

ORIGINAL



**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

**PUBLIC
VERSION**

In the Matter of)
)
ASPEN TECHNOLOGY, INC.,)
)
Respondent.)
_____)

Docket No. 9310

**ORDER GRANTING RESPONDENT ASPEN TECHNOLOGY, INC.'S
MOTION FOR CERTIFICATION FOR COMMISSION DETERMINATION
TO SEEK AN ORDER FROM THE DISTRICT COURT AUTHORIZING
VOLUNTARY DEPOSITIONS UPON WRITTEN QUESTIONS**

I.

On January 8, 2004, Respondent Aspen Technology, Inc. ("AspenTech") filed a motion for certification for Commission determination to seek an order from the district court authorizing voluntary depositions upon written questions of Japanese witnesses and for extension of time and modification of the scheduling order to allow for such depositions ("motion for certification").

On January 16, 2004, Complaint Counsel filed an unopposed motion for an extension of time to file an opposition to the motion for certification. In that motion, Complaint Counsel stated that the parties were in the process of attempting to resolve the issue. By Order dated January 20, 2004, Complaint Counsel was granted until January 23, 2004 to file any opposition.

By letter dated January 23, 2004, Respondent represented that Complaint Counsel does not oppose Respondent's motion for certification.

For the reasons set forth below, Respondent's motion for certification is **GRANTED**. Respondent's motion for extension of time and modification of the scheduling order is addressed in a separate order.

II.

Respondent moves for certification to the Commission for determination of a request to seek an order from the United States District Court for the District of Columbia ("District Court") authorizing voluntary depositions upon written questions of five Japanese witnesses. Respondent states that it makes this request because pursuant to Article 17 of the United States-Japan Consular Convention, 15 U.S.T. 768, depositions of witnesses in Japan require an American court order or commission.

Rule 3.22(a) of the Commission's Rules of Practice sets forth: "[t]he Administrative Law Judge shall certify to the Commission any motion upon which he or she has no authority to rule, accompanied by any recommendation that he or she may deem appropriate." 16 C.F.R. § 3.22(a). Because Administrative Law Judges do not have authority to seek an order from the district court authorizing voluntary depositions of Japanese witnesses, Respondent's motion is hereby certified to the Commission.


This certification is made with the recommendation that the Commission seek a court order authorizing the taking of depositions upon written questions of the five Japanese witnesses identified in Respondent's motion. This recommendation is made based on the direct relevance of the information sought, the limited nature of the discovery sought, and the representation of counsel that the witnesses will appear voluntarily.

The Complaint in this action alleges that AspenTech's acquisition of Hyprotech, Ltd. may substantially lessen competition in various markets for process engineering simulation flowsheet software. It is clear from the arguments made at the initial prehearing conference, held September 16, 2003, that the relevant market definition is integral and hotly contested in this case. *Compare* Initial Prehearing Conference Transcript pages 17-19 with pages 21-23. The views of customers - whether they perceived AspenTech's and Hyprotech's products as ready substitutes - thus are highly relevant to the allegations of the Complaint. Respondent represents that five of these customers, who are located in Japan, will appear voluntarily in Japan to give depositions upon written questions pursuant to Rule 3.33(e) of the Commission's Rules of Practice, 16 C.F.R. § 3.33(e). Respondent represents that Japanese law authorizes a deposition of a willing witness in Japan for use in U.S. courts or administrative cases only if: (1) the deposition is presided over by a U.S. consular office; (2) it is conducted on U.S. consular premises; (3) it is taken pursuant to an American court order or commission; and (4) any non-Japanese participant traveling to Japan applies for and obtains a Japanese Special Deposition visa. *See* Circular on obtaining evidence in Japan issued on the U.S. Department of State's website, attached to Respondent's motion as Exhibit A. Thus, a court order is necessary for Respondent to obtain this information.

III.

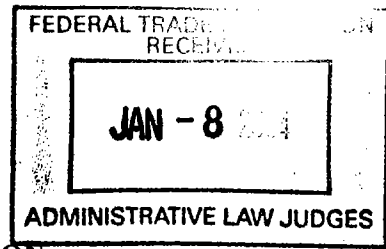
For the above stated reasons, it is hereby **ORDERED** that Respondent's motion is certified to the Commission with the recommendation that the Commission seek a court order authorizing the taking of depositions upon written questions of Japanese witnesses, as set forth in the proposed District Court order, attached to Respondent's motion for certification.

ORDERED:



Stephen J. McGuire
Chief Administrative Law Judge

Date: January 27, 2004



UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

IN THE MATTER OF)
)
ASPEN TECHNOLOGY, INC.,)
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Respondent.)
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PUBLIC RECORD VERSION

Docket No. 9310

**RESPONDENT ASPEN TECHNOLOGY, INC.'S
MOTION FOR CERTIFICATION FOR COMMISSION DETERMINATION
TO SEEK AN ORDER FROM THE DISTRICT COURT AUTHORIZING VOLUNTARY
DEPOSITIONS UPON WRITTEN QUESTIONS OF JAPANESE WITNESSES AND FOR
EXTENSION OF TIME AND MODIFICATION OF THE SCHEDULING ORDER TO
ALLOW FOR SUCH DEPOSITIONS**

Respondent Aspen Technology, Inc. ("AspenTech") respectfully moves for certification to the Commission for determination of a request to seek an order from the United States District Court for the District of Columbia ("District Court") authorizing voluntary depositions upon written questions of five Japanese witnesses. AspenTech makes this request because pursuant to Article 17 of the United States-Japan Consular Convention, 15 U.S.T. 768, depositions of witnesses in Japan require an American court order or commission. AspenTech also moves for an extension of time and modification of the September 16, 2003 Scheduling Order to allow for these depositions.

INTRODUCTION

The Complaint filed in this action on August 6, 2003, alleges that AspenTech's acquisition of Hyprotech, Ltd. ("Hyprotech") may substantially lessen competition in various markets for process engineering simulation flowsheet software. The views of customers – whether they perceived AspenTech's and Hyprotech's products as ready substitutes, etc. – will be highly relevant to the Court's consideration of this complaint. As the Court is aware,

AspenTech received written statements from over 60 customers confirming certain basic facts about customers' product use and generally supporting the transaction.

These statements were the subject of AspenTech's First Request For Admissions, dated October 21, 2003. On November 4, 2003, Complaint Counsel served AspenTech with its Responses and Objections to AspenTech's First Request For Admissions, in which Complaint Counsel declined to admit any of AspenTech's 753 requests for admission, effectively leaving every aspect of these customer statements in dispute. Based on Complaint Counsel's objections to AspenTech's requests for admission, on November 10, 2003, AspenTech identified each of the customers who provided statements as potential witnesses in its First Supplemental Preliminary Witness List. On November 18, 2003, AspenTech filed a Motion To Compel Admissions by Complaint Counsel that was denied on December 2, 2003.

Many of the potential witnesses identified in the First Supplemental Preliminary Witness List are located outside the United States.¹ AspenTech anticipates that five of these customers, who are located in Japan, will appear voluntarily in Japan to give depositions upon written questions pursuant to Rule 3.33(e) of the Federal Trade Commission's Rules of Practice, 16 C.F.R. § 3.33(e).² It is possible that one or more will decide not to do so, but we expect that we will receive their final decision within the next week or two. In order to expedite the process in view of the current schedule, however, AspenTech is submitting this motion now.³

¹ Complaint Counsel have alleged a world market for the software products at issue in this case. Therefore, evidence from non-U.S. customers is relevant to Complaint Counsel's claim and to AspenTech's defense.

² Those five witnesses are: (1) [REDACTED]; (2) [REDACTED]; (3) [REDACTED]; (4) [REDACTED]; (5) [REDACTED] A copy of each witness's signed statement is attached as Exhibit B.

³ AspenTech will advise complaint Counsel and the Court immediately upon learning that any of these witnesses has decided not to appear.

