercise of the professional duties and which facts should remain secret;
 - iii. In cases where the witness is questioned with respect to matters relating to technical or professional secrets.
2. The provisions of the proceeding paragraph shall not apply to cases where the witness has been released from the duty of secrecy.

Id.

²⁸ *Id.* arts. 190–206.

²⁹ *Id.* art. 181 (Occasions in which evidence need not be examined).

1. The court need not examine evidence offered by a party upon determining it is unnecessary to do so.
2. In cases where there is an obstacle of an indefinite duration with regard to the examination of evidence, the court may dispense with

Judges in Japan take a very “hands-on” approach to collecting evidence. The new Japanese Code of Civil Procedure permits judges to examine evidence on their own motion³⁰ and to cross-examine parties or witnesses on their own authority.³¹ In addition, experts are designated by the judges themselves, instead of by the parties, and are only summoned when a judge deems their testimony or special knowledge necessary.³² In practice, judges often control evidence production as much or more than the parties by requesting evidence or testimony according to what they feel is most in need of further proof. At the conclusion of a trial, the judge decides whether or not allegations of facts have been sufficiently supported by the evidence, taking into consideration all that transpired during the course of the litigation (referred to as the “free evaluation principle”).³³ What degree of conviction is necessary for a judge to rule a fact “proven” is the subject of some debate,³⁴ however, it is generally understood that a judge must be convinced “enough so the average person

the examination of evidence.

Id.

³⁰ *Id.* art. 207(1) (Examination of a party) (“The court may, upon motion or upon its own authority, examine the parties themselves. In such cases, the party to be examined may be required to take an oath.”).

³¹ *Minji soshō kisoku* [Rules of civil procedure], Sup. Ct. Rule No. 5 of 1996, art. 126. Article 126 of the Japanese Rules of Civil Procedure replaced Article 337 of the old Code of Civil Procedure and provides that the presiding judge may, if it is deemed necessary, issue an order to conduct a cross-examination of a party, or of a party and a witness. *Compare* MINSOHŌ, art. 179 *with* MINPŌ [Civil code], Law No. 89 of 1896, art. 337.

³² HATTORI & HENDERSON, *supra* note 5, § 7.05(9) (explaining that in addition to expert witnesses, the judge may summon government officials and juristic persons to furnish opinion testimony). Rule 129 of the Japanese Rules of Civil Procedure provides that the court shall designate matters upon which expert testimony will be given. Compare this with the U.S. Federal Rules of Evidence for expert testimony and experts called by the parties. *Compare* *Minji soshō kisoku*, art. 129 *with* FED. R. EVID. 702. However, U.S. evidence rules also allow for court-appointed experts in special situations. FED. R. EVID. 706.

³³ MINSOHŌ, art. 247 (Principle of free determination) (“In rendering a judgment, the court shall, considering the entire import of the oral argument and the result of the examination of evidence, and based upon its freely determined conviction, decide whether or not the allegations of fact are true.”).

³⁴ HATTORI & HENDERSON, *supra* note 5, § 7.05(13) (noting that the degree of conviction debate encompasses two camps: those who contend “preponderance” is sufficient, and those who believe that conviction must be beyond a reasonable doubt).

will not entertain any doubt.”³⁵

The nature and extent of discovery in Japan is therefore limited to a large degree by the nature of the trial proceedings. The combination of court-controlled evidence production and trials made up of numerous short meetings over extended periods³⁶ serves as a substitute for pretrial discovery. Furthermore, despite the adversary principle, judges are generally reluctant to dismiss a case for failure to prove allegations.³⁷ Instead, Japanese judges act as moderators, probing each party with requests for further clarification or proof. Only after all the evidence has been examined will a judge make a determination on the degree to which the alleged facts have been substantiated. Parties preparing for trial in Japan are therefore not subject to the strict burden-of-proof standard placed on parties by U.S. judges under the Federal Rules of Civil Procedure.³⁸

B. *Methods of Evidence Collection in Japan*

As would be expected, Japanese attorneys prepare for trial by collecting as much evidence supporting their allegations as possible. With the new amendments to the Japanese Code of Civil Procedure, there are essentially four formal means commonly employed by Japanese attorneys for collecting evidence. They are: 1) a motion for the preservation of evidence; 2) an application for an evidentiary request through a lawyer association; 3) court ordered production of documents; and 4) an inquiry by a party.

³⁵ *Miura v. Japan*, 29 MINSHŪ 1417, 1420 (Sup. Ct., Oct. 24, 1975) (applying this standard to find a causal relationship between a doctor's negligence and a patient's injury) (translated by Craig P. Wagnild).

