The Hague Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters from a Perspective of Japan

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Ⅰ Introduction

Globalization and interdependence have been inevitably causing many civil

or commercial disputes between parties in different territories. Nonetheless, there is no worldwide mechanism that can be utilized to adequately allocate judicial jurisdiction among countries and to have judgments smoothly recognized or enforced in other countries.[1] The Hague Conference on Private International Law's project to prepare a convention on jurisdiction and foreign judgments in civil and commercial matters is a challenge to change this situation. In response to a proposal from the United States made in May 1992, the Hague Conference organized a special commission to study this subject and prepare preliminary draft articles for submission to the Diplomatic Conference.[2] On 30 October 1999, the Special Commission adopted the Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (hereinafter referred to as the "1999 draft convention").[3]

Since this 1999 draft convention was adopted by majority vote and many proposals of the United States were defeated by civil law countries' majority vote, the United States strongly opposed submission of such a "European" draft to the Diplomatic Conference as a starting point, and proposed to have the Diplomatic Conference postponed.[4a] The European countries could not accept such a proposal easily, because they found the 1999 draft convention to be a good document for discussion at the Diplomatic Conference. On the other hand, some countries, including Japan, which do not have a multilateral framework in this field, such as the Brussels and Lugano Conventions[4] among the European countries, thought that the ratification by the United States in the final stage would be important for this convention in order for it to play an effective role in the international field as a legal infrastructure for civil and commercial litigation. Accordingly, those countries supported the idea not to adhere to the original schedule of final adoption of the convention.[5] In May 2000, it was decided that the Diplomatic Conference be divided into two parts: the first part was scheduled to be held in June 2001

when all decisions would be made on consensus or near consensus basis; and the second part was scheduled to be held at the end of 2001 or at the beginning of 2002, when a standard decision making method, that was majority vote, was expected to be adopted. Several informal meetings were held to review the 1999 draft convention, not only from the viewpoint of e-commerce and intellectual properties, which review had been done in accordance with a decision made by the Special Commission at the time of the adoption of the 1999 draft convention, but also from the viewpoint of finding a narrow way to make the articles adoptable by all countries.

In June 2001, the first part of the 19th Session was held. As anticipated, many proposals were made to change the text of the draft convention, and in accordance with the consensus method, no proposal could be dismissed so long as one country insisted on maintaining it in the text. As the result, in comparison with the 1999 draft articles, which consisted of 12,000 words, the 2001 draft articles consist of 24,000 words, and the total number of words, including notes that explain the meaning of alternatives and parentheses, is 48,000.(6) At the end of the first part of the Session, it was decided *by consensus* to postpone again the second part of the Session for adoption of the convention, since all the delegates acknowledged the need to consider how to proceed with this project. It was also decided that the meeting of the Commission I of the Diplomatic Conference, whose task was to decide general affairs,(7) was scheduled to be held within a few months in order to decide the future of the project.

This is a good time for every country to consider calmly what should be the ultimate goal of this negotiation. The 2001 draft text is a set of ideas from every viewpoint, based upon a wide variety of legal systems. It is good material for academic analysis.

This paper evaluates the articles of the 2001 draft convention from the Japanese viewpoint taking into consideration the current Japanese rules on

jurisdiction and recognition/enforcement of foreign judgments. First, the basic structure of the draft convention will be introduced in Part II. In Part III, the basic Japanese rules will be summarized as a precondition for the examination of the Hague project. And, in Part IV, general observations from the Japanese perspective and an examination of some of the articles of the 2001 draft convention will be made. Finally, in Part V, the way in which a convention that can be ratified by many countries can be made will be explored. The best policy for Japan with respect to this Hague project will be considered in the conclusion of this article.

II The Basic Structure of the Draft Convention

The draft convention is a type of mixed convention.[8] It is different from a single convention in that; a single convention just provides for rules on recognition and enforcement of foreign judgments and controls the jurisdiction of courts indirectly by checking the jurisdiction as one of the requirements for recognition and enforcement, whereas a mixed convention deals not only with the recognition and enforcement of foreign judgments but also with jurisdiction directly. However, a mixed convention does not provide a full set of rules on jurisdiction, but rather provides just a part of those rules. A convention that provides a full set of rules on jurisdiction as well as rules on recognition and enforcement of foreign judgments is called a double convention. For example, the Brussels and Lugano Conventions are double conventions, under which no rules of jurisdiction other than those provided for in the conventions can be applied to the cases in which the defendant is domiciled in any one of the contracting states, and judgments rendered by any one of the contracting states may be recognized and enforced without verifying the jurisdictional requirement. A mixed convention is different from a double convention in that a mixed convention allows the contracting parties to apply their national rules of jurisdiction insofar as such application of national rules

	Original Court—	Receiving Court—
Rules in the white list	shall apply them.	shall recognize / enforce judgments based on them.
Rules in the grey area	is free to apply them insofar as they are provided for under the applicable national law.	is free to recognize/enforce or not to recognize/enforce judgments based on them under the applicable national law.
Rules in the black list or area	Is prohibited to apply them.	is prohibited to recognize/enforce judgments based on them.

is not prohibited by the convention. Accordingly, in a mixed convention the jurisdictional rules are divided into three categories: jurisdictional rules in the white list, those in the grey area, and those in the black list or black area. The jurisdictional rules in the white list shall be applied by contracting parties, and judgments based upon those rules shall be recognized and enforced by other contracting parties so long as other requirements are met. On the other hand, the rules in the black list or area[9] shall not be applied by the contracting parties, and in the case where a judgment is rendered on the basis of such prohibited jurisdictional rules, the other contracting parties should neither recognize nor enforce such a judgment. Between the two sets of rules, there are some rules in the grey area. Every contracting party may apply such rules under each of their respective national laws, and the recognition and enforcement of judgments based upon such rules are left to the respective national laws.

Initially the United States proposed a mixed convention for the global convention, because the United States realized the difficulty of making a double convention among countries whose systems of jurisdictional rules are so different from each other. Especially since the jurisdictional rules of the United States are based upon the "due process" clause in the U.S. Constitution[10] and are very unique in comparison with jurisdictional rules in civil law coun-

tries that are based upon the Roman law tradition, it was thought impossible to unify all jurisdictional rules in a worldwide convention.

The European countries, however, had been adhering to a type of double convention and argued every issue in reference to the Brussels and Lugano Conventions at the meetings of the Special Commission until June 1999, when an article permitting the grey area was adopted. Article 17 is the key provision of the mixed convention, which provides that, subject to certain provisions, "the Convention does not prevent the application by Contracting States of rules of jurisdiction under the national law; provided that this is not prohibited under Article 18," which pertains to prohibited jurisdictional rules. The mixed convention style was adopted by 23 votes with no opposition.

Japan had originally supported the idea of a mixed convention as being the only method to make a truly worldwide convention. Within this framework Japan has been trying to realize its objectives as much as possible.[11] Before discussing the contents of the 2001 draft convention, Japanese rules on jurisdiction as well as rules on recognition and enforcement of foreign judgments should be noted.

Ⅲ Some Basic Rules of Japan

1. General

Japan adopted German law as the basic structure of its legal framework more than one hundred years ago. In the field of civil and commercial litigation, Japan's Civil Code, Commercial Code, Civil Procedure Code, and Court Administration Act were all enacted in reference to their German counterparts.[12] Japan has, however, changed its original rules in some respects by statutory amendment or by case law. As a result, some Japanese rules on jurisdiction seem to be surprisingly similar in kind to those of the United States.