AspenTech has consulted with Complaint Counsel and Complaint Counsel have indicated that they expect to oppose this request subject to reviewing AspenTech's motion.

BASIS FOR MOTION

The fact that Complaint Counsel declined to admit or deny any of AspenTech's 753 requests for admission, effectively leaving every aspect of these customer statements in dispute, makes it essential for Respondents' counsel to have a reasonable opportunity to present deposition testimony of customers who provided statements. This discovery is allowable because it is "reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defense of any respondent." 16 C.F.R. § 3.31(c)(1). In addition, these depositions meet the conditions necessary for use of deposition testimony in lieu of live testimony under Rule 3.33(g)(1)(iii)(B), which states that depositions of third parties may be used for any purpose, including for use in lieu of live testimony, if "the deponent is out of the United States or is located at such a distance that his attendance would be impractical."

Article 17 of the United States-Japan Consular Convention, 15 U.S.T. 768, authorizes American consular officers to take depositions in Japan, "on behalf of the courts or other judicial tribunals or authorities of the sending state (United States), voluntarily given, in accordance with the laws of the sending state (U.S.) and in a manner not inconsistent with the laws of the receiving state (Japan)." This general reference to the authority of consular officers to take depositions has been interpreted by the Government of Japan very strictly. Japanese law authorizes a deposition of a willing witness in Japan for use in U.S. courts or administrative cases only if: (1) the deposition is presided over by a U.S. consular office; (2) it is conducted on U.S. consular premises; (3) it is taken pursuant to an American court order or commission; and (4) any non-Japanese participant traveling to Japan applies for and obtains a Japanese Special

Deposition visa. A circular on obtaining evidence in Japan issued on the U.S. Department of State's website is attached as Exhibit A.

As to condition (2), requiring the deposition to be conducted on U.S. consular premises, immediately following the denial of its Motion to Compel Admissions, AspenTech contacted the U.S. Embassy in Tokyo and other possible U.S. consular premises in Japan to determine their availability. The earliest dates available were March 11-12 and 15-19, 2004, at the U.S. Consulate in Osaka-Kobe, Japan. AspenTech has reserved those dates for the depositions at issue.

Because the earliest available dates are outside the discovery period provided for in the Scheduling Order, AspenTech respectfully requests that the Court modify the Scheduling Order to extend the period for discovery for these depositions until March 20, 2004. The scheduling order provides for the close of discovery on February 17, 2004.⁴ Allowing an extra month for depositions upon written questions of Japanese customers will not delay the proceedings or prejudice Complaint Counsel. The questions to be asked at these depositions will be narrowly tailored to confirm the points set forth in the customer statements that were previously provided to Complaint Counsel. Because the depositions will be on written questions, there will be no burden on Complaint Counsel to prepare for or attend the depositions. And the depositions will be completed approximately one month before the scheduled hearing date, so there will be no delay in the hearing as a result of these depositions. Because AspenTech has obtained the earliest date available for a consular office in Japan and because conducting the depositions at

⁴ There is an exception for "discovery for the purposes of authenticity and admissibility of evidence." The depositions at issue here arguably fall within this exception because their purpose is to obtain admission of the Japanese customer statements (attached as Exhibit B). In an abundance of caution, however, AspenTech is seeking an extension of the discovery cut-off for these depositions.

the Consular Office is a requirement under Japanese law, AspenTech respectfully submits that it has demonstrated good cause to extend the discovery cut-off for the limited purpose of allowing these depositions.

As to condition (4), requiring attorneys to obtain a Japanese Special Deposition visa, AspenTech anticipates taking all depositions of its Japanese witnesses upon written questions pursuant to Rule 3.33(e), which negates the requirement for the special visa and the costs associated with traveling abroad.

As to conditions (1) and (3), the U.S. consular officer who presides over the deposition may do so only if appointed and authorized by a U.S. court order or commission. 28 U.S.C. App. Fed. R. Civ. P. Rule 28(b)(2). We understand that the Japanese government will not accept orders for depositions issued by administrative law judges. *See* State Department Circular on Obtaining Evidence in Japan, Exhibit A, at 2. To take the depositions of the Japanese witnesses, therefore, AspenTech will need an order by a U.S. district court authorizing the U.S. consular officer to preside over the depositions.⁵

Without a court order from a U.S. court, AspenTech will be unable to take the depositions of these witnesses and will be deprived of important evidence in its defense. By using depositions upon written questions, AspenTech is minimizing the burden of these depositions.

CONCLUSION

For the reasons set forth above, AspenTech respectfully requests certification to the Commission for its determination to seek an order from the District Court authorizing the taking of voluntary depositions upon written questions of Japanese witnesses. AspenTech also requests

an extension of time and modification of the Scheduling Order to allow for such depositions. A proposed order has been attached.

⁵ Attached as Exhibit C is a proposed order that could be entered by the district court to authorize the taking of these depositions.

Date: January 8, 2004

Respectfully submitted by:



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**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

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IN THE MATTER OF)	PUBLIC RECORD VERSION
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EXHIBIT A

OBTAINING EVIDENCE IN JAPAN

DISCLAIMER: THE INFORMATION IN THIS CIRCULAR RELATING TO THE LEGAL REQUIREMENTS OF SPECIFIC FOREIGN COUNTRIES IS PROVIDED FOR GENERAL INFORMATION ONLY AND MAY NOT BE TOTALLY ACCURATE IN A PARTICULAR CASE. QUESTIONS INVOLVING INTERPRETATION OF SPECIFIC FOREIGN LAWS SHOULD BE ADDRESSED TO FOREIGN COUNSEL.

PROVISO: THE PURPOSE OF THIS FLYER IS TO PROVIDE GENERAL INFORMATION ABOUT PROCEDURES FOR OBTAINING EVIDENCE IN JAPAN. THE INFORMATION IN THIS FLYER IS BASED ON EXTENSIVE DISCUSSIONS BETWEEN THE STATE DEPARTMENT AND THE JAPANESE EMBASSY REGARDING JAPAN'S INTERPRETATION OF APPLICABLE TREATIES AND OTHER INTERNATIONAL CONVENTIONS, AND JAPANESE LAW AND REGULATIONS. THIS IS AN INFORMATIONAL FLYER, NOT A LEGAL OPINION, AND IS NOT INTENDED TO TAKE A POSITION ON ANY ASPECT OF LITIGATION.

General Summary: It is our understanding that Japanese law permits the taking of a deposition of a willing witness for use by a court in the United States only if the deposition is presided over by a U.S. consular officer pursuant to a court order or commission, and is conducted on U.S. consular premises, Rule 28 Federal Rules of Civil Procedure; Rule 15, Federal Rules of Criminal Procedure notwithstanding. This understanding is based on extensive discussions between the Department of State and the Japanese Embassy in Washington, and between the American Embassy in Tokyo and the Japanese Ministry of Justice.

Persons travelling from the United States to Japan to participate in depositions must obtain a special Japanese deposition visa from the Japanese Embassy or Consulate in the United States. Any effort to conduct a deposition in Japan in any other way could be viewed as a violation of the judicial sovereignty of Japan and might result in the arrest and/or deportation of the person attempting to take a deposition in Japan outside these procedures. These procedures have been established pursuant to the U.S. - Japan Consular Convention, as a result of extensive discussions between the Department of State and the Embassy of Japan.

Please inform all attorneys, for both the plaintiff and the defense of the above requirements, particularly the special deposition visa.

Special Note for Official Travellers: Any local, state or federal prosecutor, attorney, investigator, etc. attempting to obtain evidence in Japan should contact the Office of American Citizens Services, Department of State for additional, specific assistance. General requirements for local, state and federal government officials are summarized in this flyer. This office will be pleased to assist local, state and federal government officials in making the necessary arrangements to obtain evidence in Japan. Officials travellers are required to obtain their own passports and visas and must obtain the necessary court orders or letters rogatory explained in this information flyer.