³⁶ Mochizuki, *supra* note 9, at 287 (“In Japan, a trial normally consists of a series of hearings once every one or two months, often lasting no more than four to five minutes.”); *see also* Forstner, *supra* note 4, at 17 (emphasizing the divergent nature of legal proceedings in the United States and Japan and noting that Japanese trials are comprised of many short hearings often lasting less than ten minutes).

³⁷ Contrast this with the U.S. rules governing civil procedure which specifically provide for dismissal of a case based on inadequacy of the pleadings. FED. R. CIV. P. 12(c). Furthermore, FED. R. CIV. P. Rule 55 allows for default judgments, and FED. R. CIV. P. Rule 56 provides for a summary judgment to be rendered before or during a trial. FED. R. CIV. P. 55, 56.

³⁸ FED. R. CIV. P. 12(c), 56. *See generally* William W. Schwarzer et al., *The Analysis and Decision of Summary Judgment Motions: A Monograph on Rule 56 of the Federal Rules of Civil Procedure*, reprinted in 139 F.R.D. 441 (1992) and Donald G. Alexander, *Summary Judgment: An Old Remedy for New Times*, 9 ME. B. J. 292 (1994), for a discussion of the use and misuse of summary judgment motions in U.S. courts.

1. Motion for the Preservation of Evidence

Parties to civil litigation may apply to the court to preserve evidence or testimony at any time prior to or during the course of litigation.³⁹ “Prior to or during an action, the court may take and perpetuate testimony of witnesses, prospective parties, or experts, in order to safeguard against loss or to assure access to evidence that might be difficult to obtain at trial.”⁴⁰ The vehicle for this means of evidence collection is the court, and whether to evoke the preservation of evidence rule based on the application lies solely at the discretion of the judge.⁴¹

Applications for preservation of evidence must be made to the correct court⁴² and must include the name of the opposing party,⁴³ the fact

³⁹ MINSOHŌ, arts. 234-42.

⁴⁰ HATTORI & HENDERSON, *supra* note 5, § 6.03 (stating that this procedure may also be used to order the production of documents and inspection of property).

⁴¹ MINSOHŌ, art. 234 (Preservation of evidence):

The court, upon determination that circumstances exist which make the availability of evidence difficult unless examination thereof is made before the time for examination in the ordinary course of the proceedings, may, upon motion, conduct such examination according to the procedures established by this chapter.

Id.

⁴² MINSOHŌ, art. 235 (Court with jurisdiction, etc.):

1. A motion for preservation of evidence after the institution of a suit shall be made to the court of instance before which the evidence is to be employed. However, it shall be made to the court before which the suit is pending after the first date has been set for oral argument, or the case has been referred to preparations for argument proceedings or preparatory proceedings by document, and before the oral argument are [sic] concluded.

2. A motion for preservation of evidence before the institution of a suit shall be made to the district court or the summary court which has jurisdiction over the place of residence of the person to be examined or the person who holds the document to be examined, or the place where the article to be inspected exists.

3. In cases where urgent circumstances exist, a motion for preservation of evidence may be made to the district court or the summary court referred to in the preceding paragraph even after the institution of a suit.

Id.

⁴³ *Id.* art. 235. In certain cases where a party has not yet been able to designate an adverse party, a motion for preservation of evidence is not prohibited, however, the

to be proved, the evidence to be examined, and the reason why preservation of evidence is necessary.⁴⁴ Most importantly, the circumstances necessitating preservation must be clearly explained by the evidence. If they are not, the application will be summarily denied. Denial of an application does not preclude reapplying, however the ruling cannot be immediately appealed to a higher court.⁴⁵ Even without an application, the court may order the preservation of evidence on its own authority,⁴⁶ though this is seldom done in practice. Where the court orders preservation of evidence, the expenses incurred are made a part of the court costs.⁴⁷ Because this is one of the few methods of production that is of a compulsory nature, it is often used as a means of pretrial discovery by Japanese attorneys.⁴⁸

2. Evidentiary Request through a Lawyer Association

According to Japanese attorneys, one of the most frequently used formal procedures for collecting evidence is making a request for evidence

court may appoint a special representative to protect the interests of the un-named adverse party. *Id.* art. 236.

⁴⁴ *Minji soshō kisoku*, art. 153(2). Rule 153(2) of the Rules of Civil Procedure adopted by the Japanese Supreme Court on December 17, 1996, and enforced as of January 1, 1998 (the same date as the enforcement of the new Japanese Code of Civil Procedure), replaced Article 345(1) of the old Code and provides that the following matters are to be made clear in a motion for preservation of evidence: “1) the names of the parties; 2) the facts to be proved; 3) the evidence sought to be preserved; and 4) the reason for preservation of evidence.” *Id.* Compare MINSOHŌ, art. 153(2) with MINSOHŌ, art. 345(1)(1890).