2. Jurisdiction

a. Established Case Law

Japanese rules on international jurisdiction have been formulated by case law.[13] Important cases on international jurisdiction in civil and commercial matters in general[14] are the Supreme Court judgment on 16 October 1981 (*Malaysian Airlines System*)[15] and the Supreme Court Judgment on 11 November 1997 (*Shin Miyhara*).[16] In accordance with these Supreme Court judgments, the international jurisdiction with regard to civil and commercial matters shall be decided as follows: (1) If there is an applicable treaty, the rules of such treaty shall be applied; (2) Since there is no explicit provision on international judicial jurisdiction, whether or not a Japanese court has jurisdiction shall be, in general, decided in accordance with the principle of justice that would require that fairness be maintained between parties, and a proper and prompt administration of justice be secured; (3) Although the provisions on venue of local courts, as provided for in the Civil Procedure Code, are not concerned with international jurisdiction in and of themselves, those provisions reflect the above principle of justice. Thus, in principle, a defendant should be subject to the jurisdiction of Japan when any one of the Japanese courts would have jurisdiction in accordance with the Civil Procedure Code; (4) Such conclusion, however, shall be reversed if it is found to be contrary to the principle of justice in consideration of the special circumstances in individual cases.

With regard to (1) above, there is no treaty on jurisdiction with a general scope of application, to which Japan is a party. Although Japan is a party to a few treaties that have provisions on jurisdiction and foreign judgments, the scope of their application is very limited.[17] The purport of (2) to the effect that there is no domestic statutory rule in Japanese law is currently generally recognized, while the Civil Procedure Code legislators in the 19th century and some court judgments issued more than sixty years ago seem to have

thought that the provisions on venue in the Civil Procedure Code had two functions: one for international jurisdiction and the other for internal venue, as has been considered in Germany. The principle of justice, mentioned in (2) above, is generally recognized to be appropriate in deciding the international jurisdiction of Japanese courts.[18] With regard to (3), this third step is criticized in that the provisions on venue of local courts cannot be deemed to be a proper starting point for determining international jurisdiction, and further in that there should be other proper bases of jurisdiction not provided for in the Civil Procedure Code. Nevertheless it cannot be denied that this step has the advantage of securing predictability for the parties.[19] In fact following the criticism above, some lower courts have held that some provisions of the Civil Procedure Code should not be applied as they are to decide international jurisdiction.[20]The last step noted in (4) above is called the "special circumstances" consideration. This step was not mentioned in *Malaysian Airlines System*.[21] However, since 1981, many lower courts have added this step and applied it widely and flexibly. Finally in 1997, the Supreme Court accepted it in *Shin Miyahara*.[22] Although commentators have been cautious about the risk that predictability might be impeded by this step, the necessity for such a step to secure an adequate conclusion on international jurisdiction is generally recognized. Whereas, among the domestic courts, cases can be transferred to an appropriate court under Japanese law "where it is decided necessary by the transferring court to avoid considerable delay of proceedings or to secure equity between parties" in accordance with Article 17 of the Civil Procedure Code, among courts of different countries such transfer is not possible because of the lack of an international system. To compensate for this, a certain degree of flexibility is thought to be necessary in determining international jurisdiction.

b. "Special Circumstances" Consideration in Comparison with the Doctrine of *Forum Non Conveniens*

One example of the "special circumstances" consideration is the Tokyo District Court judgment on 20 June 1986,[23] wherein the family members of the victim of an accident aboard a Taiwanese airline (Far Eastern Air Transport), which occurred in Taiwan, claimed damages against two American companies: one was the airplane manufacturer (The Boeing Co., Inc.) and the other was an airline company (United Airlines, Inc.) that was the former owner of the plane and sold it to the Taiwanese airline as a second-hand plane. The plaintiffs alleged that Boeing manufactured the airplane with defects and United Airlines sold it knowingly. The defendants argued that the case should be dismissed for lack of international jurisdiction and, regarding the merits of the case provisionally, that the cause of the accident was improper maintenance on the part of a Taiwanese airline company.

The Tokyo District Court held that "if a venue for local territorial competence provided for in the Civil Procedure Code is located in Japan, it would be in accordance with the principle of justice to sustain the jurisdiction of the Japanese court in general, unless special circumstances can be found," and that "such special circumstances exist where, in light of the concrete facts of the case, sustaining the Japanese court's jurisdiction would result in contradicting the principles of securing fairness between the parties and maintaining the proper and prompt administration of justice." Recognizing that international jurisdiction would be sustained under the rules for a normal situation,[24] the Court proceeded to consider the "special circumstances" in this case.

The Tokyo District Court considered the two principles separately. As for the proper and prompt administration of justice, the Court held that it would be difficult to secure a fair and prompt trial in Japan, since it would not be possible for Japanese courts to obtain crucial evidence located in Taiwan by

way of judicial assistance because of the lack of regular diplomatic relations between Japan and Taiwan. On the other hand, regarding the issue of fairness between the parties in the case of dismissal in Japan, the Court considered the following four factors: first, whether the Taiwanese court should not dismiss the case on account of lack of international jurisdiction; secondly, whether the plaintiffs had enough money to bring an action again in Taiwan; thirdly, whether the Taiwanese court should not dismiss the claim on account of prescription; and fourthly, whether the plaintiffs could enforce the judgment they would obtain in Taiwan. Upon consideration of these factors, the Court held that dismissing the case would not unreasonably impede the fairness between the parties even if the plaintiffs would be obliged to bring an action in Taiwan. Accordingly, the Court dismissed the case on the ground that there were special circumstances which made the assertion of the Japanese court's jurisdiction unreasonable.

Such "special circumstances" consideration looks similar to the doctrine of *forum non conveniens* in the United States. Indeed both are mechanisms used to attain equity in individual cases in a flexible way; however, there are some differences.[25]

First, whereas not only the private factors but also public factors, such as administrative difficulties caused by the number of cases, jury duty of the community members, and local interest in having localized controversies decided at home,[26] are considered in the doctrine of *forum non conveniens*, only the private factors are considered in the Japanese "special circumstances" consideration, such as the relative ease of access to source of proof, availability of compulsory process for the attendance of unwilling witnesses, the cost of obtaining attendance thereof, the enforceability of a judgment, and other relative advantages and obstacles to a fair, proper and prompt trial.

Secondly, whereas American courts have the power to stay or to dismiss a

case under suitable conditions, Japanese courts do not have such power. The Civil Procedure Code provides for a stay in extraordinary situations such as natural disasters or unavailability of a party due to illness or other reasons (Articles 130 and 131). Therefore, there are only two choices for a Japanese court: either sustain jurisdiction or dismiss the case completely. The lack of other options makes it difficult for the court to deal with cases in a more flexible way.

Thirdly, the "special circumstances" consideration is applied not only to deny jurisdiction but also to sustain jurisdiction. In a divorce case, the Supreme Court judgment on 24 June 1996[27] held that "in the determination of jurisdiction, while we should by all means take into account the burden that the defendant will have to bear by being obliged to appear, we should also pay heed not to belittle the protection of the plaintiff's rights to seek a divorce, considering the existence and degree of *de jure* or *de facto* obstacles which a plaintiff may face in filing an action for divorce in the country of the defendant's residence." In this case, a divorce decree had already been ordered by a German court, but the service of process and summons in the German proceedings were done by public notice. Therefore, this German decree did not satisfy the conditions for recognition in Japan, because Article 118 (2) of the Civil Procedure Code required that the service of process should not be done by public notification (see III. 3). On the other hand, the existence of this decree prevented the plaintiff from filing an action for divorce again in Germany. The denial of jurisdiction by a Japanese court would have meant the denial of justice in Japan. In order to have their marriage dissolved in Japan, the plaintiff had no other choice but to file an action in Japan. The Court held that, under these circumstances, it is in accordance with the principle of justice to accept jurisdiction.[28]

c. "Court–Claim Nexus" or "Court–Defendant Nexus"

During the Special Commission meetings, the contrast between the "court

-claim nexus" in civil law countries and the "court-defendant nexus" in common law countries, especially in the United States, was frequently mentioned. Although Japan is subject to the civil law tradition, it seems that the "court-claim nexus" is not favored. The criteria determined by the Supreme Court of Japan for international jurisdiction are, as mentioned above, fairness between parties and a proper and prompt administration of justice. It seems very similar to the American way of dealing with jurisdictional issues. According to *International Shoe*,[29] "due process requires only that, in order to subject a defendant to a judgment *in personam*, ...he has certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice."