Special Note Regarding American Attorneys Residing in Japan: In Note Verbale Hokubei 1 No. 220 dated October 31, 1996, the Japanese Ministry of Foreign Affairs provided additional clarification regarding the visa status of American Attorneys Residing in Japan who wish to participate in depositions at the U.S. Embassy or consulate in Japan. American lawyers residing in Japan under the status of "legal/accounting services" (as "gaikokuhu jimubengoshi"), permanent residents, or their spouses may participate in depositions under their current visa status, that is, without the special deposition visa under certain circumstances. They must notify the Ministry of Foreign Affairs through the U.S. Embassy in Tokyo of their proposed participation. When submitting the note verbale notification to the Ministry, the Embassy will need to provide the names of such lawyers, their company affiliation in Japan, their address, telephone number, and the type and validity of their

visa, in addition to a copy of the requisite commission or court order issued by the court in the United States for the taking of the deposition before the U.S. consular officer on U.S. consular premises. In order to facilitate the notification procedures, the Embassy has prepared a worksheet which each lawyer resident in Japan will need to fill out in order for the Embassy to submit the requisite note verbale. Questions may be addressed to the Consular Section of the U.S. Embassy in Tokyo directly.

Authority: The taking of depositions of willing witnesses in Japan is governed by:

Article 5(f) and 5(j) of the Vienna Convention on Consular Relations (to which Japan and the United States are parties);

Article 17(1)(e)(ii) of the U.S. - Japan Consular Convention, 15 U.S.T. 768;

22 U.S.C. 4215; 22 USC 4221; 18 U.S.C. App. Fed. R. Civ. P., Rules 15 and 17; 28 U.S.C. Fed. R. Civ. P., Rules 28-31; 22 CFR 92.55 - 92.66 (general authority)

It is our understanding that **Articles 3 and 72 of the Japanese Lawyer Law may prohibit the taking of depositions in Japan by private attorneys not admitted to practice law in Japan.**

Depositions of Willing Witnesses

Article 17 of the Japan-United States Consular Convention authorizes American consular officers to take depositions in Japan, "on behalf of the courts or other judicial tribunals or authorities of the sending state (United States), voluntarily given, in accordance with the laws of the sending state (U.S.) and in a manner not inconsistent with the laws of the receiving state (Japan)". This general reference to the authority of consular officers to take depositions has been interpreted by the Government of Japan very strictly. Japanese law and practice, and the mutually agreed upon interpretation of the U.S. - Japan Consular Convention concerning obtaining evidence in Japan permits the taking of a deposition of a willing witness for use in a court in the United States only

- (a) if the deposition is presided over by a U.S. consular officer;
- (b) is conducted on U.S. consular premises
- (c) is taken pursuant to an American court order or commission;
- (d) and if any non-Japanese participant travelling to Japan applies for and obtains a Japanese Special Deposition visa.

The Japanese Ministry of Foreign Affairs and Ministry of Justice have advised the United States that these requirements apply in civil, criminal and administrative cases. The Japanese requirement for a court order and special deposition visas would apply in all cases, even though the depositions began in the United States initially. Japan will not accept orders issued by administrative law judges. Examples of court orders obtained from U.S. courts under the All Writs Act, 28 U.S.C. 1651, by various administrative agencies for the taking of depositions in Japan are available from this office upon request. The Ministry of Foreign Affairs has informed the U.S. Embassy that Japan does **not** permit telephone depositions.

Therefore, depositions may be taken in Japan:

- (1) pursuant to a commission (28 U.S.C. App. Fed. R. Civ. P. Rule 28(b)(2)) to take a deposition issued by a

court to any Consul or Vice-Consul of the United States at (Tokyo, Naha, Osaka-Kobe, Sapporo, Fukuoka) or

(2) on notice, provided an order issued by a court in the United States specifically authorizes an U.S. consular officer to take the deposition on notice.

Sample Suggested Text for Court Order or Commission

Japanese authorities have requested that the court order or commission contain the following information:

NAME OF COURT

CAPTION)

)

)

)

TO ANY CONSUL OR VICE CONSUL OF THE UNITED STATES

UNITED STATES (EMBASSY/CONSULATE) (NAME OF CITY)

UPON THE APPLICATION OF (PLAINTIFF, DEFENDANTS), AND PURSUANT TO ARTICLE 17 OF THE UNITED STATES - JAPAN CONSULAR CONVENTION,

YOU HAVE BEEN DULY APPOINTED AND YOU ARE HEREBY AUTHORIZED TO TAKE ORAL DEPOSITIONS AT THE UNITED STATES (EMBASSY/CONSULATE) IN (NAME OF CITY), JAPAN, OF THE FOLLOWING WITNESSES WHO WILL APPEAR VOLUNTARILY:

OR

IT IS ORDERED THAT THE DEPOSITIONS ON NOTICE OF THE FOLLOWING WITNESSES BE TAKEN AT THE UNITED STATES (EMBASSY/CONSULATE) IN (NAME OF CITY), JAPAN

(NAMES, ADDRESSES, AND EMPLOYER OF WITNESSES) COMMENCING ON OR ABOUT (DATE), (TIME) AND TERMINATING ON OR ABOUT (DATE), (TIME), AND TO MARK ANY DOCUMENTARY EXHIBITS IN CONNECTION THEREWITH.

COUNSEL FOR DEFENDANTS WHO WILL PARTICIPATE IN SAID DEPOSITIONS ARE (NAMES); AND COUNSEL FOR PLAINTIFFS WHO WILL PARTICIPATE IN SAID DEPOSITIONS ARE (NAMES). THE PROCEEDINGS WILL BE REPORTED BY (NAME OF AMERICAN COURT REPORTER, IF ONE IS TRAVELLING FROM UNITED STATES TO JAPAN). PLEASE CAUSE THE TESTIMONY OF SAID

WITNESSES TO BE REDUCED TO WRITING AND THE DEPOSITIONS SIGNED BY SAID WITNESSES AND ANNEX SAID DEPOSITION TESTIMONY TO YOUR COMMISSION AND CLOSE THE SAME UNDER YOUR SEAL AND MAKE RETURN THEREOF TO THIS COURT WITH ALL CONVENIENT SPEED.

DATE SIGNATURE OF JUDGE

NAME OF JUDGE

SEAL

Voluntary Oral Depositions: American attorneys may travel to Japan to participate in depositions on U.S. consular premises (as described in 22 CFR 92.57) provided they have obtained the "special deposition visa" required by Japan. Any effort to conduct a deposition in Japan in any other way might be viewed as a violation of the judicial sovereignty of Japan and could result in the arrest, detention or deportation of the participants. The procedure for scheduling a deposition at the U.S. Embassy or one of the U.S. Consulates in Japan and obtaining the "special deposition visa" is outlined below.

U.S. Federal, State or Local Government Participants: If a U.S., state or local Government official is to participate in a deposition before a U.S. consular officer in Japan, special host country clearance (in addition to the deposition visa) must be obtained for the travel. Such Government officials should contact the Office of American Citizens Services, Department of State, (202) 647-6769, fax (202) 647-2835 to initiate the process of obtaining the host country clearance. The Japanese Government requires 7-10 days to consider such a formal request before host country clearance is answered by the Ministry of Foreign Affairs. Some U.S. Government agencies find it preferable to bring their own court reporters and interpreters to Japan to ensure confidentiality and availability/flexibility.

