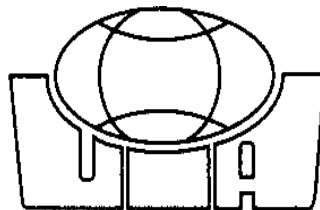


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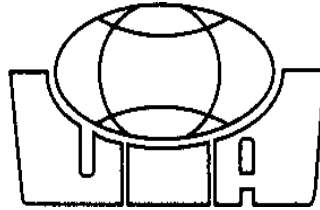


LE PROJET DE CONVENTION SUR LA
COMPETENCE ET LES JUGEMENTS ETRANGERS
EN MATIERE CIVILE ET COMMERCIALE

THE DRAFT CONVENTION ON JURISDICTION
AND FOREIGN JUDGEMENTS IN CIVIL AND
COMMERCIAL MATTERS

Séminaire organisé par la Commission de Droit International Privé de l'UIA avec la collaboration d'un nombre de délégations nationales à la Conférence de La Haye, en association avec le Scottish European Group, la Law Society of Scotland, la Faculty of Advocates et le Cabinet ADK Prinsen Van Wijmen

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Law Society of Scotland, the Faculty of Advocates and the ADK Prinsen
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UN POINT DE VUE D'EXTREME ORIENT

A VIEW FROM THE FAR EAST

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The Hague Draft Convention from the Perspective of Japan

Masato Dogauchi*

I. Introduction

Globalisation and Interdependence are inevitably causing many civil or commercial disputes between parties in different territories. Nonetheless, there is no world-wide mechanism to adequately allocate judicial jurisdiction among countries and to recognise or enforce foreign judgements smoothly. The project of the Hague Conference on Private International Law to make a convention on jurisdiction and foreign judgements in civil and commercial matters is a good challenge to change this situation. The preliminary draft articles adopted in October 1999 by the Special Commission¹ seems to be a good starting point to make a final set of texts among countries that have different legal frameworks respectively.

This paper is to evaluate the articles of this Preliminary Draft Convention from Japanese viewpoint in consideration of the present Japanese rules on jurisdiction and recognition/enforcement of foreign judgements. First, some basic rules of Japan on these matters will be introduced. Then, some articles of the Hague Preliminary Draft Convention of 1999 will be considered from the Japanese viewpoint.

II. Some Basic Rules of Japan

a. General

Japan had been closed its door to foreign states with very limited exceptions in relation to Korea and the Netherlands since the early 17th century until the middle of 19th century. When Japan opened its door, Japan had to modernise all aspects of its social system, such as administrative framework, military power, or educational system. Japanese young bureaucrats went abroad to find what was worthwhile to be adopted in Japan. For example, Japan introduced Scottish songs to its music education at an elementary school level, because they found that the Japanese language was able to adapt to the Scottish melody. Japanese law had to be modernised, too. Japanese people at that time studied, in particular, French law, German law and English law. Hot discussion was done on which system of law should be the best model for Japan. Finally, Japan adopted German law as its basic structure of the legal framework. In the field of civil and commercial litigation, Civil Code, Commercial Code, Civil Procedure Code and the Court Administration Act were all enacted with reference to German counterparts, though Japan changed and has since changed the German rules in some respects.²

b. Jurisdiction

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¹ See, <http://www.hcch.net/e/conventions/draft36e.html>.

² The Civil Procedure Code was amended by the Act No.109 of 1996 and put in force in 1 January 1998. Nevertheless, the basic structure has not been changed.

1. Case law

As there are no particular provisions for international jurisdiction in the Civil Procedure Code and no treaties on jurisdiction with general scope of application to which Japan is a party³, Japanese rules on this subject have been formulated by case law.⁴ Important cases on international jurisdiction in civil and commercial matters in general⁵ are the Supreme Court judgement on 16 October 1981 (*Malaysian Airlines System case*)⁶ and the Supreme Court Judgement on 11 November 1997.⁷ The Supreme Court held the general rules on international jurisdiction with regard to civil and commercial matters as follows: There are no explicit statutory provisions on international jurisdiction in Japan;

- (1) Therefore, international jurisdiction has to be decided in accordance with the principle of justice that would require that fairness be maintained between parties, and a proper and prompt trial be secured;

³ As the exception, there are several provisions in international treaties of which Japan is a party, such as 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.