Behind that way of thinking in Japan, Article 7 of the Civil Procedure Code seems to play an important role. Article 7 provides that, in a case where jurisdiction with regard to one of the claims jointly made in one lawsuit against the same defendant is accepted, jurisdiction over other claims is also sustained, even though jurisdiction over the other claims cannot be admitted if those other claims are filed separately.[30] This is called "the jurisdiction over objectively joint claims",[31] which was inserted in the Civil Procedure Code in 1926. According to an explanation this provision does not place an unreasonable burden on the defendant because, in any event, the defendant must defend at least one of the alleged claims of the plaintiff in court. According to Article 136, the plaintiff can file several claims in one action to the extent that the same procedure can be applied to all claims. It means that there is no requirement at all for the consolidation of claims jointly filed in one action between the same parties. Article 7 seems very important in that, at least in domestic cases, it cuts the nexus between the court and the claim. The jurisdiction over objectively joint claims has also been recognized to be consistent with the principle of justice in deciding international jurisdiction for Japanese courts,[31a]provided that there must be a close relationship

between the claims for the purpose of international jurisdiction in accordance with the Supreme Court judgment on 8 June 2001,[31b]since without such close relationship the proceedings would be complicated and would consume long period of time.[31c]However, even if such condition is required, some of the claims may not have any nexus with the court.

Thus, in a defamation case such as *Shevill*,[32] the conclusion would be different in Japan. In the *Shevill* case, among others, one of the plaintiffs, a U.K. national living in England, filed a lawsuit in England for damages against a French newspaper company. According to that plaintiff, an article in the defendant's newspaper was defamatory in that it suggested that she played a money-laundering role in a drug-trafficking network. The defendant disputed the jurisdiction of the English court under Article 5(3) of the Brussels Convention.[33] According to this provision, a person domiciled in a Contracting State may, in another Contracting State, be sued: "in matters relating to tort, delict or quasi-delict, in the courts of the place where the harmful event occurred." The House of Lords referred the question to the European Court of Justice. The European Court of Justice held that "the victim of a libel by a newspaper article distributed in several Contracting States may bring an action for damages against the publisher either before the courts of the Contracting State of the place where the publisher of the defamatory publication is established, which have jurisdiction to award damages for all the harm caused by the defamation, or before the courts of each Contracting State in which the publication was distributed and where the victim claims to have suffered injury to his reputation, which have jurisdiction to rule solely in respect to the harm caused in the State of the court seised."

According to the Japanese rules on international jurisdiction, once a Japanese court sustains jurisdiction over the claim for damages for harm caused in Japan, the court also has jurisdiction over other claims for damages for the harmful event that occurred in other countries insofar as the same plain-

tiff files such claims against the same defendant. Even if the court takes a narrower view, requiring a connection among claims, the conclusion would be the same since there is a connection in such a case.

Upon considering the above situations, the "court-defendant nexus" seems to be regarded as being important in the determination of international jurisdiction in Japan, notwithstanding the fact that Japanese law is based in principle on German law as a whole.

3. Recognition and Enforcement of Foreign Judgments

With respect to the rules on recognition and enforcement of foreign judgments, the Japanese rules seem to be quite ordinary.[34] Regarding recognition, Article 118 of the Civil Procedure Code provides as follows:

Article 118:

A final and conclusive judgment rendered by a foreign court shall have its effect insofar as it satisfies the following conditions:

i. The jurisdiction of the foreign court is not denied either by the law or the treaty;

ii. The defeated defendant was served summons or an order necessary for the commencement of the procedure other than by service by publication, or has voluntarily appeared without being so served;

iii. The judgment of the foreign court is not against the public order or good morals in its contents and proceedings upon which it was based; and

iv. Reciprocity is guaranteed.

With regard to enforcement of foreign judgments, Article 24 of the Civil Execution Code provides as follows:

Article 24:

(1) An action for execution order for a judgment rendered by a foreign court shall be under the jurisdiction of the district court of the general venue for the debtor or, in a case where there is no such general venue, it shall be under the jurisdiction of the district court where subject matter of the claim or any attachable property of the debtor is located.

(2) An execution order shall be rendered without reviewing the merits of the judgment.

(3) An action in accordance with paragraph 1 shall be dismissed where the finality and conclusiveness of the judgment rendered by the foreign court is not proven,

or where it does not fulfill the conditions set forth in the subparagraphs of Article 118 of the Civil Procedure Code.

(4) In the execution order, it shall be declared that an execution is granted based upon the judgment rendered by the foreign court.

According to the case law on these provisions, the following points have been clarified:

- Provisional measures ordered by a foreign court do not fulfill the requirement of finality and conclusiveness of the judgment.[35]
- The overdue interest not mentioned in a foreign judgment can be enforced insofar as it can be enforced in the original country, since whether or not it is written in the judgment itself or not depends on just a technical matter of the legal system of each country.[36]
- Although Article 118 (i) of the Civil Procedure Code provides in a negative way, a foreign court shall have jurisdiction in accordance either with Japanese rules that are the same as those applied in deciding jurisdiction of Japanese courts or with the treaty to which Japan is a party.[37]
- Although service of summons as provided for in Article 118 (ii) of the Civil Procedure Code may not precisely comply with the rules of Japan, it shall give the defendant actual knowledge of the commencement of action and not hinder the exercise of his right of defense.[38]
- Considering the importance of securing a clear and stable procedure, where a treaty is concluded on service of process and such service is required to be taken in accordance with the ways provided in the treaty, the service not in accordance with the rules does not satisfy the condition of Article 118 (ii) of the Civil Procedure Code.[39]
- Voluntary appearance under Article 118 (ii) of the Civil Procedure Code is different from appearance as the basis of jurisdiction. When a defendant appeared in order to oppose the jurisdiction of the foreign court, Article 118 (ii) is satisfied insofar as the defendant had an opportunity to defend

the merits of the case, although Article 118 (i) is not satisfied by such appearance.[40]

- It is incompatible with the fundamental principles or basic tenets of the Japanese system of damages to order the offender to pay, in addition to damages for the actual loss, money to the victim on account of punishment, and general prevention (punitive damages). Under the Japanese system, damages in a tort case purports to restore a victim to the state in which the victim would have been if the tort had not been committed by the offender by assessing the actual loss in terms of the pecuniary sum. It is left to the criminal or administrative sanctions to punish the offender and to deter similar conduct in the future. Therefore, the enforcement of the part of the foreign judgment ordering punitive damages should be rejected under Article 118 (iii) of the Civil Procedure Code.[41]
- If the share is determined within the confines of the actual expenses incurred, even if one of the parties is to bear the entire expense, including lawyer's fees, it is not contrary to the public order of Japan under Article 118 (iii) of the Civil Procedure Code.[42]
- Reciprocity is satisfied if there is substantive similarity between the conditions for recognition and enforcement of the same kind of judgments in Japan and those in the foreign country.[43]

Ⅳ Analysis from the Japanese Viewpoint

1. The Objectives

In order to evaluate the value of a global convention on jurisdiction and foreign judgments and to find the ultimate goal for Japan, it would be useful to consider the following four dimensions respectively:

(1) Rules of jurisdiction in Japan,

(2) Rules of jurisdiction in foreign countries,

(3) Recognition and enforcement of foreign judgments in Japan, and

(4) Recognition and enforcement of Japanese judgments in foreign countries.