Voluntary Depositions on Written Questions: Voluntary depositions on written questions may be taken in Japan (28 USC Fed. R. Civ. P., Rule 31, 22 C.F.R. 92.58). Requesting counsel should contact the U.S. Embassy or Consulate to arrange a mutually convenient day or days when the deposition may be conducted. The requirements for an American court order, consular fees and scheduling the Embassy special deposition room based on space availability still apply. Counsel must make all the arrangements for the witness to appear and for stenographic or video services and translators if necessary. The U.S. consular officer will administer the oath to the witness, and if necessary to the stenographer, video tape operator or interpreter/translator, and withdraw, subject to recall. If the witness does not speak or read English adequately, a Japanese translation of the English text should be provided. The questions should be sent directly to the U.S. consular officer at the U.S. Embassy or Consulate. If preferred, the witness may write down the answers to the questions, rather than dictate the answers to the stenographer or video tape operator. The U.S. consular officer will affix a closing certificate after the deposition is completed.

Arranging the Deposition

(1) Scheduling With the U.S. Embassy/Consulate: Contact the U.S. Embassy or Consulate and make arrangements to schedule the availability of U.S. consular premises and a U.S. consular officer to conduct the deposition. Note: The American Embassy in Tokyo is generally booked six months in advance.

Please note that for administrative and security reasons, the embassy/consulate's deposition room and consular staff are not available for deposition taking outside of working hours 8:30 a.m. to 5:00 p.m. or on weekends or holidays.

The Embassy/consulate can tentatively schedule a deposition, and hold the dates reserved for three weeks. If the non-refundable scheduling fee (\$410.00) is not received at the Embassy/consulate within three weeks, the dates tentatively reserved will be released to others. In addition, the Embassy/consulate cannot confirm a scheduled deposition until both the court order/commission and deposit for the prescribed deposition fee are received at the Embassy/consulate. We suggest that the court order be worded "on or about" a date for maximum flexibility in scheduling. The court order/commission should be addressed to "any consul or vice consul at (Tokyo; Naha; Osaka Kobe; Fukuoka; Sapporo), Japan".

The embassy/consulate does not schedule the appearance of deponents or make arrangements for court reporters/stenographers or interpreters for private attorneys.

(2) Court Order/Commission: Obtain a Commission or Court Order as noted above. The Commission or Court Order should include the name of the case, docket number, names of the witnesses to be deposed, the fact that they are willing (voluntary) witnesses, the dates on which the depositions will be conducted and the fact that the depositions will be attended by counsel before "any consul or vice consul of the United States, at the (United States Embassy (Consulate) in (name of city), Japan. Send the original order, or a certified copy to the U.S. Embassy or Consulate where the deposition is to be conducted by the fastest available means. In addition, names of lawyers and other participants should be provided to the U.S. Embassy in Tokyo since the Japanese Foreign Ministry checks with the Embassy before approving visa issuance.

(3) Special Deposition Visa: Apply for a "special deposition visa" at the Japanese Embassy or Consulate in the United States nearest you. The Consular Section of the Japanese Embassy is located at 2520 Massachusetts Avenue, N.W., Washington, D.C. 20008, tel: (202) 939-6700. Japanese consulates are also located in Anchorage, Atlanta, Boston, Chicago, Detroit, Guam, Honolulu, Houston, Kansas City, Los Angeles, Miami, New Orleans, New York, Portland, San Francisco and Seattle. You will be required to present a photocopy of the commission or court order to the Japanese consular officer when you apply for the "special deposition visa". This special visa must be applied for at least two weeks before departure for Japan. The request should be made on letterhead stationery and include the following information: (a) the name and location of the court; (b) name and occupation of each witness; and (c) a summary of the case. Travellers will also be required to present their U.S. passport, complete Japanese Embassy/consulate visa application forms and to provide the requisite photographs. A photocopy of the commission or order for a U.S. consular officer to take the deposition must accompany the request. Special visas may also be required of deposition participants other than attorneys (American stenographers, interpreters, parties, etc.). Inquiries should be made of the appropriate Japanese consular officer in the United States.

(4) The Japanese Embassy or Consulate in the United States will contact the Japanese Foreign Ministry for permission to issue the "special deposition visa".

(5) The Japanese Foreign Ministry will contact the U.S. Embassy or Consulate to confirm whether the U.S. consular officer has received a photocopy of the American court order and whether the deposition has been scheduled.

(6) The Japanese Foreign Ministry will authorize the Japanese Embassy or Consulate in the United States to issue the "special deposition visa".

Consular Fees for Voluntary Depositions: The prescribed statutory fee for consular services in connection with depositions (22 CFR 22.1, item 69, as amended 11/1/91) is 140 dollars per hour for consular officer time plus 65 dollars per hour for consular clerical time. A flat fee of \$410.00 must be paid to the embassy or consulate before a deposition can be scheduled. **The fee is not refundable if the deposition is later canceled.** The fee covers consular officer and staff time in scheduling the deposition, communicating with requesting counsel by telephone or fax, and coordinating with Japanese authorities to confirm the scheduling of a deposition before Japanese authorities will issue the special deposition visa to persons travelling to Japan to participate in a deposition.

Pre-paid Hourly Rate for Consular Time During the Deposition: In addition to the non-refundable scheduling fee, there is a fee of \$140.00 per hour for consular officer time plus \$65.00 per hour for consular clerical time for the length of the deposition. You should notify the embassy/consulate of the estimated length of time necessary to take the deposition, allowing for the additional time required for interpreter/translator

services questions and answers. Be aware that the use of interpreters will approximately double the time required. The Embassy or consulate must receive a deposit (\$140.00 x the number of hours required for the deposition plus \$65.00 clerical fee), which must be deposited in full prior to the taking of the deposition. (22 CFR 22.5(c))

Deposition Closing Certificate Fee and Postage: In addition, the U.S. Embassy/consulate requires a 65 dollar deposit to cover clerical time involved in consular certification of the completed deposition and for postage. Any unused portion from your deposit will be refunded. As federal regulations prohibit the performance of consular services in advance of payment of statutory consular fees, depositions cannot be convened until all the required funds have been deposited.

Payment of Fees: Payment should be made by international money order or certified bank check payable to the American Embassy, Tokyo, Japan or to the appropriate American consulate. Personal or corporate checks are not acceptable.

Court Reporters/Stenographers/Interpreters: The U.S. Embassy/consulate does not provide interpreters or stenographers. American attorneys must arrange directly with such persons for their services and payment of their fees. (As noted previously, the Office of American Citizen Services and the U.S. Embassy/consulate can make these arrangements on behalf of U.S. Government officials or state and local Government officials. Contact the Office of American Citizens Services for more information.) At least a week to ten days advance notice or more is desirable so that the assigned interpreter/translator may have time to familiarize himself/herself with the subject concerned. If lengthy depositions are envisioned, arrangements should be made weeks or months in advance.

In accordance with the guidelines for interpreters of the Administrative Office of the U.S. Courts, when taking the testimony of a non-English speaking witness, generally the question is posed in English, the interpreter translates the English question into Japanese; the witness answers in Japanese; the interpreter translates the answer into English and the stenographer records the answer in English. Not all interpreter/stenographer services have the capacity to provide simultaneous translations. The U.S. Embassy/consulate will attempt to accommodate any special instructions which accompany the request for a deposition pursuant to a commission or court order (22 CFR 92.56).

Participants may wish to bring their own court reporters/interpreters from the U.S. with this capability. They must have the Japanese Special Deposition visas and be included in the American court order. If any participant (not a witness) is a Japanese citizen travelling to Japan from the U.S. or residing in Japan, they are not eligible for a Japanese visa, but must be included in the American court order.

Video Tape Equipment: The embassy/consulate does not provide tapes, taping equipment or equipment operators. The embassy/consulate also does not provide commercial rates for tapes, taping equipment or equipment operators. Participants must make all arrangements directly with the service providers. Participants are responsible for obtaining their own clearances from Japanese Customs authorities for bringing equipment into Japan. Check with the Consular Section of the Japanese Embassy or Consulate in the U.S. for details. If you intend to bring equipment to Japan for the deposition, it is advisable to provide the U.S. Embassy/Consulate with details via fax or phone regarding that equipment to ensure that it is compatible to the electrical equipment at the U.S. Embassy/Consulate. After the advance arrangements are completed, please so notify the U.S. Embassy a few days in advance of the actual deposition, so that the Embassy can obtain the necessary clearance from the Security Office for the entry of the equipment and the operators into the Embassy premises.

