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International Divorce between Foreigners

Alimony (1)

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I. Introduction

In an international divorce case, in particular, divorce of foreigners living in Japan, we often encounter questions as to whether a husband (or a wife) is required to pay alimony (post-divorce spousal support) to a wife (or a husband). In this regards, unique questions come from rich foreigners' divorce as to whether a husband (or a wife) is required to pay alimony to a wife (or a husband) to pay lots of alimony (sometimes over US\$5000 per months) for a long time (sometimes more than 15 years) to fill the income gap between the husband and the wife even the wife receive a lots of the division of assets (sometimes worth more than US\$1 million) obtained during their marriage. As the post-divorce spousal support is only required to a husband (or a wife) if the division of the asset is not sufficient for the wife (or the husband) under the civil code of Japan (in practice), the request sounds excessive spousal support in Japan.

This request of very large and quite long time alimony (or post-divorce spousal support) is one of the most complicated and contentious issues under the laws of Japan.

We will try to explain complexity of the applicable laws of Japan using a couple of example:

- (1) Divorce of US husband and UK wife got married and living in Japan for more than 10 years.
- (2) Divorce of US husband born and grew up in the state of New York and US wife born and grew up in the state of California got married and living in Japan for more than 10 years.
- (3) Divorce of Canadian husband born and grew up in the province of Nova Scotia and Canadian wife born and grew up in British Columbia and got married and living in Japan for more than 10 years.

II. Governing Law of Alimony in Japan

1. Jurisdictional Issue

As long as the husband and the wife lives in Japan, the husband and wife could file a divorce law suit against his wife or her husband in Japan (he or she may be required to file mediation first though in accordance with Article 257(1) of the Domestic Relations Case Procedure Act.).

2. Conflict of Law Issues

The court of Japan shall decide the governing law of international divorce by applying the conflict of laws of Japan.

With respect to the alimony, the governing law of the alimony of the international divorce is governed by the Act on the Law Applicable to the Obligation of Support (“LAOS”), which is implemented to execute the Convention on the law applicable to maintenance obligation. According to Article 2 of LAOS, the governing law of the Alimony is governed by the laws of the governing law of divorce, which is the Act on General Rules for Application of Law (“GRAL”).

Please note that the governing law of the Divorce (and Alimony) is determined as the laws other than Japan in accordance with GRAL and LAOS, the foreign law would not be applicable if the application of the foreign law would be manifestly contrary to public policy of Japan.

Furthermore the amount of alimony shall be determined by taking the need of a wife (or a husband) and the financial resources of a husband (or a wife) into the consideration, which is two elements of spousal support available under the laws of Japan, even though the applicable foreign laws provides otherwise under Article 8(2) LAOS.

The meaning of Article 8(2) of LAOS is somewhat unclear. According to the prominent scholars, the meaning of Article 8(2) of LAOS would not exclude the request of alimony for filling the income gap of the wife and husband. The provision is interpreted to require considering the need of a wife (or a husband) and the financial resources of a husband (or a wife), in addition to the requirements of available law. Prominent scholars also admit that the actual amount of alimony is related to the amount of the assets divided between husband and wife upon divorce. Although the governing law of the divorce and asset division shall be the same in accordance with the prevailing opinion among the scholars, some of the jurisdiction is inevitably different. Prominent scholars admit that the discrepancy of the governing law of the alimony and the asset division and determination of the actual amount of the alimony by considering the alimony determined by the elements of the applicable law, the need and financial resources and amount of the assets divided. The actual amount of the alimony is eventually decided by the judge by considering all the relevant circumstances between the wife and husband at issue, if the governing law of alimony is not the laws of Japan.

4. GRAL

(1) Governing law of Divorce

Under Articles 25 and 27 of GRAL, (1) the divorce shall be governed by the national law of the parties to the divorce if the national law of the parties is the same, or (2) where that is not the case, by the law of the habitual residence of the parties to the divorce, or (3) where neither of these is the case, by the law of the place most closely connected with the parties to the divorce.

In Case (1), the national law of the husband is US and the national law of the wife is UK. As the national law of the wife and husband is not the same, the governing law of the wife and the husband is the law of Japan in which their habitual residence is located under Articles 25 and 27 of GRAL.

(2) Issues of National Law on Federal States (Canada)

A. Canadian Confederation

In Case (3), both of the husband and wife have Canadian nationality. However, Canada is a federal state where each province has the laws of alimony. As the husband was born and grew up in the state of Nova Scotia, his national law seems to be the laws of province of Nova Scotia. Likewise the national law of the wife seems to be the laws of province of British Columbia. Accordingly the governing law of the divorce of them seems to be the laws of Japan. However, it is not true.

Although Canada is a federal state but not the United (sovereign) State but the confederation of British colonies. Reflecting the above political difference, Canadian constitution gives more power to the federal Parliament.

Under Section 91(26) of the Constitution Act, 1867, which gives the federal Parliament exclusive power over marriage and divorce, the constitutional divorce power has been interpreted to all the federal government to deal with matters of “corollary relief” sought in the context of divorce, which includes spousal support.

Provincial government in Canada also have significant jurisdiction over family law stemming from their powers over “property and civil rights and matters of a merely local or private nature in the province under section 92(13) and (16) respectively of the Constitutional Act, 1867. Based on the above, each province has its own laws of spousal support which apply outside of the divorce context governed by the federal law, in cases involving unmarried couples or married couples who have separated but are not seeking a divorce.

Please note, however, each province is given power to have its own laws of matrimonial property division under the Constitutional Act, 1867. In 1968, first federal Divorce Act is implemented and 1985 Divorce Act, a revised federal law, applicable to the spousal support of a wife (or a husband) of a married couple, is now in force.

B. Applicability of Canadian Confederation to the Conflict of Laws in Japan

a. Governing Law of the Spousal Support

Because 1985 Divorce Act is applicable to the determination of spousal support upon the divorce of married couple in any province of Canada, Canada is not a federal state where the applicable law is different in each province in relation to the spousal support upon the divorce of married couple.

In that case Article 38(3) of GRAL is not applied to the spousal support upon the divorce of the husband and wife both having Canadian Nationality. In that case the national law of the spousal support upon the divorce is Canadian law (1985 Divorce Act) for both of the husband and wife.

Therefore, the governing law of the spousal support upon the divorce of the husband and wife in Case (3) is Canadian Law (1985 Divorce Act).

b. Governing Law of the Asset Distribution

In Case (3), both of the husband and wife have Canadian nationality. However, Canada is a federal state where each province has the laws of division of assets. As the husband was born and grew up in the state of Nova Scotia, his national law seems to be the laws of province of Nova Scotia. Likewise the national law of the wife seems to be the laws of province of British Columbia. In that case, the governing law of the asset division upon the divorce is the laws of Japan where both of the husband and wife have the habitual residence.

c. Determination of Actual Amount of Alimony

As discussed above, the actual amount of the alimony is eventually decided by the judge by considering all the relevant circumstances between the wife and husband at issue, if the governing law of alimony is not the laws of Japan in accordance with the interpretation of Article 8(2) of LAOS,

III. Conclusion

As discussed above, the alimony upon the divorce of international marriage is relatively if the applicable laws are the laws of Japan where the husband and wife have the habitual residence.

It, however, become complex if the husband and wife are Canadian but born and grew up in the different province due to Canadian history. Because the alimony or spousal support is highly controversial and extremely complex in some case, the advice of true expert like us is highly recommended.

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