With regard to (1), as initially explained in III.2, the Japanese rules on international jurisdiction are very vague. The "special circumstance" consideration plays a decisive role in many cases.[44] The disadvantage of such rulings may be indicated from the fact that many cases were settled out of court after receiving decisions on international jurisdiction from the courts of first instance. This seems to mean that, without having an actual decision on jurisdiction, parties cannot agree on the applicable law as the basis of settlement on both substantive and procedural matters. Accordingly, Japan will have the benefit of a new worldwide convention with clear jurisdictional rules. However, as the structure of the convention will be a mixed one, Japan will have to make clear its own jurisdictional rules in the grey area. In any event, this is a matter for Japan to resolve by itself.

With regard to (2), Japan has serious concerns about the exorbitant jurisdiction being exercised by foreign courts. Although a trend to limit the scope of jurisdiction can be observed in the United States;[45] for Japanese parties there is still the significant risk of being summoned by the United States courts when their jurisdiction are based on the Japanese parties' doing business in the United States, since they are forced to defend claims related to their activities in foreign countries and the litigations in the United States are very attractive for foreign claimants. The service of a writ upon Japanese defendants during their short stay in the United States is also a potential risk for them to become involved in litigation in that country. On the other hand, according to Article 4 (1) of the Brussels and Lugano Conventions,[46] when a defendant does not have its domicile in one of the Contracting States, international jurisdiction is determined by the laws of the individual states. Several countries have rules of exorbitant jurisdiction, such as: French and Luxemburg rules on the basis of the nationality of the plaintiff;

French, Luxemburg and Belgian rules on the basis of the nationality of the defendant; Belgian and Dutch rules on the basis of the domicile of the plaintiff; English and Irish rules on the basis of the service of a writ on the defendant in the territory; English rules on the basis of the place where a contract is concluded; English rules on the basis that the governing law of a contract is English law;[47] and so on. Accordingly, Japan has been interested in the contents of the black list, as provided for in Article 18.

With regard to (3), Japan has no serious problem. Japan has recognized and enforced many foreign judgments, including those of the United States, Australia, Germany, the United Kingdom, Korea, and so on.

With regard to (4), there seems to be no serious problem in relation to the United States. However, there are problems in the rules of some European countries. They can apply their national laws to the recognition and enforcement of judgments rendered by the courts of countries which are not parties of the Brussels and Lugano Conventions. Thus, for instance, Belgium and Luxemburg review the merits of foreign judgments; France and Luxemburg maintain as a condition that the foreign judgments have applied the law that is designated in accordance with the choice of law rules of the recognizing state; France rejects at least in theory the jurisdictional basis of a foreign court in a case in which one of the parties is French, since jurisdiction based upon Articles 14 and 15[48] is considered to be exclusive; and the Netherlands and Scandinavian countries refuse to recognize or enforce foreign judgments without treaties.

In consideration of the above four dimensions, the most important points for Japan are apparently (2) and (4), in other words, to limit the application of rules on excessive jurisdiction in the United States and some European countries and to have Japanese judgments recognized and enforced smoothly in some European countries.

Bearing these concerns in mind, the 2001 draft convention made in the

first part of the Diplomatic Conference will be examined in the following sections.

2. General Observation

With regard to the provisions on recognition and enforcement of foreign judgments in the 2001 draft convention, there seems to be a consensus in general. The main problems at present over which delegations in the Hague Conference found difficulties in finding solutions to be accepted by all are as follows:

(1) Should the rule on special "activity-based jurisdiction" be put in the white list ? [49]

(2) Should the rule on general "doing business jurisdiction" be put in the black list ? [50]

(3) Should choice-of-court agreements overcome the application of protective rules on jurisdiction, which allow such weaker parties as consumers and employees to file lawsuits against the business parties or the employers in the court of state where consumers or employees have their habitual residences ? [51]

(4) How should the activity through the Internet be evaluated in making the rules on jurisdiction ? [52]

(5) How should the litigation over intellectual property be dealt with ? [53]

(6) What should be the relationship between the application of the future convention and other conventions, especially the Brussels and Lugano Conventions ? [54]

As mentioned in III, whereas Japanese law in this field is in principle based upon the civil law tradition, Japan has an unique rule of jurisdiction on objectively joint claims, and its case law on international jurisdiction is very flexible as expressed in the "special circumstances" consideration and places emphasis on the "court-defendant nexus". Therefore, it would not even be

difficult for Japan to accept the provisions over which civil law countries and common law countries conflict with each other. For example, since Japan has a provision on *lis pendens* in Article 142 of the Civil Procedure Code and, also, has the rule on the "special circumstances" consideration in deciding international jurisdiction,[55] Japan would be able to accept both Article 21 (*lis pendens*) and Article 22 (exceptional circumstances for declining jurisdiction). With regard to special activity-based jurisdiction as mentioned in (1) above, it would not be seriously difficult for Japan to accept the proposals submitted by the United States in relation to Articles 6 (contract) or 9 (branch [and regular commercial activity]), since the "court-claim nexus" is not considered essential under Japanese law in deciding international jurisdiction.[56]

Although it is a matter of course that Japan has serious concerns about all other problems, in the next section some of the problems from the Japanese perspective will be picked up. They include the problems of (2) and (4) above, as well as some other problems which are to be examined more carefully by all delegations.

3. Some Problems

a. Substantive Scope

In the field of nuclear liability, there are two basic conventions: the Convention on Third Party Liability in the Field of Nuclear Energy ("the Paris Convention") of 1960, as amended, made under the auspices of the OECD Nuclear Energy Agency;[57] and the Convention on Civil Liability for Nuclear Damage ("the Vienna Convention") of 1963 made under the auspices of the IAEA.[58] According to these conventions, the country where the installation is situated has exclusive jurisdiction over action for damages in the case of a nuclear accident,[59] and the court may apply its own law to the matters not controlled by the conventions.[60] This system can secure not only a uniform

solution for many claims but also the application of the nuclear liability law of the home country of the operator. In consideration of the special regime for nuclear activity in combination with a forced liability insurance system, such system is considered to be reasonable.

For the contracting parties of these conventions, Article 37 (the disconnection), which is still under consideration among delegations, will, in any event, guarantee the application of this special scheme for nuclear liability as provided for in the Paris and Vienna Conventions. However, for the countries that are not a party to either convention, including Japan, the normal rules on jurisdiction for torts would be applied. This means that, in the case of a nuclear accident with cross-border damage in several countries, every such country would have jurisdiction over actions for damages and the countries would respectively apply their own laws in accordance with their choice of law rules that provide for the application of the law of the place of damage. Such a conclusion would be unreasonable when considering the nuclear liability system. Accordingly, in order for those non-contracting countries to the nuclear liability conventions to have the option to make special jurisdictional rules for nuclear liability, the matters relating to nuclear liability should be excluded from the application of the substantive scope of Article 1 (2).

b. Torts or Delicts

Article 10 (2), as proposed by the United States, cannot be accepted by Japan as a tort provision. Article 10 (2) reads as follows: "A plaintiff may bring an action in tort in the courts of the State in which the defendant has engaged in frequent or significant activity, or has directed such activity into that State, provided that the claim arises out of that activity and the overall connection of the defendant to that State makes it reasonable that the defendant be subject to suit in that State." The United States delegation explained the effect of this provision by using the following example: guns made in

Country A were imported to the United States, where the manufacturer promoted the guns, selling them through local retailers. A person purchase one of the guns from a local retailer and goes hunting in Country B; during the hunting expedition, the gun explodes and the person is injured. In such a case this provision makes it possible for the person to file suit against the foreign manufacturer in a United States court. This is foreign to the Japanese notion of tort claim jurisdiction. Only the country in which the act that caused the injury occurred, that is Country A in this case, and the country in which the injury arose, that is Country B, should have jurisdiction over the case under the tort jurisdictional rule. However, it may be possible for Japan to accept the rule in Article 9 on the basis of the regular commercial activity, as already mentioned.