Fees for Interpreters/Stenographers: Fees for interpreters in Japan range from 90,000 to 100,000 yen per day and stenographic services from 70,000 to 80,000 yen per day plus transcript fees of 3,000 to 3,500 yen per page.

The exchange rate fluctuates daily. See also the U.S. Embassy Tokyo, Commercial Section Home Page: <http://www.csjapan.doc.gov> at the heading, "Doing Business in Japan".

Signing, Certifying and Mailing Depositions: Participants to a deposition may stipulate regarding the manner in which the transcript of the deposition (any exhibits) should be signed, certified and mailed. The transcript may be forwarded to counsel rather than to the clerk of court which requested the deposition. Moreover, participants may stipulate that after the deposing of witnesses is completed and the stenographer transcribes the testimony, the transcript may be sent directly to the witness for signature or to counsel for the participants who will make arrangements directly with the witness for signature of the transcript. If required by local or federal rules in the United States, the witness may bring the transcript to the American embassy or consulate for signature before a consular officer, making any necessary corrections in the presence of a consular officer. If required, a consular certification of the deposition may be made at this time.

If you plan to have the deposition taped without subsequent transcription, the embassy/consulate asks that the court order or commission specify whether audio or video tape is to be used. Tapes may be sent directly by the video operator or by the embassy/consulate via registered air mail to either the person stipulated by the participants or directly to the court clerk immediately following completion of the deposition. Any change in the above procedures would have to be agreed to by both parties in the dispute and, if necessary, covered by an amended court order.

List of Interpreters, Stenographers and Video Operators

Disclaimer: The Department of State and the U.S. Embassy in Tokyo and Consulate General in Osaka Kobe assume no responsibility for the professional ability and integrity of the interpreters, stenographers and video operators whose names appear in this list from the consular districts.

Internet Resources

For additional lists of interpreters/stenographers, see the U.S. Embassy Tokyo, Commercial Section Home Page: <http://www.csjapan.doc.gov> at the heading, "Doing Business in Japan".

Tokyo

Interpreters:

Alpha Corporation, 5-7 Hirakawa-cho 2 chome, Chiyoda Ku, Tokyo 102, tel: 011-81-3-3230-0090; fax: 011-81-3-3234-5336

English Services, c/o Hotel Okura, South Wing Arcade, 2-10-4 Toranomom, Minato Ku, Tokyo 107. tel: 011-81-3-3585-8578 (Mrs. Sei Ghoda). Fax: c/o Hotel Okura: 011-81-3-3582-3707

Inter Group Corporation, 7-5-17 Akasaka, Minato Ku, Tokyo 107, tel: 011-81-3-5570-6161

Interlanguage Service System (ISS), Nihon Seimei Ichibancho Bldg., 7F, 23-3 Ichibancho, Chiyoda Ku, Tokyo 102. tel: 011-81-3-3230-4391; fax: 011-81-3-3262-6633

International Institute of Japan (IJ), Belaire Gardens Bldg., 4-2-11 Jingumae, Shibuya Ku, Tokyo 150, tel: 011-81-3-3405-0754; fax: 011-81-3-3405-0754

Man-Friday Co, Ltd., Shin Aoyama Bldg., West 13th Floor, 1-1-1 Minami Aoyama, Minato Ku, Tokyo 107, tel:

011-81-3-3408-7196

Manpower, Japan Co., Ltd., CS Tower, 1-11-30 Akasaka, Minato Ku, Tokyo 107 tel: 011-81-3-5570-4781

Multilingua Inc., Kawamura Bldg., 5F, 21-6 Akasaka 3-chome, Minato Ku, Tokyo 107, tel: 583-0791;

Okawara, Taji & Associates, 3-26-1-B1 Ekoda, Aoba-ku, Yokohama-shi, Kanagawa-ken 225, tel: 011-81-45-904-4503; fax: 011-81-45-904-4502

Sansei International Inc., Fukide Bldg., No. 2, 4-1-21 Toranomom, Minato Ku, Tokyo 105, tel: 011-81-3-3433-1560; fax: 011-81-3-3433-1612

Simul International Inc., No. 9 Kowa Bldg., 1-8-10 Akasaka Minato Ku, Tokyo 107, tel: 011-81-3-3586-8911; fax: 011-81-3-3583-8336

Mrs. Kaoru Ikeda, 5-3-11 Kinuta, Setagaya Ku, Tokyo 157, tel: 011-81-3-3417-7949

Mr. William Lise, New-Tech, Ltd., Room 1101 Seven Star Mansion Higashiyama, 1-5-9 Higashiyama, Meguro-ku, Tokyo 153. tel: 011-81-3-3791-6870; fax: 011-81-3-3715-2748

Mr. Osamu Takagi, Tokyo: 1-403-10, Sunnywell Kosugi Nakahara-ku, Kawasaki-shi Kanagawa-ken 211; Okazaki: 301 Kura Bldg. Syouda Miai, Okazaki-shi, Aichi-ken 441, tel: 011-81-564-55-8844; fax: 011-81-564-2308

Stenographers:

Alpha Corporation: See Interpreting Services.

English Services: See Interpreting Services.

International Institute of Japan: See Interpreting Services.

Ralph Rosenberg Court Reporters: 2460 Pacific Tower, 1001 Bishop st., Honolulu, Hawaii 96813, tel: 808-524-2090; fax: 808-524-2596.

Sansei International Inc.: See Interpreting Services.

Simul International Inc.: See Interpreting Services.

Ms. Tomoko Ito, 2-37-18 Nakamachi, Setagaya Ku, Tokyo 158, tel: 011-81-3-3701-1961; fax: 011-81-3-3704-2325

Mrs. Mary Regan Kagami, Apt. 605, 1-9-11 Meguro Honcho, Meguro Ku, Tokyo 152, tel: 011-81-3-3712-3176

Mrs. Kimiko Seki, 2-31-5 Matsugaoka, Nakano Ku, Tokyo 165, tel: 011-81-3-3952-1542.

Video Operators:

Eizo Kiroku Service, Yamazaki Bldg., 302, 6-12-12 Honcho, Nakano Ku, Tokyo 164, tel: 011-81-3-3384-5551; fax: 011-31-3-3384-5333

ELCOM, 1-4-1 Shibaura, Minato Ku, Tokyo 105, tel: 011-31-3-3453-5551; fax: 011-81-3-3453-5428

Hawaii Video Productions, Inc., Pioneer Plaza, 900 Fort Street Mall, Suite 210, Honolulu, Hawaii 96813; tel: 808-538-0005; fax: 808-538-7627

Ichinohashi Studio, Ai Square 3F, 2-10-3 Azabu Juban, Minato Ku, Tokyo 106, tel: 011-31-3-5443-6382; fax: 011-81-3-5443-6395

Rise Video 80, 2-12-5 Ikebukuro, Toshima Ku, Tokyo 170, tel: 011-81-3-3988-0804; fax: 011-81-3-3987-3670

Spot Shokai, 1-2-saki Nishi, Ginza, Chuo Ku, Tokyo 104, tel: 011-31-3-3567-5021; fax: 011-81-3-3561-7305

Videobank, 6-6-16 Akasaka, Minato Ku, Tokyo 107, Tel: 011-81-3-3588-1011; fax: 011-81-3-3589-0054

Visual Information Systems Inc., 3-20-7 Nishidai Itabashi Ku, Tokyo 105, Office tel: 011-81-3-3933-2358; Studio Tel: 011-81-3-3505-1271; fax: 011-81-3-3505-1272

Heidi Vorwidk, Holcombe Video Service, 1734 N. McCadden Place, Suite B, Los Angeles, California 90028, tel: 213-385-3315

Osaka Kobe

Disclaimer: The American Consulate General in Osaka-Kobe assumes no responsibility for the professional ability or integrity of the under-mentioned interpreters, stenographers and video recorders. They will provide a cost estimate upon receipt of a direct request. There is no significance to the order in which they are listed.