⁴⁵ MINSOHŌ, art. 238 (Prohibition of appeal) (“No appeal may be made against a ruling concerning preservation of evidence.”).

⁴⁶ The broad power of the judge to order the preservation of evidence without a pending motion is found in the Code of Civil Procedure, Article 237. MINSOHŌ, art. 237 (Preservation of evidence upon the court’s own authority) (“The court may, upon determining it necessary, render a ruling for the preservation of evidence upon its own authority during the pendency of the suit.”).

⁴⁷ *Id.* art. 241 (Expense for preservation of evidence). This is significant because court costs are ultimately borne by the non-prevailing party to the litigation. *See id.* art. 61.

⁴⁸ HATTORI & HENDERSON, *supra* note 5, § 6.03 n.10 (explaining that since expansive discovery devices similar to those in the United States have yet to be adopted in Japan, attorneys have resorted to using preservation of evidence even though it was not meant to be utilized as a discovery tool).

through a lawyer association of which you are a member. Japan's Attorney Law, Article 23-2 provides that:

A lawyer may, concerning a case he/she is handling, through a lawyer association to which he/she belongs, be introduced to and make a request for a report on necessary items, to a public office or a public or private organization. When such a request is made, that same lawyer association may, if it finds the request unsuitable, refuse it

2. A lawyer association may, based on a request made under the previous section, introduce a request for a report on the necessary items to a public office or a public or private organization.⁴⁹

This provision of the law regulating attorneys was apparently designed to provide an avenue for attorneys to pursue discovery. However, the path created by Article 23-2 of the Attorney Law is narrow and quite unsure. The law limits requests to only those being made on public offices or public/private organizations. Since the majority of all civil litigation can be assumed not to involve or require evidence from one of these groups, it appears that the scope of this law is rather limited.

The law is also hampered by the use of “may” and the provision allowing for refusal by lawyer associations. The grounds for refusal are not addressed by the Attorney Law, and therefore Attorney Law Article 23-2 appears to be only a recommended way of collecting evidence from a cooperative third party. The Japanese Supreme Court has further limited the effect of this law by allowing public offices to refuse a production request when there is a conflicting obligation to protect privacy.⁵⁰ Notwithstanding these handicaps, Attorney Law Article 23-2 appears to be a commonly-used, well-entrenched method of pretrial discovery in Japan.

3. *Court Ordered Production of Documents*

A major tool for collecting evidence from an opposing party or third person in Japan is to request that the court order a production of documents.⁵¹ Such a request is considered and either granted or refused

⁴⁹ BENGOSHIHŌ [Attorney Law], Law No. 221 of 1951, art. 23, § 2 (translated by Craig P. Wagnild).

⁵⁰ *City of Kyoto v. Ikemiya*, 35-3 MINSHŪ 620 (Sup. Ct., April 14, 1981).

⁵¹ See MINSOHŌ, arts. 220-21. Any time a party is under an obligation to produce documentation the opposing party may request that the court order production.

by the court.⁵² In some cases, the court may require production of only relevant portions of the document.⁵³ However, the holder must produce the document: 1) in cases where a party to the litigation is in possession of the document referred to by such party in such litigation; 2) in cases where the party who offers the evidence is entitled to demand delivery from the holder of the document or to demand perusal thereof; or 3) in cases where the document has been drawn for the benefit of the party who offers the evidence or with regard to the legal relations between such party and the holder thereof.⁵⁴

Under the previous procedural rules, parties were able to demand production under this law *only* if they were able to demonstrate a substantial legal interest in the document and point to its location and identity.⁵⁵ Since such a requirement necessitated an almost-intimate knowledge of the document, the old procedural rules seemed designed only to protect against the concealment of known evidence, and not to facilitate any kind of discovery of new information. The new amendments to the Japanese Code of Civil Procedure now create a general duty on corporations and private citizens to produce the documents that they possess,⁵⁶ unless a document falls within one of the following three excepted categories: 1) where the document contains information regarding which the holder of the document (or the people who have a

The situations in which an obligation to produce documents arise are discussed in the Code of Civil Procedure, Article 220 (Duty to produce document). *Id.* art. 220. The procedure and elements of a motion for production of documents are contained in Article 221 (Motion for Order to Produce Document). *Id.* art. 221.

⁵² *Id.* art. 223(1) ("The court shall, upon determining that there are grounds for a motion for an order to produce a document, by ruling, order the holder of the document to produce it.").

⁵³ *Id.* art. 223. Article 223 further provides that "if there is a part [of the document] which is unnecessary to be examined or if a duty to produce a part of the document is not found, the court may order the production of the document except for such part." *Id.*

⁵⁴ *Id.* art. 220(i)-(iii) (creating a general duty to produce documents).