Article 10 (4) should also be deleted. It is undoubtedly important in the Internet age to freeze an activity before the injury occurs. However, it would be dangerous to include in the future Hague Convention such Article 10 (4), which allows a plaintiff to bring an action in accordance with paragraph 1, in other words, in the courts of the State in which the act or omission may occur or in which the injury may occur. The problem is that every country could be the place of injury that has not happened yet, and that the plaintiff might be able to file suit everywhere. Perhaps, in accordance with the laws of most countries, an action for suspending a certain act without a real or threatened danger of injury would be dismissed on account of lack of standing for filing. However, even in such a case, each contracting State has an obligation to accept jurisdiction since Article 10 (4) is on the white list. And, if one of those countries does render judgment in such circumstances, other contracting States would have to enforce such a judgment without reviewing the merits of the case. The jurisdictional rule in such circumstances should be left to the national laws.

c. Intellectual Properties

There is a variety of opinions in Japan concerning jurisdiction in cases concerning industrial property rights, especially foreign patent infringement litigations.[61] In order to avoid forced unification of opinions, which might cause strong opposition from the losing side at a future convention, we should leave this matter to the national law for the moment.

On the other hand, with regard to copyright and related rights, since the issue of applicable law has not been clarified yet, even among the Union members of the Berne Convention,[62] it would be dangerous to fix the rule on jurisdiction, leaving the applicable law problem aside.

The intellectual properties issues might be adequately considered in a more appropriate forum such as the World Intellectual Property Organization in cooperation with the Hague Conference.

d. Provisional and Protective Measures

The recognition and enforcement of foreign provisional and protective measures should be abandoned in this convention. Nobody can deny the significance of the role of provisional and protective measures in international civil and commercial disputes. However, in a global convention at this moment, it would be premature to make it an obligation, for the contracting states, to enforce such foreign measures without conducting a detailed survey on the practice of mandating such measures in every country. Without knowing each other's system, an enforcing country would have to require a deposit from the plaintiff that would be enough to cover the possible damage, in the event such measures might be cancelled afterwards. Such a requirement would diminish the merits of the system of mutual enforcement of such measures.

It might be possible, however, to make an independent separate provision on jurisdiction with regard to provisional and protective measures, in an effort to separate the connection with the chapter on recognition and enforcement.

e. General Doing Business Jurisdiction in the Black List

Article 18(2) of the 2001 draft convention lists exorbitant jurisdictional rules under national laws such as the location of the defendant's assets, the nationality of the plaintiff, and the service of a writ upon the defendant in the territory of the State. As already mentioned,[63] Japan is seriously interested in this matter. Among others, it is essential for Japan to maintain Article 18(2) (e) in the black list, that is "the carrying on of commercial or other activities by the defendant in that State, [whether or not through a branch, agency or any other establishment of the defendant,] except where the dispute is directly related to those activities." Such general "doing business" jurisdiction, as is found in the United States, is notorious in business societies outside the United States and is deemed exorbitant in every country except in the United States, where it is constitutionally legitimate. It is said that many Japanese companies have been forced to settle a case when sued in the United States courts, since it would be impossible for those companies to have these cases dismissed because of their doing business in the United States, even in cases where the plaintiffs and the disputes were foreign from outside the United States. Without this provision in Article 18, the incentive for Japan to negotiate this convention would be fundamentally diminished.

As already mentioned,[64] it might be possible for Japan to accept Article 9 in such a form that "(a) plaintiff may bring an action in the courts of a State where the defendant has carried on regular commercial activity by other means, whether or not through a branch, agency or any other establishment of the defendant, provided that the dispute relates directly to that regular commercial activity." However, the acceptance of such a rule is subject to the condition that general doing business jurisdiction shall be prohibited in Article 18.[65]

f. Denial of Justice as an Exception to the Black List Provision

The following new paragraph should be added to Article 18: "2a. Preced-

ing paragraphs shall not be applied where the application thereof would deny justice under special circumstances."

It would be impossible to foresee every situation that might happen in an international dispute. The judicial system of a State might be suspended by revolution or civil war. Also, as did happen in a Japanese case that was introduced in III.2, a plaintiff might not be able to file suit in a country whose jurisdiction is sustained in accordance with ordinary rules on jurisdiction.(66) Whereas, among the domestic courts transfer of cases is possible to secure justice, in the international field this method cannot be utilized. Denial of justice is, in any event, unconstitutional.(67) Accordingly, we have to have some mechanism to avoid denial of justice in the future convention.

This provision can also be supported from a different perspective. This is similar to a public order provision in an applicable law convention, according to which a contracting party can be exempted from accepting the abnormal consequence of an application of the law designated under the convention, in order to protect the domestic public order. Since denial of justice is also a violation of the domestic public order, in such a situation every contracting party must be free from the obligation under the convention.

V Possibility of a *Smaller* Convention

As mentioned above, there are a few hurdles for Japan to overcome, since the Japanese system is a hybrid of the civil law tradition and the American-style due process consideration. Japan would be able to accept the 1999 draft convention as well as the 2001 draft articles, in principle. However, the European countries and the United States especially have been expressing their dissatisfaction in many respects. Therefore, we must find a way to develop articles that are acceptable to both sides in order to make the convention a truly global one.

The system of a mixed convention seems to make it possible for us to find

the way to success, since it represents a moderate program of work. In other words, a mixed convention by itself is a mechanism for moving forward step by step. The size of the white list and the size of the black list or area need not be large at the beginning. We can add items to these lists at a later stage. In fact, such an idea was proposed in the first part of the Diplomatic Conference in June 2001 by Argentina, Australia, New Zealand, and Norway.[68] According to those countries, a three stage approach should be adopted: first, to identify the core provisions on which there is a consensus or near consensus; secondly, to perfect those provisions and add further provisions on which consensus or near consensus can be reached during the second part of the Diplomatic Conference; and thirdly, to conduct periodic reviews of the convention with a view toward building on the initial convention over time. This idea deserves serious consideration in light of the conflict between the concepts of justice as developed in the United States and as developed in other countries.

For instance, with regard to the subject of jurisdiction in contract cases under Article 6, the United States has proposed the establishment of an activity-based jurisdiction rule, whereas civil law countries have proposed the traditional place of performance rule. Even in such a conflicting area, an overlapping space can be found, that is, the place of performance of a contract on the basis of supplying goods or providing services as a whole or in a significant part. This could be viewed as a type of activity-based jurisdiction and, also, as a type of place of performance jurisdiction.[69]

With respect to consumer contracts under Article 7, the permissibility of choice of forum is the key problem.[70] European countries have insisted on having the same rule in both the Brussels and Lugano Conventions where choice of forum in a consumer contract does not have any effect, whereas some other countries have argued to allow it in order to protect their business activities, especially through the Internet where the habitual residence

of their customers cannot be identified in some types of transactions. Therefore, in order to reach a compromise, we should exclude the cases in which there are choice-of-court clauses in consumer contracts, and, at the same time, we should make the rule on choice of forum (Article 4) inapplicable to the consumer contracts. This means that Article 7 would be applied in consumer contracts that do not contain a choice-of-court agreement, and, further, that the national law would be applied to those cases in which there are choice-of-court clause in the contracts in question.

A similar approach could be applied to Article 8 on individual contracts for employment.

With regard to Article 10 on torts and delicts, we could omit difficult types of torts from the mixed convention. Only the place where the act that caused the injury occurred and the place of physical injury, death, bodily injury, or damage to tangibles can be the bases for jurisdiction in the white list. According to this approach, the scope of Article 10 is made small, excluding the place of omission and the place of mental and nonphysical injury from the white list bases. Thus, in the case of defamation, the courts of the State in which the act of publication or uploading to the Internet took place have white list jurisdiction under this convention, and the courts of the State in which mental injury or economic loss arose might have jurisdiction in the grey area under the national law, or they may not.