Inter Osaka (interpreter)
Shohaku Bldg 2-12
Kakuto-cho
Kita-ku
Osaka 530, Japan
Tel: 011-81-6-372-8048
Fax: 011-81-6-372-6127

Mrs. Yasuko Kawakami (interpreter)
2-10-1 Takakuradai, Suma-ku, Kobe 650, tel: 011-81-78-734-0515

Rainbow Network
1750 Kalakaua Ave. No. 116, Honolulu, Hawaii 96826, tel: 808-955-5257; fax: 808-946-7025

Kokusai Communication Service (interpreter)
IB Center Bldg, No. 505
1-13 Isogami-dori, 4-chome
Chuo-ku
Kobe 650, Japan
Tel: 011-81-78-251-8821
Fax: 011-81-78-251-8694

Nihon Convention Service, Inc. (interpreter)
Sumitomo Seimei Midosuji Bldg. 13th Floor

14-3 Nishitenma, 4-chome
Kita-ku
Osaka, Japan
Tel: 011-81-6-311-2131
Fax: 011-81-6-311-2130

Simul International, Inc. (interpreter), Kogin Bldg., Annex 8F, 4-2-7 Koraibashi, Chuo-ku, Osaka 541, tel: 011-81-6-231-2441; fax: 011-81-6-231-2447.

Stenographers: The following deposition stenographers are located in Tokyo, but willing to travel to Osaka for depositions.

Mrs. Mary Regan KAGAMI
1-9-11 Meguro Honcho Apt 605
Meguro-ku
Tokyo 152, Japan
Tel: (81) (3) 3712-3176

Mrs. Kimiko Keki
2-31-5 Matsugaoka
Nakano-ku
Tokyo 165, Japan
Tel: (81) (3) 3952-1542
Fax: (81) (3) 3223-0313

Naha, Sapporo, Fukuoka

A list of interpreters and stenographers outside the Tokyo and Osaka Kobe consular districts is available directly from the U.S. consulates.

U.S. Consular Offices in Japan

American Embassy
ATTN: Consular Section/American Citizen Services
10-1, Akasaka 1-chome
Minato-ku (107)
Tokyo, Japan
tel: 011-81-3-3224-5000
fax: 011-81-3-3224-5856
telex: 2422118 AMEMB J

Internet: <http://www.csjapan.doc.gov> for the Commercial Service Home Page.

American Consulate General
ATTN: Consular Section/American Citizen Services
11-5 Nishitenma
2-chome
Kita Ku
Osaka 530
Osaka, Japan

tel: 011-81-6-315-5900
fax: 011-81-6-315-5914
telex: 5233037 AMCONJ

Internet: http://www.senri-i.or.jp/amcon/usa_01.html for the American Citizens Services home page. This includes a segment on taking depositions under "Other Topics" which can be downloaded.

American Consulate ATTN: Consular Section, American Citizen Services
5-26 Ohori 2-chome
Chuo Ku,
Fukuoka 810
Fukouka, Japan
tel: 011-81-92-751-9331
fax: 011-81-92-713-9222
telex: 725679

Internet: <http://www.city.kitakyushu.jp/amconsul/consvc.html>

American Consulate General
ATTN: Consular Section/American Citizen Services
2564 Nishihara
Urasoe City
Okinawa 901-21
Naha, Okinawa, Japan
tel: 011-81-98-876-4211
fax: 011-81-98-876-4243

Internet: None

American Consulate General
ATTN: Consular Section/American Citizen Services
Kita 1-Jo
Nishi 28-chome
Chuo Ku
Sapporo 064
Sapporo, Japan
tel: 011-81-11-641-1115
fax: 011-81-11-643-1283
telex: 935338 AMCONS J

American Consulate
Nishiki SIS Building 6l, 10-33
Nishiki 3-chome
Naka-ku
Nagoya 460, Japan
tel: 011-81-52-203-4011
fax: 011-81-52-201-4612

Internet: None, but see Osaka-Kobe Home Page, http://www.senri-i.or.jp/amcon/usa_03.html, Consular Services for Americans, Nagoya Text.

(BECAUSE OF ITS LIMITED STAFF, THE NAGOYA CONSULATE PROVIDES NOTARIAL AND EMERGENCY SERVICES FOR AMERICAN CITIZENS ONLY, AND GENERALLY IS NOT AVAILABLE TO CONDUCT DEPOSITIONS.)

Other Informal Evidence Gathering

Conducting Informal Interviews: While the taking of depositions, under the conditions explained above, is a right secured under the U.S.-Japan Consular Convention, 15 U.S.T. 768, conducting interviews and other informal evidence gathering or investigation techniques are entirely subject to the discretion of the Japanese government. The Japanese Ministry of Foreign Affairs has advised the U.S. Embassy in Tokyo that it considers the conducting of information interviews by in Japan to constitute formal evidence gathering and therefore to be subject to the Japanese law on international investigative assistance. Private litigants may need to obtain a special visa for travel to Japan to conduct informal interviews, inspections or other investigations. Contact the Japanese Embassy or consulate in the U.S. for information. Japanese authorities may require that the request to conduct such interviews be made in the form of a letter rogatory, or in criminal cases, on behalf of the U.S. Government, a formal letter of request. Local, state and federal prosecutors/attorneys seeking to conduct such interviews/inspections should contact the Office of American Citizens Services for additional information.

Compulsion of Evidence

Japan is not a party to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. There is not in force between the United States and Japan any other treaty or international agreement on judicial assistance.

Compulsion of evidence in Japan from an unwilling witness can only be achieved on the basis of comity, pursuant to a letter rogatory. See Rule 28(b), Fed. R. Civ. P.; 4 Moore's Federal Practice 28.05-28.8 (2d ed. 1950); Ristau, International Judicial Assistance (Civil and Commercial), Vol. I, 3-36 et seq., International Law Institute, 1984; Article 5(j) of the Vienna Convention on Consular Relations [1963], 21 UST 77 to which the United States and Japan are both parties.

Preparation of Letter Rogatory for Use in Japan: A letter rogatory is a request from a court in one country for assistance from a court in another country. Such requests are executed by Japanese district courts in accordance with the laws of Japan and generally take six months to a year to execute. The Japanese court will compel the witness to appear before a Japanese judge to respond to written questions annexed to the letter rogatory. All proceedings will be conducted in the Japanese language. The letter rogatory should be written in clear, simple language and should be written in the form of a request, not a demand for assistance. Japan requires that requests for international judicial assistance be processed through the diplomatic channel. This means that a request must be transmitted to the Department of State by the requesting court, or by counsel. The Department of State understands that the following conditions must be met before such a request will be honored:

- A.** The request must be made through diplomatic channels (as mentioned);
- B.** The letter rogatory should have attached documents showing parties to be examined, the type of evidence to be examined, the name, nationality and address of the persons to be examined and the items with respect to which they should testify [Law W relating to Reciprocal Judicial Aid to be Given at the Request of Foreign Courts - Law 63 of March 13, 1905, as amended];
- C.** The letter rogatory and all attachments must be translated into Japanese. Japanese courts often reject a letter rogatory if the documents including all attachments are not completely translated into Japanese, or if the quality

of the translation is poor;

D. The letter rogatory must assure the Japanese court that compensation for all expenses incurred by the Japanese court will be paid;

E. The letter rogatory must assure the Japanese court that the requesting court will honor similar requests from the Japanese court.

