

Litigation - Japan

Representations in non-contemporaneous notary deeds

Contributed by [Anderson Mori & Tomotsune](#)

February 15 2011

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Background

In Japan, a statute sometimes requires a certain document to be received by one contractual party in order for the contract to be binding between the contracting parties. On July 16 2010 the Supreme Court issued a judgment that has significant implications for the probative value of statements contained in contractual documents concerning receipt of a document required by law.

Representation concerning delivery

It is common practice in Japan for a written agreement (or a related document, such as a notary deed) to include a representation stating that one party to the agreement acknowledges receipt of a certain document (including a document required by law) in order to prove subsequently that delivery of the document occurred. However, as Japan has no parol evidence rule, a representation concerning delivery may be subject to subsequent challenge by a party which asserts that delivery did not occur as represented.

Land Lease and Building Lease Act

Under the Land Lease and Building Lease Act, leases are regulated in various ways for the purpose of protecting tenants. For example, a fixed-term building lease automatically renews unless the landlord notifies the tenant that the lease will not be renewed at least six months before its expiry, and unless the landlord has reasonable grounds for such non-renewal. However, an exception to the foregoing automatic lease renewal provision exists where:

- before the execution of the lease, the landlord explains to the tenant that the lease will not be renewed on expiry of its stated term and the landlord thereafter delivers a document, which is separate from the lease, to the tenant containing such explanation; and
- a written lease agreement is executed.

Facts

The Supreme Court case dealt specifically with the probative value of statements in a notary deed, which was executed two days after a lease agreement was executed. The notary deed included representations that a document, which the landlord was required by law to provide to the tenant before the execution of the lease agreement, was delivered before execution of the lease. The Tokyo High Court, as the intermediate appellate court, found that delivery of the required document had occurred as represented in the notary deed. Stating that the representation clause in the notary deed alone could not be sufficient evidence to prove actual delivery, the Supreme Court reversed the decision and remanded the case for further consideration.

The landlord and the tenant entered into a fixed-term building lease agreement. Two days after the execution of the lease, they executed a notary deed wherein the tenant acknowledged and agreed that the landlord had delivered the document required under the act to prevent the automatic renewal of the lease.

Once the lease had expired by its terms, the landlord gave the tenant notice of termination of the lease and requested the tenant to vacate the leased premises. Alleging that the lease was automatically renewed by operation of the provisions of the

act, due to the landlord's failure to deliver the requisite explanatory document, the tenant refused to vacate the leased premises. As a result, the landlord filed a lawsuit seeking to evict the tenant from the leased premises and to collect holdover rent. In response, the tenant sought a declaration of its right to present possession of the leased premises under the act.

Procedural position and legal issue on appeal

Although the written judgments of the court of first instance and the Tokyo High Court have not been officially reported, the Supreme Court judgment indicates that the Tokyo High Court ruled in favour of the landlord on the basis that the statements in the notary deed were conclusive evidence of the landlord's delivery of the requisite written explanation to the tenant in accordance with the exception to automatic renewal, meaning that the lease was terminated in accordance with its stated term pursuant to the exception.

The Supreme Court reversed the Tokyo High Court decision. It stated that the landlord had failed to provide evidence other than the notary deed to prove the delivery of the written explanation required by the act. Accordingly, the Supreme Court held - as a matter of law - that the landlord's delivery of the written explanation to the tenant could not be determined solely by the tenant's representations set out in the notary deed due to the 'rule-of-thumb' doctrine⁽¹⁾ and the 'evidence rule'.⁽²⁾

Comment

Japan is a civil law country where a notary public is a type of legal expert (most notaries public are retired judges or public prosecutors). A Japanese notary deed is a document which a notary public prepares after obtaining oral confirmation of the contents to be set out in the notary deed, such as legal acts (eg, the formation of an agreement) and facts related to private rights (eg, the condition of property as the subject of a sale and purchase agreement). Accordingly, notary deeds are regarded as highly probative evidence in Japan.

As a result of the reliability of notary deeds in general, it is unsurprising that the Tokyo High Court found that the landlord delivered the written explanation to the tenant based on the tenant's representations in the notary deed. Nevertheless, the Supreme Court denied that the representations set out in the notary deed had sufficient evidentiary value. Although not discussed in the judgment, one plausible explanation for such denial is the two-day gap between the date of lease execution and the date of the notary deed, together with the lack of written explanation.

The Supreme Court judgment implies that notary deeds may not always suffice to prove the veracity of representations set forth therein. Similarly, private documents (eg, contracts which are not notarised) may be insufficient to prove the representations set forth therein. In consideration of the risks raised by the judgment, it would be advisable to create and preserve more direct evidence of facts that will be included as representations in notary deeds or private documents, such as a receipt issued immediately after the delivery of the written explanation.

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Endnotes

(1) The term '*keiken-soku*' refers to inductive knowledge of a causal relationship gained through common experience.

(2) The term '*saishou-housoku*' refers to the rule that in taking evidence, a judge must determine the weight and probative value of evidence in a reasonable manner.

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