Other articles should, if necessary, be amended in order to avoid difficulties to the extent that such amendment would not impair the value of the future convention.[71]

From the perspective of Japan, something is better than nothing. Such a smaller convention would function as a framework for future negotiations to expand the white list in consideration of the technological and social developments. In addition, it is important to note that, being objectively evaluated, a significant number of cases can be dealt with under such a smaller conven-

tion.

VI Conclusion

It is of great importance to connect each country's mechanism of adjudication in order to secure a more predictable and more stable legal order on the earth. The Japanese Government has been very positive towards the Hague Project and will continue to be so. We must do our best to find an adequate balance of rules acceptable to many countries at the second Diplomatic Conference to be held in the near future.

From the Japanese viewpoint, it is essential to prohibit the application of exorbitant jurisdiction rules, including the American rule on doing business as a basis for general jurisdiction, and to have Japanese judgments recognized and enforced in foreign countries under reasonable conditions. In order to achieve these objectives, we might have to be satisfied with a smaller convention at the beginning, if it makes it possible for every country to ratify the future convention.

According to an old Japanese maxim, it is dangerous to have tigers free in the field. Instead, we had better have them in a cage even if the space between the bars is very wide at the beginning, because we would be able to have the opportunity to make the space narrower at some future time. And, finally, the field would become safe enough for everyone to play.

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that seminar. After the seminar, a new set of convention articles were prepared in June 2001, and modifications were made. This article was written in October 2001, and all academic works written in Japanese are omitted in this paper.

(1) With regard to arbitration, the so-called New York Convention (Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958), has succeeded in being accepted as the legal infrastructure shared by 126 countries. See, http://www.uncitral.org/en-index.htm. (on 21 October 2001)

(2) In 1994 and 1996 a feasibility study was done by the Special Commission. And, in October 1996, the 18th Session (the Diplomatic Conference) of the Hague Conference decided to make this theme the subject of the 19th Session to be held in 2000 and newly established the Special Commission to prepare a preliminary draft convention on jurisdiction and foreign judgments in civil and commercial matters (Final Act of the Eighteenth Session, October 19, 1996, 35 I.L.M. 1391, 1405 (1996)). The Special Commission met five times: in June 1997; in March 1998; in November 1998; in June 1999; and, in October 1999.

(3) See, http://www.hcch.net/e/conventions/draft36e.html (on 21 October 2001). Japanese translation is found in "Jurist", No, 1172, pp. 90-96 (2000) and "NBL", No. 699, pp.26-43 (2000) with English version. For an explanatory report on the 1999 draft convention, see, Preliminary Document No 11 - Report of the Special Commission, written by Peter Nygh and Fausto Pocar (2000) (fttp://www.hcch.net/doc/jdgmpd11.doc (on 21 October 2001)).

(4a) In a letter of February 22, 2000, the Head of the United States delegation wrote to the Secretary General of the Hague Conference that the project as embodied in the 1999 draft convention stood no chance of being accepted in the United States. See, von Mehren, Drafting a Convention on International Convention and Effect of Foreign Judgments Acceptable World-wide : Can the Hague Conference Project Succeed? 49 Am. J. Comp. L. 191, 192-3(2001).

(4) The Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1968, which was entered into force by the original six member states of the EEC, has been amended by subsequent Accession Conventions. It is now applied among the fifteen member states of the EEC. For the present version, see [1997] OJ C15/1. The Lugano Conven-

tion on the same matter is a separate convention that was made in order to apply almost the same rules as those in the Brussels Convention to a larger area of Europe. There are now 19 contracting states for the Lugano Convention, including, among others, Switzerland in addition to 15 EEC member states. Incidentally, the Brussels Regulation, the contents of which are a revised version of the Brussels Convention, is scheduled to be implemented in principle among EU member states as of 1 March 2002.

(5) In early 2000, Japan, Korea, Australia, and the United States collectively wrote a letter to the Bureau of the Hague Conference to that effect, and China separately wrote a letter to the same effect.

(6) Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference 6–20 June 2001. For the text, see, http://www.hcch.net/e/workprog/jdgm.html (on October 20, 2001). With regard to main difficult issues, see, Part IV.2.

(7) It is the Commission II that is to prepare the substantive rules of the convention.

(8) With regard to the idea of a mixed convention, see, von Mehren, Recognition of United States Judgments Abroad and Foreign Judgments in the United States: Would an International Convention Be Useful?, RabelsZ 57 (1993), p. 449; von Mehren, Recognition and Enforcement of Foreign Judgments: A New Approach for the Hague Conference ?, 57 L. Comtemp. Probl. 271 (1994); von Mehren, The Case for a Convention-mixte Approach to Jurisdiction to Adjudicate and Recognition and Enforcement of Foreign Judgments, RabelsZ 61(1997), p. 86; von Mehren, Enforcing Judgments Abroad: Reflections on the Design of Recognition Conventions, 24 Brook. J. Int'l L. 17 (1998).

(9) Article 18(1)is a general clause which prohibits the application of jurisdictional rules under national law if there is no substantial connection between the forum state and [either] the dispute [or the defendant]. If Article 18 (1)is retainde,it will represent a black area, within which the counts of Contracting States are forbidden to exercise jurisdiction. In such a case, Article 18(2), which identifies certain notorious bases of jurisdiction concretely, becomes merely a nonexclusive list. If instead, Article 18 (1) is deleted, Article 18 (2) will become an exclusive list of prohibited jurisdictions, otherwise known as a black list.

(10) The personal jurisdiction authority of states is limited by the Fourteenth Amendment of the U.S. Constitution and by each state's own statutory limits. In federal court in the United States, the analysis is slightly different. First, it is the Fifth Amendment that imposes a due process restriction and then federal courts look to federal legislation and the Federal Rules of Civil Procedure.The XIVth Amendment of the U.S. Constitution reads in part: "(N) or shall any State deprive any person of life, liberty, or property, without due process of law...." Similarly the VthAmendment of the U.S. Constitution reads in part : "nor [shall any person]be deprived of life, liberty, or propenty, without due process of law..."

(11) See, IV.1.

(12) The new Civil Procedure Code was put in force 1 Janyary 1998(Act No. 109 of 1996). Nevertheless, the basic structure has not changed.

(13) See, M. Dogauchi, "Japan"; J.FAWCETT ed., DECLINING JURISDICTION IN PRIVATE INTERNATIONAL LAW, p. 303 [1995, Clarendon Press].

(14) With respect to a choice-of-court clause on international jurisdiction, see, the Supreme Court judgment on 28 November 1975 (*Koniglike Java China Paletvaat lijnen B.V. Amsterdam (Royal Interocean lines) v. Tokyo Marine and Fire Insurance Co.)*, *Minshu*, Vol. 21, No. 10, p. 1554; 20 Japanese Annual of International Law 106 (1976). It was held that the requirements for validity of the agreement on choice of forum on the bill of lading of international carriage by sea should be determined in accordance with the principles of justice; that Article 11 (Article 25 at that time) of the Civil Procedure Code was a mere guideline; that an agreement on jurisdiction in an international case need not necessarily be in writing, as required by Article 11; and that the formality of an agreement on international jurisdiction should be deemed to be satisfied if a court of a certain country is at least expressly designated on the document prepared by either of the parties, and if the existence of such an agreement between the parties and the contents thereof are explicit. The reasons mentioned by the court were (i) that the purpose of Article 11 was to preserve the clear intentions of the parties, (ii) that under the laws of many countries an agreement on jurisdiction was not necessarily required to be in writing, (iii) particularly, that the signature of the shipper on a bill of lading was not required, and (iv) that it is important to secure the need for expedient processing of international transactions. In addition, the court clarified, as obiter dictum, the requirements on the merits of the choice of international jurisdiction: (a) the case was not subject to the

exclusive jurisdiction of Japan; (b) the designated foreign court had jurisdiction over such a case under its own law. Moreover, the court held that the agreement on exclusive international jurisdiction designating a foreign court should be valid in principle unless such a conclusion would lead to an unacceptable result that violates public policy. In this case, the choice of the Amsterdam court was held valid.