Moreover, Japan requires that any document annexed to the letter rogatory must bear the seal of the requesting court and the signature of the judge. Japan will reject a request if the letter rogatory or accompanying documents bear the signature of the clerk of the court. Japanese authorities do not honor amendments to a letter rogatory which are not under the seal of the requesting court. A separate information flyer regarding preparation and transmittal of letters rogatory is available from the Department of State, Office of American Citizens Services.

Fees for Letters Rogatory:

The consular fee for transmittal of letters rogatory (22 CFR 22.1 item 67) is \$32.00. Japanese authorities may charge additional fees. The U.S. Embassy in Tokyo requests that a check in the amount of \$200.00 accompany letters rogatory for use in Japan, payable to American Embassy Tokyo in the form of a money order or certified bank check. A personal check or corporate check is not acceptable. (\$200 is the estimate based on compulsion of testimony of one witness.) Any unused funds will be refunded.

Participation of American Counsel in Japanese Court Proceedings Regarding Execution of Letters Rogatory: Most American attorneys would prefer to participate in the proceeding before the Japanese court. This may well pose a problem in that it appears generally prohibited by Articles 3 and 72 of the Japanese Lawyer Law. The Japanese judge, however, may permit American counsel to participate on a case-by-case basis. For this reason, it may be preferable for you to prepare the letter rogatory in a way which offers the Japanese court alternative ways of executing the request. For example, the letter rogatory could request that:

- (a) American counsel be permitted to participate in the proceedings before the Japanese court;
- (b) If this is not possible, the letter rogatory could ask that local Japanese counsel representing the American client be permitted to participate in the proceedings;
- (c) Finally, if this alternative is not possible, the letter rogatory could enclose written questions to be put to the witness by the Japanese court.

Retaining a Foreign Attorney: You may wish to retain local Japanese counsel for more detailed information about Japanese procedures. Lists of attorneys in Japan are available from the Department of State, Office of American Citizens Services and from the U.S. Embassy and consulates in Japan. See also, the Martindale-Hubbell Law Directory.

Transmittal of Letter Rogatory: The letter rogatory and any accompanying documents should be translated into Japanese and transmitted in duplicate (a certified original in English and a photocopy; a certified translation in Japanese and a photocopy) to the Office of American Citizens Services, East Asia and Pacific Division, Department of State, Room 4811A, 2201 C Street N.W., Washington, D.C. 20520. The Department will transmit the request to the American Embassy in Tokyo, which will transmit the request to the Japanese Ministry of Foreign Affairs. The Ministry of Foreign Affairs will forward the request to the Japanese Supreme Court which will send the letter rogatory to the appropriate Japanese District Court. The Japanese District Court

will execute the letter rogatory and send the evidence back through the same channel to the American Embassy in Tokyo which will forward the evidence to the Department of State for transmittal to the requesting court in the United States. Requesting counsel in the United States will be advised by the Department of State when the evidence is forwarded to the court in the United States.

Criminal Cases: Requests for compulsion of evidence (testimony or production of documents) on behalf of the U.S. Government (including local, state and federal prosecutors) are made in the form of a formal letter of request. These requests constitute formal evidence gathering and therefore to be subject to the Japanese law on international investigative assistance. Preparation of the formal letter of request is coordinated with the Office of International Affairs, Criminal Division, Department of Justice, 202-514-0005. Japan does not permit direct transmission of judicial assistance requests to agencies or instrumentalities of the Government of Japan, but rather requires formal transmission through established diplomatic channels. Requests on behalf of defense counsel are prepared in the form of a letter rogatory, using the general instructions noted in the previous discussion of letters rogatory. Department of Justice assistance is only available to local, state and federal prosecutors and other government attorneys, not to private litigants or defense counsel generally.

Compulsion of Documents and Other Physical Evidence: As in the taking of depositions United States consular officials have no authority to compel the production of any document or other article. Japan has advised the United States that Japanese law does not include any provision for compulsion of documents or other physical evidence except in criminal cases. The Department of State continues to explore this issue with Japanese authorities. In the interim, while the Department is prepared to transmit such requests, be aware that attempts to compel such evidence by means of letters rogatory in civil cases have proven unsuccessful. However, production of documents and other physical evidence may be compelled through the Japanese courts by letters rogatory in criminal cases.

References

T. Hattori & D. Henderson, *Civil Procedure in Japan*, 1985.

Kenadjian, R. Wohl, S. Chemtob, & G. Fukushima, *Practice By Foreign Lawyers in Japan*, *Fordham International Law Journal*, 1989-1990, Vol. 13, No. 3, pp. 390-404.

Koroyasu, *Transnational Litigation - Part II: Perspectives from the U.S. and Abroad: Japan*, *The International Lawyer*, Fall 1984, Vol. 18, No. 4, pp. 785-787.

MacMullin, *Foreign Attorneys in Japan: Past Policies, The New Special Measures Law and Future Expectations*, *Florida International Law Journal*, Fall 1988, Vol. 4, No. 1, pp. 51-84.

Matsuo, *Jurisdiction in Transnational Cases*, *The International Lawyer*, Spring 1989, Vol. 23, No. 1, pp. 6-9.

Mori, *Discovery and Taking Evidence (in Japan)*, *The International Lawyer*, Spring 1989, Vol. 23, No. 1, pp. 3-5.

Ohara, *Judicial Assistance to be Afforded by Japan for Proceedings in the United States*, *The International Lawyer*, Spring 1989, Vol. 23, No. 1, pp. 10-28.

Peterson, *Jurisdiction and the Japanese Defendant*, 25 *Santa Clara L. Rev.* 555, 576-79 (1985)

Ramseyer, *Lawyers, Foreign Lawyers, and Lawyer-Substitutes: The Market for Regulation in Japan*, *Harvard International Law Journal*, 1986, Vol. 27, pp. 499-539.

Sawaki, Recognition and Enforcement of Foreign Judgments, *The International Lawyer*, Spring 1989, Vol. 23, No. 1, p. 29.

Sheehy, Japan's New Foreign Lawyer Law, *Law and Policy in International Business*, Vol. 19, No. 2, 1987, pp. 361-383.

Symposium: Japanese Law and Practice in Transnational Litigation, *The International Lawyer*, Spring 1989, Vol. 23, No. 1.

Tada, Role of Corporate Legal Departments in Japan, *The International Lawyer*, Winter 1988, Vol. 22, No. 4, pp. 1141-1144.

Takaishi, Hirakawa and Tomatsu, International Civil Litigation Over Securities-Related Disputes in Japan, *Hastings International and Comparative Law Review*, Winter 1991, Vol. 14, No. 2, 423.

Yamanouchi and Cohen, Understanding the Incidence of Litigation in Japan: A Structural Analysis, *The International Lawyer*, Summer 1991, Vol. 25, No. 2, pp. 443-454.

Recognition and Enforcement of Foreign Judgment (First District Court, Munich, Federal Republic of Germany) - Judgment Rendered by Munchen Landgericht I - Conditions for Recognition of Foreign Judgment (Art. 200, C.C.P.) - Jurisdiction of the Foreign Court - Proper Law to Determine the Validity of Jurisdictional Agreement - Interpretation of "as long as" Clause - Foreign Judgment by Default - Public Order - Guarantee for Reciprocal Recognition, Nagoya District Court, Judgment, February 6, 1987; H.J. (1236) 113 (1987), H.T. (627) 244 (1987), *The Japanese Annual of International Law*, 1990, No. 33, p. 189.

Effect of Foreign Judgment - Divorce between Japanese Spouses - Pronounced by a California Court (Superior Court, Los Angeles County, California, U.S.A.) - Service by Mail from California Court and Article 200(2), Code of Civil Procedure - Recognition (Denied), Tokyo District Court, Judgment, November 11, 1988; H.T. (703) 271 (1989), *The Japanese Annual of International Law*, 1990, No. 33, p. 208.