⁵⁵ See MINSOHŌ, art. 312 (1890); see also Jonathan D. Richards, *Japan Fair Trade Commission Guidelines Concerning Distribution Systems and Business Practices: An Illustration of Why Antitrust Law Is a Weak Solution to U.S. Trade Problems with Japan*, WIS. L. REV. 921, 939 n.106 (1993) (listing as one of the reasons for a lack of private party antitrust actions in Japan, the difficulty for plaintiffs to obtain discovery in the Japanese court system).

⁵⁶ Mochizuki, *supra* note 9, at 299 ("[U]nder the New Code, all documents that are relevant to the dispute are presumptively discoverable.").

certain close relationship with the holder) would have a right to refuse to testify; 2) where the document contains information on which the holder of the document owes a duty of confidentiality as a lawyer or other prescribed professional, or information relating to a technical or professional secret regarding which the duty to keep secret is not exempted; or 3) where the document is made solely for the sake of the use of the holder.⁵⁷

The scope of these exceptions is quite broad and therefore appears to provide easy routes to avoid the general obligation to produce documents.⁵⁸ For example, documents such as diaries, calendars, notes, and agendas are all documents that were arguably made solely for the use of the holder, and may therefore be exempted from production. Where the party is a corporation, this exemption may be expanded to prevent the production of in-house memoranda, financial documents, *ringi-sho* (Japanese corporate approval circulars), and many other relevant and important documents that may have been created only for the internal use of the corporation.⁵⁹ How the Japanese courts respond to assertions of exemption based on these grounds will likely determine the true effectiveness of the amendments to this discovery procedure.⁶⁰ The courts have the power to compel the production of a document for in-camera review by the judge to determine whether an assertion of an exemption by a party is proper.⁶¹ In such a case, the adversary party will not be permitted to view the document until a determination that an exemption is inapplicable has been made by the judge.⁶² The addition of this in-camera

⁵⁷ MINSOHŌ, art. 220(iv).

⁵⁸ Mochizuki, *supra* note 9, at 301 (“[T]hese exceptions pose the greatest threat to the objective of providing litigants with greater, earlier access to information because they are phrased in a manner that allows the greatest expansion through judicial and academic interpretation.”).

⁵⁹ *Id.* at 301-04.

⁶⁰ Taniguchi, *supra* note 8, at 778 (“An interesting development of case law will be seen after January 1, 1998 [when the New Code will be implemented] regarding this matter.”); *see also* Mochizuki, *supra* note 9, at 305 (explaining that factors will be weighed by the court with categories of documents discoverable or non-discoverable depending on the circumstances).

⁶¹ MINSOHŌ, art. 223(3) (“The court may cause the holder of a document to present it upon determining it necessary for determining whether or not the document under a motion for an order to produce falls under any of the documents referred to in Article 220, item iv, a to c inclusive.”).

⁶² *Id.*

review process will hopefully prevent parties from falsely claiming that they are not obligated to produce relevant documents.⁶³

The new amendments to the Code of Civil Procedure also set forth new proceedings to address the situation where a party may have difficulty clearly designating the document it wishes produced or the gist of the document.⁶⁴ These new proceedings permit the movant to simply clarify matters sufficient for the holder of the document to identify what is being requested, at which point the burden then shifts to the holder of the document to designate the document(s) responsive to the request.⁶⁵

Despite the amendments to the Code of Civil Procedure relating to the court order of the production of documents, a number of impediments to the use of this procedure remain. Requesting a court to order the production of documents is an in-court procedure that can only be used after litigation commences. Appeal can immediately be made against the ruling to a higher court,⁶⁶ which inevitably results in substantial delay. While the Japanese procedural rules governing court orders of the production of documents have improved dramatically with the new amendments,⁶⁷ concerns remain about the effectiveness of sanctions for non-compliance.⁶⁸ Sanctions for non-compliance with a court order to produce documents include deeming the allegations of the requesting party *relating to such fact to be proven* to be true.⁶⁹ This is a slight improvement from the prior procedural rule which provided that a

⁶³ Mochizuki, *supra* note 9, at 299.

⁶⁴ MINSOHŌ, art. 222(1) (Proceedings to specify document).

⁶⁵ *See id.*; *see also* Taniguchi, *supra* note 8, at 778.

⁶⁶ MINSOHŌ, art. 223(4) ("An immediate *kokoku*-appeal may be made against a ruling regarding a motion for an order to produce a document.").

⁶⁷ Naoya Endo, *Minji Soshō Sokushin to Shōko Shūshū* [Civil Litigation Promotion and Evidence Gathering], July 15, 1998 HANREI TAIMUZU 24, 28 (noting that court decisions and legal scholars have specifically declined to recognize orders for document or evidence production directed at third parties as compulsory).

⁶⁸ Hasebe, *supra* note 7, at 103 (arguing that the means of compelling evidence production under the old rules were insufficiently compulsory).