(15) Supreme Court judgment on 16 October 1981 (*Michiko Goto, et al. v. Malaysian Airline System Berhad)*, *Minshu*, Vol. 35, No. 7, p. 1224; 26 Japanese Annual of International Law 122 (1983). A Japanese wife and other family members living in Japan brought an action for damages against a foreign airline company, which has an office in Japan, for the death of the husband in an airplane accident in Malaysia where he had purchased his ticket during a short trip. The Nagoya District Court dismissed the case for lack of international jurisdiction on 15 March 1979. The Nagoya High Court, however, reversed the judgment and accepted jurisdiction on 12 November 1979. Following a general discussion on international jurisdiction, the Supreme Court accepted jurisdiction based upon Article 4(5) (Article 4(3) at that time), which provides venue at the location where a branch of a foreign company is situated.

(16) The Supreme Court judgment on 11 November 1997 (*Family Co. Ltd. v. Shin Miyahara)*, *Minshu*, Vol. 51, No. 10, p. 4055; 41 Japanese Annual of International Law 117 (1998). With regard to the contents of this judgment, see *infra* note 19.

(17) There are several provisions in international treaties of which Japan is a party, such as the Convention for the Unification of Certain Rules Relating to International Carriage by Air of 1929 (Article 28(1)), International Convention on Civil Liability for Oil Pollution Damage of 1969 (Articles 5(3) and 9 (1)) and so on.

(18) As will be discussed in III.2.c, it should be noted that there is no condition requiring a nexus between the claim and the forum.

(19) In *Shin Miyahara, supra* note 16, the plaintiff, a Japanese company, bought automobiles in Europe through the defendant, a Japanese person living in Germany, and imported them to Japan. On the dispute that arose concerning settlement of the fund deposited by the plaintiff with the defendant, the plaintiff filed suit in Japan claiming for the return of the deposited money. The plaintiff asserted that the jurisdiction of the Japanese court should be sustained on the basis that Japan was the place of the performance of the

obligation to return the money. The defendant disputed this assertion on jurisdiction. The Supreme Court denied jurisdiction in consideration of several factors, such as: that the contract was concluded in Germany, that the purpose of the contract was to commission the defendant to do business activities in Germany, that there was no explicit agreement on the place of performance of the obligation, that there was no explicit agreement on the governing law, that the defendant lived and had his principal place of business in Germany for more than twenty years, that the evidence concerning the payment and other related matters were in Germany, and that it would not be so burdensome for the plaintiff to bring an action in Germany since it had been engaged in business in Germany. The Court held that, considering these facts, "regardless of whether or not the Japanese law should govern the effects of the contract, there can be found the special circumstances where the international jurisdiction of Japan should be denied." This judgment drew a conclusion skipping the application of the third step, which is to verify whether any one of the Japanese courts would have jurisdiction in accordance with the provisions in the Civil Procedure Code. As a result of skipping (3), it is said that predictability has been impeded by this judgment.

(20) For example, Tokyo District Court preliminary judgment on 15 February 1984 (*Greenlines Shipping Company Ltd. v. California First Bank*), *525 Hanrei Times* 132; 28 Japanese Annual of International Law 243 (1985), held that the court should deny the existence of jurisdiction on the basis of the place of performance of the obligation, at least in international tort case, disregading Article 5(1) (Article 5 at that time) of the Civil Procedure Code, which stipulates that a suit concerning any pecuniary claim can be brought before a court situated in the place where the obligation was to be performed. Tokyo District Court judgment on 28 July 1987 (*Nagan (Panama),S. A. and Shinwa Shipping Co., Ltd. v. Attica Shipping Co., S.A.*), 1275 *Hanrei Jiho* 77; 32 Japanese Annual of International Law 161 (1989) held that Article 5(4) (Article 8 at that time), which provides for *forum bonae rei sitae* (the forum of the defendant's properties), did not reflect the principle of justice in cases of negative declaration of a debt in an international dispute. This latter court also held that Article 7 (Article 21 at that time), which provided for ancillary jurisdiction for actions against defendants joined together in one suit, unlike in cases of a purely domestic character, was not appropriate in principle as a basis for deciding international jurisdiction.

(21) See, *supra* note 15.

(22) See, *supra* note 16.

(23) *Sei Mukoda et al. v. The Boeing Co. Inc., 1196 Hanrei Jiho* 87; 31 Japanese Annual of International Law 216 (1988).

(24) The Tokyo District Court referred to Article 4(5) (Article 4 at that time), Article 5(1) (Article 5 at that time), and Article 7 (Article 21 at that time). These provide for jurisdiction on the basis of the existence of a branch of a foreign company, the place of performance of obligation, and the existence of jurisdiction over co-defendant.

(25) While one of the indispensable prerequisites in applying the doctrine of *forum non conveniens* is the existence of other more appropriate *fora*, such a condition is not mentioned as a requirement in a general way, in dismissing the case on the grounds of Japan's "special circumstances" consideration. However, in many cases it can be said that there was no necessity to check on the existence of available foreign courts due either to the foreign residence of the defendant or to the foreign pending litigation. If the defendant had argued for the availability of a foreign court, the Court would have considered this problem deliberately. In fact, the Tokyo District Court on 20 June 1986, *supra* note 23, did consider this condition when it dismissed the case. Therefore, this difference is not as significant as one might intially assume.

(26) See, *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

(27) *D. Kono v. Taro Kono, Minshu*, Vol. 50, No. 7, p. 1451; 40 Japanese Annual of International Law 132 (1997).

(28) It was pointed out by some commentators that the jurisdiction in an emergency was accepted in this case.

(29) *International Shoe Co. v. Washington*, 326 U.S. 310 (1945)see, Brand, Due Process, Jurisdiction and a Hague Judgments Convention, 60U. Pitt. L. Rev. 661 (1999).

(30) Article 7 (Forum for Joint Claim) reads: "In case of a suit for more than one claim, one may bring the suit before the court having a jurisdiction over any of these claims in accordance with preceding three articles, provided however that the former part of Article 38 shall be followed for a suit by more that one plaintiff or against more that one defendant."

(31) This is different from "the jurisdiction over subjectively joint claims" in that the latter is jurisdiction over a lawsuit by more than one plaintiff or against more than one defendant. Article 7 of the Civil Procedure Code provides for both types of joint claims, and it imposes a condition upon the subjective one, that is fulfillment of the former part of Article 38, but does not

impose any requirement upon the objective one.

(31a) For instance, Tokyo District Court preliminary judgment on 23 October 1987, 1261 *Hanrei Jiho* 48; Tokyo District Court preliminary judgment on 30 May 1989, 1348 *Hanrei Jiho* 91. Incidentally, with regard to jurisdiction over subjectively joint claims, some lower courts denied it as a rule of international jurisdiction because of undue burden on the defendant who by himself would not be subject to the jurisdiction of Japanese courts. See, Tokyo District Court judgment on 27 July 1987, 1275 *Hanrei Jiho* 77, 669 *Hanrei Times* 219; Tokyo District Court judgment on 29 January 1991, 1390 *Hanrei Jiho* 98; Tokyo High Court judgment on 25 December 1996, *Kosai Minshu*, Vol.49, No.3, p.109.

(31b) *Tsuburaya Production* case, *Minshu*, Vol.55, No.4, p.727.

(31c) The condition of close relationship between claims has been asserted by commentators and some lower courts have already made it a condition to admit jurisdiction over objectively joint claims. See, Tokyo District Court judgment on 27 November 1998, 1037 *Hanrei Times* 235.

(32) Judgment on 7 March 1995. Case-C-68/93.

(33) See, *supra* note 4.

