PAPER:

ELECTRONIC EVIDENCE IN CIVIL PROCEDURE IN JAPAN

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Evidential principles in Civil Procedure

In Japan there exists no unified statute for both civil and criminal procedure. Both procedures have their own provisions relating to the examination of evidence.[1] In Japan, the principle of free evaluation of evidence ('Jiyu-Shinsho-Shugi'), that is, a principle giving judge the discretion to determine facts fundamental to court judgment, is present in the civil and criminal procedure codes (JCCivP art. 247, JCCriP art. 318).

In civil procedure, there are no limits on the admissibility of evidence except for evidence collected illegally. The judge can, at his discretion, determine facts fundamental to the court taking into account the whole process of the trial (Koto-Benron-No-Zenshushi). The judge can also consider the attitude taken by a party, such as any delay in producing documentary documents, as factors against the party.

Statutes on electronic evidence

Neither the code of civil procedure nor the code of criminal procedure has general provisions for examining electronic evidence. JCCivP (art.231) provides for the admissibility of recorded audio and video tapes as evidence, quasi documentary evidence (Jun-Bunsyo), but according to the purpose of the legislation, it is not intended to include computer data.[2] Computer data (digital data) are usually treated differently from recorded audio and video tapes (analogue data), because their contents cannot be verified directly by using a playback machine and there is no single medium nor form.

There are three principal reasons for this absence of special provisions with regard to the electronic record as a means of evidence. First, under the principle of free evaluation of evidence, all forms of evidence are admissible in civil procedure, but are evaluated based on their credibility. Second, in practice courts do not need special provisions for examining an electronic record. It is considered that a judge could examine the electronic record either through examining print-outs as documentary evidence (Shosho), through an expert witness (Kantei), or inspection (Kensho) of the media that stored the information. Finally, there is a difficulty in drafting a general provision that covers various forms of media comprehensively.[3]

Official documents are presumed to be authentic,[4] and a signed or sealed private document by the author or a representative of the author is presumed authentic.[5] It is possible to object to the presumption of the authenticity of these documents. Electronic documents cannot be signed or sealed physically. Thus the criteria of presuming the authenticity of documents, that is, the existence of signature or seal affixed to the document, does not exist for electronic documents. The provisions of the Law of Electronic Signature and the Certification of Servicing Electronic Signature aims to resolve the problem. Article 3 provides that an electronic document with electronic signature affixed by the author is presumed as authentic.

In civil proceedings, a document presented as evidence should be the original. However, an authenticated copy of the original document (Seihon) or a certified copy (Ninsho-Tohon) of the document is admissible as a substitute.[6] Given these rules, it can be considered that electronic data recorded on media can be considered as original.[7] Some lower courts consider the print-outs of electronic data is the original because electronic data themselves could not be signed.

To examine an electronically stored record, the record as printed out is the most important material to be

[1] *The Japanese Code of Civil Procedure ('JCCivP'), the Rule of Civil Procedure ('JCivP Rule'), the Code of Criminal Procedure ('JCCriP') and the Rule of Criminal Procedure ('JCriP Rule'). A translation of JCCivP and JCivP Rule (some provisions had already amended) can be found in Hosou-Kai, Nihon-no-Minjisoshoho-Dou-Kisoku (Housou-Kai 1999).*

[2] *Homusho-Minjikyoku-Sanjikanshitsu (Counselor for the Civil Affair Bureau of the Ministry of Justice) Ichimon-Ito-Shiki, Shin-Minji-Soshoho, at 277(Shoji-Homu 1996).*

[3] *Houmusho-Minjikyoku-Sanjikanshitsu, Minjisoshoho KaiseiShian (Counselor for the Civil Affair Bureau of the Ministry of Justice, The Revision Plan on the Code of Civil Procedure), at 45.*