⁶⁹ MINSOHŌ, art. 224(1) ("In cases where a party does not comply with an order to produce a document, the court may deem the allegations of the adversary party relating to the statement within such document to be true."); *id.* art. 224(2) ("The same shall apply as under the preceding paragraph to cases where a party has destroyed a document which such party is bound to produce or has otherwise rendered it impossible for use for the purpose of preventing its use by the adversary party.").

sanction for non-compliance could include deeming allegations of the requesting party *relating to a statement within the document* to be true.⁷⁰ In addition, the sanction for a third-party's failure to comply with a court's order to produce documents was increased to up to 200,000 yen (approx. U.S. \$2,000).⁷¹

4. *Inquiry by a Party*

The amendments to the Code of Civil Procedure included the addition of a wholly new "discovery" procedure to be used by parties: an inquiry by a party. This new procedure, said to be modeled after the interrogatories used in the United States, permits a party to inquire of the adversary party in writing and request written responses regarding matters necessary for the assertion of proof.⁷² Parties are required to respond to inquiries, unless the particular written request falls within one of the following exemptions: 1) an inquiry which is not concrete or particular; 2) an inquiry which insults or embarrasses the adversary party; 3) an inquiry which duplicates an inquiry which has already been made; 4) an inquiry which requests an opinion; 5) an inquiry which requires undue expense or time for the adversary party to answer; or 6) an inquiry regarding matters similar to such matters as to which testimony may be refused in accordance with the provision of Articles 196 or 197.⁷³

There are no concrete sanctions for a failure to properly respond to an inquiry by a party.⁷⁴ Instead, compliance with this new procedure is predicated upon the principle and obligation of good faith and trust set forth in Article 2 of the new Code of Civil Procedure.⁷⁵ The effectiveness

⁷⁰ *Id.* art. 224(3).

⁷¹ *Id.* art. 225(1); *see also* Mochizuki, *supra* note 9, at 296 (noting that the new Code doubled the penalty assessed against third parties for non-compliance with an order for production of documents).

⁷² *Id.* art. 163 (Inquiry by a party) ("A party may, during the pendency of a suit, inquire in writing of the adversary party about matters which are necessary for the preparation of assertions of proof, requesting written responses within an appropriate period to be designated by such party.").

⁷³ *Id.* art. 163(i)-(vi).

⁷⁴ Taniguchi, *supra* note 8, at 779 (noting that while there are no formal sanctions for non-compliance with an inquiry request, "it is hoped that the bar will cultivate a mutual feeling of collegial obligation to cooperate").

⁷⁵ MINSOHŌ, art. 2 (Responsibilities of the court and the parties) ("Courts shall make efforts to secure that civil actions be conducted with justice and speed, and parties

of this new procedure for discovering information from the opposing party will ultimately depend upon the court's actions to compel compliance and prevent abusive tactics. However, if the past is any indication, it seems unlikely that the reluctance of the courts to sanction parties for anything other than obvious and egregious procedural abuses will change enough to make the inquiry by a party an effective discovery tool.

III. WHY EVIDENCE COLLECTION IN JAPAN DIFFERS FROM U.S. DISCOVERY

A brief discussion is appropriate regarding why such great differences exist between the Japanese and American systems for collecting evidence. Though undoubtedly numerous factors combined to influence Japan's choice of such a highly restrictive and cumbersome system of discovery, five major reasons are worthy of mention.

First, Japan's legal system was modeled after Germany's civil law system, a method of jurisprudence that has traditionally limited discovery.⁷⁶ Civil law countries have a different concept of the role of a trial, seeing it as the whole, rather than as just one part, of litigation.⁷⁷ For this reason, the discovery of evidence is considered to be one of the main functions of the trial process.⁷⁸ Extensive pretrial discovery is considered unnecessary.

Second, Japan does not have a jury system like the United States. All trials are conducted by a judge, or panel of judges.⁷⁹ Therefore,

shall conduct civil actions in accordance with good faith and trust.”).

⁷⁶ Taniguchi, *supra* note 8, at 767 (explaining that the modern Japanese Code of Civil Procedure adopted in 1890 was drafted by a German legal advisor named Hermann Techow under heavy influence of the German Code of Civil Procedure of 1877); *see also* Ohara, *supra* note 3, at 21 (continuing on to briefly explain Japanese evidentiary rules and noting how their limited nature often made transnational litigation with Japan prohibitively complex and expensive).

⁷⁷ Mackey, *supra* note 10, at 149-50. See generally Fernando Orrantia, *Conceptual Differences Between the Civil Law System and the Common Law System*, 19 SW. U. L. REV. 1161 (1990), for a discussion contrasting civil law and common law systems.