(34) See, generally, M. Takeshita, "The Recognition of Foreign Judgments by the Japanese Courts", 39 Japanese Annual of International Law 55 (1996).

(35) The Supreme Court judgment on 22 May 1917, 33 *Min-Roku* 793 and the Supreme Court judgment on 26 February 1985, *Kasai Geppo*, Vol. 37, No. 6, p. 25; 28 Japanese Annual of International Law 225.

(36) The Supreme Court judgment on 11 July 1997 (*Mansei Kogyo Co., Ltd. v. Northcon I*), *Minshu*, Vol. 51, No. 6, p. 2530; 41 Japanese Annual of International Law 107, and the Supreme Court judgment on 28 April 1998 (*Gobindram Naraindas Sadhwani, at al. v. Kishinchando Naraindas Sadhwani, at al*), *Minshu*, Vol. 52, No. 3, p. 853; 42 Japanese Annual of International Law 155.

(37) The Supreme Court judgment on 28 April 1998, *supra* note 36.

(38) The Supreme Court judgment on 28 April 1998, *supra* note 36.

(39) The Supreme Court judgment on 28 April 1998, *supra* note 36. In this case, service of process was done by means of direct delivery by a lawyer who was personally asked to do so by the party. Such method was not permitted in accordance with the Hague 1965 Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, which was applied to this case. Accordingly, the court held that such a

method did not satisfy Article 118 (ii). However, in this case, since the defendant appeared in the foreign court, Article 118 (ii) was held satisfied.

(40) The Supreme Court judgment on 28 April 1998, *supra* note 36.

(41) The Supreme Court judgment on 11 July 1997 (*Northcon I v. Mansei Kogyo Co., Ltd.*), *Minshu*, Vol. 51, No. 6, p. 2573; 41 Japanese Annual of International Law 104. Some commentators, however, asserted that the judgment order to pay punitive damages should be excluded from the scope of Article 118, since punitive damages were deemed to be criminal in character in accordance with Japanese criteria.

(42) The Supreme Court judgment on 28 April 1998, *supra* note 36.

(43) The Supreme Court judgment on 7 June 1983, *Minshu*, Vol. 37, No. 6, p. 611, and the Supreme Court judgment on 28 April 1998, *supra* note 36.

(44) The Supreme Court judgment on 11 November 1997, *supra* notes 16 and 19.

(45) See, *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987).

(46) Article 4 (1) reads: "If the defendant is not domiciled in a Contracting State, the jurisdiction of the courts of each Contracting State shall, subject to the provisions of Article 16, be determined by the law of that State."

(47) R.S.C. Order 11, r. 1(1) (d) (i) and (iii).

(48) In accordance with the French case law on these provisions, French nationals can file any kind of lawsuit against foreign parties in French courts.

(49) The United States has been asserting to have "frequent or significant" activity of the defendant as a basis of jurisdiction in contract and tort cases directly relating to such activities. While such jurisdictional idea is admitted in the United States, such a rule based on the nexus between the defendant and the court is not easy to be accepted by civil countries, since the nexus between the claim and the court is the key concept in special jurisdictional rules for contract and tort cases.

(50) The "doing business"is one of the "activities"by the defendant. However, the "general" doing business jurisdiction is different from the "special" activity-based jurisdiction in that the former allows the courts to decide on any claim against the defendant, while the latter allows the courts to decide on the claims directly related to the activity there. The general doing business jurisdiction is notorious among countries other than the United States, where it is constitutionally legitimate one. According to the United States delegation, as there are many strong opinions among American lawyers against the inclusion of (e) in Article 18(2), it would cause difficulty for the United

States ratification to prohibit the application of this jurisdictional rule under the future convention. In contrast, it is considered by other countries that Article 18(2) would be the essential provision in the future convention.

(51) In accordance with the Brussels and Lugano Conventions, choice-of-court agreements are invalid in such cases. Therefore, the contracting states to these conventions are of opinion to the same effect. On the contrary, some other countries cannot easily accept such a solution, especially in consideration of e-commerce where, in some cases, the habitual residence of the customer cannot be identified.

(52) E-commerce through the Internet is a relatively new way of doing business. We have not yet understood its legal implications precisely. Tortious activities can also be done through the Internet. In the context of jurisdictional rules, there are many unanswered questions. For instance, is information provision through the Internet included in "supply of goods" or "provision of services" under Article 6? Is the location of the server in which an interactive website operates a "branch" under Article 9? How should the place of damage be determined in such cases as defamation, unfair competition, or copyright infringement through the Internet? Businesses worry about such unclear issues which might cause an unreasonable burden on their activities.

(53) The most debated problem is whether the exclusive jurisdiction of the state of registration over the patent and other industrial properties cover the foreign patent infringement as well or not. In such infringement litigation the issue of validity of the patent in question is often raised by the defendant.

(54) The contracting states to these conventions want to have their own regime untouchable, while other states want to have the application of the future convention not be diminished by such local regimes.

(55) See, III.2.b.

(56) See, III.2.c. However, even Japan cannot easily accept such an activity-based rule in Article 10 (torts and *delicts*). See, IV.3.b. Therefore, it is considered that such expansion of Article 9 as to admit regular commercial activity without any establishment as a ground of jurisdiction with regard to the dispute directly relates to such activity would be an acceptable solution for Japan.

(57) The Paris Convention was supplemented by the Supplementary Convention on Third Party Liability in the Field of Nuclear Energy of 31 January 1963 ("the Brussels Supplementary Convention"), as amended.

(58) The Vienna Convention was revised in 1997, but this new convention is not yet in force. Also, in 1997, the Convention on Supplementary Compensation for Nuclear Damage was adopted (not yet in force). Incidentally, the Paris Convention and the Vienna Convention have been linked by the Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention of 21 September 1988, which entered into force on 27 April 1992.

(59) See, Article 13 of the Paris Convention and Article XI of the Vienna Convention.

(60) See, Articles 11and 14 of the Paris Convention and Article VIII of the Vienna Convention.

(61) See, Dogauchi, Jurisdiction over Foreign Patent Infringement under the Hague Draft Convention as of June 2001, a paper submitted to the SOFTIC (Software Information Center) Symposium held on November 20–21, 2001 in Tokyo (http://www.softic.or.jp/).

(62) Although there are some provisions on applicable laws in the Berne Convention for the Protection of Literary and Artistic Works 1886, as amended, such as Articles 5(2), 14bis(2)(a) and so on, the interpretation of these provisions has not yet been unified. See, Dogauchi, "Private International Law on Intellectual Properties: A Civil Law Overview", http://ww.wipo.int/pil-forum/en/ (on 21 October 2001).

(63) See, IV.1.

(64) See, III.2 and *supra* note 56.

(65) It might be possible to consider that *Malaysian Airline System* as introduced in *supra* note 15 admitted a Japanese version of the general doing business jurisdiction, since the only connection between the defendant and Japan in that case was the location of the defendant's branch which had no direct relationship with the dispute in question. Even so, there seems to be no powerful opinions in Japan which insist on maintaining this kind of jurisdictional basis for the Japanese courts and opposes to have (e) in Article 18 (2). It is now widely considered in Japan that such kind of jurisdiction should be prohibited in the future convention.

(66) See, the text accompanying *supra* note 27.

(67) Article 32 of the Constitution of Japan reads: "No person shall be denied the right of access to the courts."

(68) Working Document, No. 97, distributed on 18 June 2001.See, Goddard, Rethinking the Hague Judgments Convention: A Pacific Perspective, 3 Yearbook of Private International Law 27 (2001).

(69) A similar compromise was reached in Article 6 of the 1999 draft convention at that time.

(70) This is one of the difficult problems as mentioned in IV.2.

(71) The provision on the black list or area, Article 18, should be maintained as it is as much as possible. In particular, it seems essential for Japan to have a general "doing business" jurisdiction in the black list, as stated in IV.3.e.