A comment on Professor Hau’s paper “E-Justice in International Civil Procedure: Recent Developments in the European Union”

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Japan has made significant strides in digitalizing its civil procedures through legislation enacted in 2022. This Act will have a profound impact on domestic cases, enabling trial hearings to be conducted via video link where deemed appropriate by the court after consulting with the parties (under Article 87-2 of the Code of Civil Procedure). By May 2026, courts will be able to examine witnesses via video conferencing unless there are objections from the parties involved (future Article 204 of the same Code). Additionally, judicial documents may be served directly by electronic means with the addressee’s consent (future Article 109-2).

These measures would be particularly valuable if they were available in international cases, as they help bridge geographical distances. Technologically, it should be possible to use these measures in a cross-border context. For example, it should be possible to serve a claim form electronically on the defendant abroad and for that defendant to participate in trial hearings in Japan via video link. Similarly, it should be possible to examine a witness abroad via video link.

However, sovereignty concerns stand in the way. The court’s powers to maintain order (Article 71 of the Courts Act) could potentially violate foreign sovereignty if applied to participants in other countries. Direct service of judicial documents could also violate the sovereignty of the foreign country where the addressee is present. Japan’s reservation against direct postal service under Article 10 of the Hague Service Convention may prevent it from seeking permission from other countries for direct service by electronic means.

From this perspective, the European Union is a step ahead as similar measures are available in cross-border contexts. Thus, cross-border electronic service is possible with the addressee’s consent (Article 19 of the Service Regulation). A hearing via video link is also possible without the consent of the Member State in which the participating party is present (Article 5 of the Digitalisation Regulation). Furthermore, a witness present in another Member State may be examined directly via video link (Article 20 of the Evidence Regulation), although only with the latter State’s consent. This progress is due to the willingness of Member States to give up their sovereign prerogatives in favour of Union legislation.

However, EU Member States face similar limitations in their relations with non-EU countries as Japan does. This is because a blanket waiver of sovereign objections would be difficult to obtain on a global scale. In this respect, arbitration maintains an advantage over litigation by avoiding sovereignty issues.

What remains possible in litigation is to facilitate communication between national authorities by replacing postal exchanges with electronic channels. The latter must be secure and interoperable. In this respect, the European Union seems leading the way with its initiatives to develop eCODEX. I am curious as to why a decentralised architecture is chosen and why it will take so many years (until 2031) to develop.