⁷⁸ Taniguchi, *supra* note 8, at 769 (“Thus, a hearing before a court may be broken down into several short sessions, in which the pleading stage need not be clearly separated from the evidentiary stage.”).

⁷⁹ *Id.* (“With no jury in the Civil Law system, it is not as necessary to have a concentrated hearing session for the fact finding. Professional judges both determine the facts and apply the law.”); *see also id.* at 769 n.6 (“The first instance court consists of either one judge or a panel of three judges.”).

concerns about the effect of sudden introductions of evidence of a questionable nature at trial do not exist, because judges will properly weigh and consider the type and nature of all evidence. Although the *Roppō* (Six Codes) of Japan contains a provision which allows for jury trials in limited instances,⁸⁰ this law was not used and was suspended by legislation in April 1943.⁸¹ Much of discovery in the United States is designed to eliminate the element of surprise and allow both parties to fully evaluate evidence to enable each to explain it in a favorable light to a jury. In Japan, the judge is considered fully qualified to evaluate and form unbiased opinions about evidence without explanation by the parties.⁸² Therefore, pretrial examination of all evidence by the parties is not considered necessary.

Third, in Japan the burden of proof required to maintain a lawsuit is not judged until all of the evidence has been presented and evaluated by the court.⁸³ As previously mentioned, early dismissals for lack of evidence to support allegations are almost nonexistent. There is therefore little pressure on parties, prior to the commencement of litigation, to “discover” evidence that could later be procured at trial. Furthermore, liberal rules concerning the amendment of claims mean that parties need not worry that they will be stuck with the claims set forth in their original complaint or answer.⁸⁴ Amendments or additions may be made throughout litigation depending on the evidence presented.⁸⁵

Fourth, the aversion in Japan to confrontation, and therefore litigation, often leads to settlement before or during trial.⁸⁶ Most parties in

⁸⁰ *Baishinhō* [Jury law], Law No. 50 of 1923.

⁸¹ *Baishin teishihō* [Suspension of the jury system law], Law No. 88 of 1943.

⁸² Taniguchi, *supra* note 8, at 770 (“The system protects the parties against surprise because they are permitted to plead and produce evidence to cope with a new development.”).

⁸³ See MINSOHŌ, art. 243(i) (Final judgment) (“The court shall render a final judgment when a suit is ripe for decision.”); *id.* art. 247 (Principle of free determination) (“In rendering a judgment, the court shall, considering the entire import of the oral argument and the result of the examination of evidence, and based upon its freely determined conviction, decide whether or not the allegations of fact are true.”).

⁸⁴ See *id.* art. 143.

⁸⁵ Taniguchi, *supra* note 8, at 769-70.

⁸⁶ Mark D. Calvert, *Out with the Old, In with the New: The Mini-Trial is the New Wave in Resolving International Disputes*, 1991 J. DISP. RESOL. 111, 122 (premising that methods of dispute resolution other than full litigation would be helpful

Japan wish to settle disputes informally, and there is significant judicial pressure to reach a settlement rather than see a trial through.⁸⁷ This is true both before trial, where compliance with procedures such as "*minji chōtei*" (a kind of preliminary hearing by a layperson) and "*wakai*" (negotiated settlement) is commonly expected, and during trial, where proceedings are extended over a long period,⁸⁸ during which time judges make strong efforts to encourage settlement.⁸⁹ Delay in Japanese litigation is chronic,⁹⁰ as judges exercise their "*shakumeiken*" (right to clarify facts and issues).⁹¹ One attorney posited that the reason judges postpone hearings and delay litigation is to wear the parties down to the point where they want to settle. This emphasis on reaching an amicable settlement generally overrides any desire to prepare for a head-to-head courtroom battle. This is one reason that in the past, few calls for more extensive methods of discovery were heard.

Fifth, appellate courts in Japan can conduct fact finding in the same way as courts of first instance.⁹² Japanese attorneys have relied on the fact that if the lower court makes a mistake concerning evidence, that mistake may be corrected by the higher court. Therefore, the first trial in Japan, at least in one sense, comes to serve as a form of pretrial discovery for the appeal. To the Japanese attorney, extensive discovery prior to the first trial consequently appears both time-consuming and redundant.

While the extent to which each of these factors has influenced the direction of discovery practice in Japan is uncertain, the few highly-limited means of collecting evidence in Japan are obviously symbolic of

in bridging the cultural gap inherent in Japanese-American corporate disputes).

⁸⁷ See John O. Haley, *The Myth of the Reluctant Litigant*, 4 JOURNAL OF JAPANESE STUDIES (No.2) 359, 378-389 (1978).

⁸⁸ Mackey, *supra* note 10, at 150 (explaining how the Japanese legal system approaches litigation in a fundamentally different way than the way trials are conducted in the United States. Chief among the differences is that Japanese civil trials are actually a series of isolated meetings involving a small portion of the litigation each time).