Private International Law - Enforcement of Foreign (U.S. District Court, District of Columbia, U.S.A.) Judgment - Public Order - Reciprocity (Mutual Guarantee), Supreme Court of Japan, June 7, 1983, Supreme Court Civil Reports, Vol. 37, No. 5, pp. 611 et seq., *The Japanese Annual of International Law*, 1984, No. 27, p. 119.

Private International Law - Enforcement of Foreign (U.S. District Court, District of Columbia, U.S.A.) Judgment - Public Order - Reciprocity (Mutual Guarantee), Tokyo High Court, March 31, 1982, *The Japanese Annual of International Law*, 1984, No. 27, p. 136.

Private International Law - The Requisites for Recognition of a Foreign Judgment (U.S. District Court, District of Columbia, U.S.A.), Tokyo District Court, September 17, 1979, *The Japanese Annual of International Law*, 1981, No. 24, p. 196.

Execution of Foreign Judgment (Paris Commercial Court) - Jurisdiction of Foreign Court - Place Where Obligation Performable Not Sufficient Connection to Establish Jurisdiction, Tokyo District Court, May 2, 1972, *The Japanese Annual of International Law*, 1974, No. 18, p. 209.

Foreign Judgment of Divorce - Invalidity - Compliance with Requirements regarding Enforcement of Foreign Judgment (First Civil Court of Bravos District, Chihuahua, Republic of Mexico), Tokyo District Court, December 17, 1971, *The Japanese Annual of International Law*, 1973, No. 17, p. 212.

International Law - Contracts - Judgment of Foreign Court (Superior Court of Los Angeles County, California, U.S.A.) - Compatibility with Public Order or Good Morals, Tokyo District Court, September 6, 1969, The Japanese Annual of International Law, 1971, No. 15, p. 181.

Private International Law - Enforcement of New York Arbitral Award - The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (Article 5) - Burden of Proving Conditions to deny Recognition, Osaka District Court, April 22, 1983, The Japanese Annual of International Law, 1984, No. 27, p. 184.

Additional Information: The Office of American Citizens Services has available general information flyers and country specific flyers on international judicial assistance. These topics include:

Preparation of Letters Rogatory
Hague Legalization Convention
Hague Service Convention

Using the Internet: These flyers are available on the Internet via the Department of State, Bureau of Consular Affairs home page under Judicial Assistance. See also, the Department of State, Office of the Legal Adviser for Private International Law home page. See also the home pages for our Embassy in Tokyo, the Consulate General in Osaka-Kobe and the Consulate in Fukuoka. As noted above, the text of the Convention and updated information concerning countries which have acceded to the Convention can be found in the Martindale-Hubbell Law Directory, Law Digest Volume.

Questions: Should you have further questions about the procedures obtaining evidence in Japan not addressed in this material, please contact the Office of American Citizens Services, East Asia and Pacific Division, Department of State, 2201 C Street, N.W., Room 4811A, Washington, D.C. 20520, tel: 202-647-6769; or 202-647-5226; fax: 202-647-2835.

[Return to Judicial Assistance Page](#)

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

IN THE MATTER OF)	PUBLIC RECORD VERSION
ASPEN TECHNOLOGY, INC.,)	Docket No. 9310
Respondent.)	
)	

**RESPONDENT ASPEN TECHNOLOGY, INC.'S
MOTION FOR CERTIFICATION FOR COMMISSION DETERMINATION
TO SEEK AN ORDER FROM THE DISTRICT COURT AUTHORIZING VOLUNTARY
DEPOSITIONS UPON WRITTEN QUESTIONS OF JAPANESE WITNESSES AND FOR
EXTENSION OF TIME AND MODIFICATION OF THE SCHEDULING ORDER TO
ALLOW FOR SUCH DEPOSITIONS**

EXHIBIT B

[REDACTED]

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

IN THE MATTER OF)	
)	
ASPEN TECHNOLOGY, INC.,)	Docket No. _____
)	
Respondent.)	
)	

**[PROPOSED] ORDER DIRECTING THE TAKING ABROAD OF VOLUNTARY
DEPOSITIONS UPON WRITTEN QUESTIONS OF JAPANESE WITNESSES**

**TO ANY CONSUL OR VICE CONSUL OF THE UNITED STATES AT THE
UNITED STATES CONSULATE IN OSAKA-KOBE, JAPAN**

Upon the application of the Federal Trade Commission as requested by Respondent Aspen Technology, Inc. ("AspenTech"), and pursuant to Article 17 of the United States-Japan Consular Convention, you have been duly appointed and you are hereby authorized to take depositions upon written questions at the United States Consulate in Osaka-Kobe, Japan, on or about March 11-19, 2004, of the following witnesses, to the extent such witnesses appear voluntarily:

- 1) [REDACTED]
- 2) [REDACTED]
- 3) [REDACTED]
- 4) [REDACTED]
- 5) [REDACTED]

These depositions upon written questions shall be conducted under Rule 3.33(e) of the Federal Trade Commission's Rules of Practice for Adjudicative Proceedings, 16 C.F.R. § 3.33(e), a copy of which is attached as Exhibit 1. The questions to be answered shall be

delivered to the consulate by AspenTech before March 11, 2004. Answers to these questions shall be taken under oath. You should prepare and certify a written record of the responses and mail such written record to counsel for AspenTech, along with a copy of the notices of deposition and the questions. Counsel for AspenTech shall promptly serve copies of the responses on Complaint Counsel.

ORDERED:

UNITED STATES DISTRICT COURT JUDGE

Date:

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

IN THE MATTER OF)	
)	CONFIDENTIAL VERSION
ASPEN TECHNOLOGY, INC.,)	PURSUANT TO FTC RULE 3.45(e)
)	SUBJECT TO PROTECTIVE ORDER
Respondent.)	
)	Docket No. 9310

**[PROPOSED] ORDER GRANTING RESPONDENT ASPEN TECHNOLOGY, INC'S
REQUEST FOR CERTIFICATION FOR COMMISSION DETERMINATION TO SEEK
AN ORDER FROM THE DISTRICT COURT AUTHORIZING VOLUNTARY
DEPOSITIONS UPON WRITTEN QUESTIONS OF JAPANESE WITNESSES AND FOR
EXTENSION OF TIME AND MODIFICATION OF THE SCHEDULING ORDER TO
ALLOW FOR SUCH DEPOSITIONS**

On January 9, 2004, Respondent Aspen Technology, Inc. ("AspenTech") filed its Motion for Certification for Commission Determination to Seek an Order from the District Court Authorizing Voluntary Depositions upon Written Questions of Japanese Witnesses and for Extension of Time and Modification of the Scheduling Order to Allow for Such Depositions.

Upon consideration of AspenTech's motion and Complaint Counsel's opposition thereto, the motion is hereby GRANTED. AspenTech's motion is certified to the Commission with the recommendation that the Commission seek a court order authorizing the taking of depositions upon written questions of Japanese witnesses, as set forth in the attached proposed District Court Order. Further, it is hereby ordered that the close of discovery in this matter is extended until March 20, 2004 in order to allow for these depositions.

ORDERED:

Stephen J. McGuire
Chief Administrative Law Judge

Date:

CERTIFICATE OF SERVICE

I, Tanya Dunne, hereby certify that on January 8, 2004, I caused a true and correct copy of the attached *Motion for Certification for Commission Determination to Seek an Order from the District Court Authorizing Voluntary Depositions upon Written Questions of Japanese Witnesses and for Extension of Time and Modification of the Scheduling Order to Allow for Such Depositions (Public Record Version)* to be served upon the following persons:

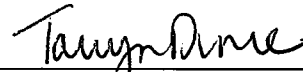
By hand delivery:

Hon. Stephen J. McGuire
Chief Administrative Law Judge
Federal Trade Commission
Room H-112
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

Donald S. Clark, Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

By hand delivery and e-mail:

Peter Richman
Phillip L. Broyles
Federal Trade Commission
Room NJ-7172-A
601 New Jersey Ave., N.W.
Washington, D.C. 20001



Tanya Dunne