[4] *JCCivP art. 228(2).*

[5] *JCCivP art. 228(4).*

[6] *JCCP Rule sec. 143(1).*

[7] *Print-outs of real estate registration or other public registration are, in principle, mere records, but in relation to other laws they are also treated as an exemplified copy. See The Law of Promotion of Management of Registration of Computer System, sec. 3 and 4.*

examined as evidence. According to the eclectic method of examination (Shin-Kensho-Setsu), the media storing the data, as well as print-outs, can be presented to the court as quasi-documentary evidence.[8] The party that is requested to produce the electronic record on storage media should provide supplementary information, such as the name and whereabouts of the operators responsible for putting the data into the media, as well as the details of operators producing the print-outs, the software and the format of the record required for the examination of the content of the electronic record. If the requested party does not disclose such supplementary information, the judge may determine, by the principle of free evaluation of evidence, that the party required to produce the evidence has not cooperated with the court fully, unless it shows a justifiable reason for failing to comply with the requirements.[9] Where the identity of the print-outs and data stored on media or the authenticity of the data is at issue, it will be necessary for a digital evidence specialist to inspect or examine the media itself. The court may also call the operators of the electronic record to the court as a witness.

Production of electronic evidence

In Japan there is no discovery or disclosure as in the U.S or England. The Code of Civil Procedure provides some categories of documents should be produced to the court.[10] It expresses the responsibility of the parties to produce documentary evidence to the court. The production order for the production of ordinary documentary evidence applies to the print-outs of electronically stored records that exist at the time of the motion for the inspection of evidence. The party moving for the production of documents should present their titles, summaries, possessor's names, the facts to be proven and the reason for the production of the evidence.[11]

In court practice, through the discussion between judge and the parties when clarifying and focusing on the issues of the case at the early stages of the procedure, the parties are recommended or urged to produce the evidence to the court. The judge can consider the failure of a party to cooperate as a factor against the party, besides the evaluation of the evidence presented by the parties. If the party ordered to produce documents by the court unreasonably disobeys, the court may decided against the party. However there are no sanctions against the party such as contempt of court.

Using the summary of electronically stored information

In Japan, it seems that courts do not consider it is necessary to examine voluminous amounts of electronically stored information (ESI). The court requests a party to produce the summary or partial print-outs of ESI referred by the parties without presenting the copy of ESI to the court. If there are any objection on the authenticity or the integrity of the summary of the ESI, the court requests the party to produce additional print-outs of the ESI, or the court inspect the ESI.

Recent cases on ESI

In Japan, a small number of published case reports mention the production of electronic evidence. In some categories of cases, harassment cases, moneylender cases, future trading cases and medical malpractice cases, it is often necessary to examine the electronic evidence. In cases of futures trading, the court practically requests the defendant trader to make a chart tracing the transaction history with the plaintiff customer in spreadsheet and to produce it in electronic format.[12] It is intended to clarify issues in the case. However, even in these cases, the print-outs of electronic documents must be examined.

In recent years, there have been many cases of consumers initiating litigation against moneylenders, claiming reimbursement of repayment including interests that exceed the restrictions provided by the Interest Restriction Law. In these cases, the plaintiff consumers initiate motions to produce the transaction record over ten years, which is stored in the defendant's computer system.[13] One nationwide moneylender repeatedly objects to the production of such records. The appellate court has concluded that the defendant does not show enough evidence that the defendant's computer system routinely deletes records over ten years, and it is inconsistent with the assertions in previous customer cases. The judgment was rendered against the defendant.[14]

[8] *JCCivP art. 231.*
[9] *Counselor for the Ministry of Justice, The Revision Plan of the Civil Procedure.*
[10] *JCCivP art. 220.*
[11] *JCCivP art. 221(1), JCivP Rule sec. 140(1).*
[12] *If the party produce the chart or other document in electronic format to the court, the court accepts the files in 'Ichi-Taro', which is popular word processing software in governmental offices, and is in MS EXCEL. See Hanrei-Taimes No. 1072 at 4 (2001).*
[13] *A company should reserve its business records for ten years in accordance with the Company Law article 435(4). The court can order the company to produce business records, article 443.*
[14] *Osaka High Court Decision, 2003.8.28, Tokyo High Court Decision, 2003.12.26*

There is a problem of obtaining electronic evidence from back-up tapes, which are primarily meant for disaster recovery, which means they need to be restored for the data to be read. However, the courts have yet to discuss the cost of restoring data. Since the main issue is consumer protection in these cases, it is not possible to generalize how to deal with back-up tapes at present.

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