⁸⁹ Taniguchi, *supra* note 8, at 785-786.

⁹⁰ Haley, *supra* note 87, at 381.

⁹¹ See MINSOHŌ, art. 149 (Authority to ask for explanations, etc.); *id.* art. 151 (Disposition for explanation).

⁹² See JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* 120 (2d ed. 1985) ("In the civil law tradition, the right to appeal includes the right to reconsideration of factual, as well as legal issues.").

an approach to litigation and dispute resolution that differs greatly from American practices. Even after the extensive amendments to the Code of Civil Procedure were passed, calls for additional reformation of evidence collecting methods in Japan continue. However, despite a growing trend toward more pretrial discovery, it seems unlikely that Japan will see the introduction of extensive discovery rules modeled after the U.S. system in the near future.

IV. TRANSNATIONAL LITIGATION AND DISCOVERY IN JAPAN

Of the many problems posed in transnational litigation, one of the most frustrating and difficult to remedy is that of differing rules concerning pretrial collection and production of evidence. “Neither common law nor civil law permits searching scrutiny of material in other party’s possession and U.S. attorneys often encounter resistance when they seek to use discovery in transnational litigation.”⁹³ The most common remedy to problems caused by divergent systems in different countries is an international treaty. Treaties are often used to try to bridge the gap between common law systems (like that of the United States), and civil law systems (like that of Japan).⁹⁴ Unfortunately, although calls for Japan to join the Hague Evidence Convention persist,⁹⁵ America’s largest trading partner has yet to sign the treaty that might solve many, if not most, international discovery problems.⁹⁶

In place of the Hague Evidence Convention, the United States and Japan have signed a bilateral treaty concerning the gathering of evidence.⁹⁷ This treaty allows for evidence to be taken directly in Japan

⁹³ YEAZELL, *supra* note 15, at 482.

⁹⁴ *See* Mackey, *supra* note 10, at 156.

⁹⁵ Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555 (typically referred to as “Hague Evidence Convention”). *See* Ohara, *supra* note 3, at 10 (noting that Japan is a signatory to the Hague Convention Relating to Civil Procedure, *opened for signature* Mar. 1, 1954, 286 U.N.T.S. 265, but not the Hague Evidence Convention, while the United States is a signatory to the latter, but not the former); *see also* Mori, *supra* note 1, at 3; Mackey, *supra* note 10, at 151.

⁹⁶ *See* Mackey, *supra* note 10, at 156-157; *see also* Ohara, *supra* note 3, at 10 (suggesting that Japan should join the Hague Evidence Convention for the purpose of facilitating transnational litigation).

⁹⁷ Ohara, *supra* note 3, at 10 (noting that Japan and the United States signed the Consular Convention, Mar. 22, 1963, U.S.-Japan, 518 U.N.T.S. 179, which provides for assistance in the collection of evidence).

by a U.S. representative following the Federal Rules of Civil Procedure or by a Japanese court conducting evidence gathering. Although this treaty was intended to resolve the problems associated with collecting evidence in Japan, major obstacles still exist that effectively preclude most forms of discovery.

Evidence may only be directly taken by a U.S. attorney or recognized official representative when it is offered voluntarily. U.S. courts have no power to compel production of evidence or compliance with U.S. discovery rules. Furthermore, the treaty does not provide a means by which testimony or evidence production may be obtained by a U.S. attorney as a matter of right. U.S. attorneys attempting to discover information in Japan are therefore limited to those witnesses and persons who voluntarily answer their requests.

If a U.S. attorney attempts to take a deposition or inspect documents unsupervised in Japan, that attorney is considered to be violating Japan's sovereignty.⁹⁸ Japan considers engaging in unauthorized discovery (i.e., any discovery beyond that provided for by treaty or by the Japanese Code of Civil Procedure) to be illegal, and therefore enforcement of U.S. judgments based on such discovery would violate the public order as stated in Japanese Civil Code Article 200(3).⁹⁹ "The New Code makes it clear that this requirement covers not only the contents of a foreign judgment but also the procedure through which a foreign judgment was obtained."¹⁰⁰ U.S. attorneys are understandably hesitant to engage in discovery practices that might sacrifice their ability to later collect on a judgment.¹⁰¹ The result is that in transnational litigation proceedings in the United States, very little direct discovery takes place in Japan.

The U.S.-Japan treaty also provides a second method of discovery.

⁹⁸ Mackey, *supra* note 10, at 150 (explaining that evidence collection by a U.S. party in Japan without special authorization is viewed as a violation of the judicial sovereignty of Japan).

⁹⁹ Ohara, *supra* note 3, at 21 (explaining that while informal discovery is often necessary in Japan for proceedings in the United States, such unauthorized discovery is considered illegal and therefore contrary to Japan's public order). Japan's Civil Code, Article 200(3) provides that "the judgment of a foreign court must not be contrary to the public policy in Japan." MINPŌ, art. 200(3) (Japan).

¹⁰⁰ Taniguchi, *supra* note 8, at 788 n.27. Recognition of foreign judgments by Japanese courts is addressed in the Code of Civil Procedure, Article 118. MINSOHŌ, art. 118.

¹⁰¹ See Kenneth D. Helm, *Enforcing Foreign Civil Judgments in Japan*, 1 WILLAMETTE BULL. INT'L L. & POL'Y 71 (1993), for a discussion of the obstacles encountered when attempting to obtain an execution of a U.S. judgment in Japan.

A U.S. party wishing to have a particular document examined or witness deposed may apply through a U.S. court to request a Japanese court conduct the examination. The primary difficulty with this procedure is that the examination by the Japanese court is often not conducted in accordance with the Federal Rules of Civil Procedure.¹⁰² Thus, great effort and expense might be made to comply with the requirements of this provision and avoid offending Japanese public order, only to procure evidence that ultimately will not be admitted in the U.S. proceedings. At present, this is the only compulsory method of discovery in Japan allowed U.S. attorneys.¹⁰³ However, the major issue of expense, as well as concerns about eventual acceptance by a U.S. court of a deposition conducted by a Japanese judge, have severely limited its use.

Further impediments to the discovery of information in Japan by U.S. attorneys are the "blocking statutes," which prohibit Japanese nationals from providing information to foreigners that might be considered "vital."¹⁰⁴ Japanese parties or witnesses from whom evidence is sought may claim that providing the requested information would violate a blocking statute and thereby refuse to answer. The U.S. Supreme Court has held that foreign parties may be compelled to produce evidence,¹⁰⁵ and that they must provide such evidence even if doing so violates a blocking statute.¹⁰⁶ Failure to comply with U.S. discovery rules may therefore subject a foreign party to court sanctions in the United States. This places U.S. courts in the unique position of deciding whether to sanction a foreign party for obeying its own country's blocking

¹⁰² Mackey, *supra* note 10, at 132 (examining the procedures available to U.S. attorneys for taking depositions and collecting evidence in Japan for use in civil litigation against a Japanese party in a U.S. court).

¹⁰³ Of course, there are situations where a U.S. court may order a Japanese party to participate in discovery either in Japan or the United States. For example, where the plaintiff is a Japanese national, the plaintiff cannot avoid discovery requests from the defendant by hiding in Japan. Court sanctions in the United States, including dismissal of the action, are available to prevent such an improper tactic. This is also true where a Japanese defendant has asserted a counterclaim in an action.

¹⁰⁴ Mackey, *supra* note 10, at 132.

¹⁰⁵ *United States v. First Nat'l City Bank*, 396 F.2d 897 (2d Cir. 1968) (upholding a contempt order against a bank's branch in Germany for failing to comply with a subpoena requiring the production of documents in an antitrust case).

¹⁰⁶ *Societe Nationale Industrielle Aerospatiale v. United States*, 482 U.S. 522 (1987) (advising, however, that American courts take care to demonstrate due respect for problems faced by foreign litigants because of their nationality, location of operation, or because of any sovereign interest expressed by a foreign state).

statute.¹⁰⁷ Most courts faced with such a situation would opt against any form of strict sanction, which may be why Japanese parties regularly invoke Japan's blocking statute to frustrate discovery efforts by U.S. opponents.

Perhaps no foreign country stands to benefit more from evidence collection reform in Japan than the United States. U.S. companies seeking to do business with or in Japan are frequently discouraged by the lack of adequate legal recourse in the event a problem occurs. Despite the bilateral treaty, one of the main problems in transnational litigation involving a Japanese party is an insufficient means of gathering evidence before trial. While the new amendments to Japan's Code of Civil Procedure have paved the road for more extensive "discovery" among domestic parties to a dispute in Japan, their effect on transnational litigation has yet to be seen. It is believed that further reformation of Japanese procedural rules concerning the collection of evidence and the introduction of expanded methods of pretrial discovery are needed to bridge the gap between our vastly different legal systems.

Since Japanese courts refuse to enforce U.S. judgments based on evidence discovered "illegally," a broadening of the legal means of pretrial evidence procurement in Japan should provide U.S. attorneys increased opportunities to engage in discovery without violating Japan's public order. This, in turn, may help to dispel some of the reluctance of U.S. companies to deal with Japan. For these reasons, the benefits of further expanding Japanese methods of evidence collection will likely be felt both in Japan and in the United States.

¹⁰⁷ Mackey, *supra* note 10, at 132.