⁴ See, M. Doguchi, "Japan", J.FAWCETT ed., DECLINING JURISDICTION IN PRIVATE INTERNATIONAL LAW, p.303 [1995, Clarendon Press]. Articles written in Japanese are all omitted in this paper.

⁵ In respect of 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 the 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 the agreement of jurisdiction in an international case should not necessarily be in writing as required by Article 11; and that the formality for the agreement on international jurisdiction should be deemed to be satisfied if a court of a certain country be 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 be explicit. The reasons mentioned by the court were that the purpose of Article 11 was to preserve the clear intentions of the parties, that under the laws of many countries the agreement of jurisdiction was not necessarily required to be in writing, particularly that the signature of the shipper on the bill of lading was not required, and that it was important to secure the necessity of expedient processing of international transactions. In addition, the court clarified, as *obita 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 of exclusive international jurisdiction designating a foreign court should be valid in principle unless such a conclusion would lead to unacceptable result that violates public policy. In this case, the choice of the Amsterdam court in the present case was held valid.

⁶ 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 a office in Japan for the death of the husband in an airplane accident in Malaysia where he purchased his ticket during a short trip. Nagoya District Court dismissed the case for the lack of international jurisdiction on March 15, 1979. The Nagoya High Court, however, reversed the judgment and admitted the jurisdiction on November 12, 1979. Following the general discussion on international jurisdiction, the Supreme Court admitted the jurisdiction based upon Article 4(5) (Article 4(3) at that time) that provides for the venue where a branch of the foreign company is situated.

⁷ 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 the text accompanying *infra* note 27.

- (3) Although the provisions on distribution of the venue among the local courts as provided for in the Civil Procedure Code are not concerned with international jurisdiction itself, they are believed to reflect, in principle, the above principle of justice. Thus, a defendant should be, in general, subject to the jurisdiction of Japan when any one of Japanese courts would have jurisdiction in accordance with the Civil Procedure Code.
- (4) However, the conclusion would have to be reversed if it is found to be contrary to the principle of justice in consideration of special circumstances in an individual case.

The purport of (1) above is currently recognised in general, while the legislators of the Civil Procedure Code in the 19th century and some judgements over sixty years ago seem to have thought that these provisions had two functions: one for international jurisdiction and the other for internal venue, just as has been considered in Germany. The principle of justice as mentioned in (2) is generally recognised as appropriate in deciding international jurisdiction of Japanese courts.⁸ However, some commentators criticise the purport of (3). Problem is whether all the provisions on venue as they are in fact reflect the principle of justice on international jurisdiction. Some lower courts, following to the above criticism, held that some provisions of the Civil Procedure Code should not be applied as they were to decide international jurisdiction.⁹ The last step (4) is called a “special circumstances” consideration. This step was not admitted in *Malaysian Airlines System* holding only steps from (1) to (3). However, since 1981, many lower courts added this step and applied it widely. And finally, the Supreme Court admitted it in 1997 in the above case. Although commentators are cautious about the risk that the predictability might be denied by this step, it is generally recognised the necessity of such step to secure an adequate conclusion on jurisdiction. Whereas among domestic courts cases are transferred relatively easily “where it is decided necessary by the transferring court to avoid considerable delay of proceedings or to secure equity between

⁸ As will be discussed, it should be noted that there is no condition to require nexus between the claim and the forum.

⁹ 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 reject assuming jurisdiction on the basis of the place of performance of obligation at least in international tort case even if Article 5(1) (Article 5 at that time) of the Civil Procedure Code that provided that a suit concerning a pecuniary claim could be brought before the 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 provided for the *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.

parties” in accordance with Article 17 of the Civil Procedure Code, among courts of different countries it is not possible to transfer cases. By way of compensation for it, certain degree of flexibility is thought to be necessary in deciding international jurisdiction.

2. “Special Circumstances” Consideration in Comparison with the Doctrine of *Forum Non Conveniens*

One example of the “special circumstances” consideration is Tokyo District Court judgement on 20 June 1986,¹⁰ where 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 the airline company (United Air Lines, Inc.) which had sold the airplane to the Taiwanese airline as a second-hand one. The plaintiffs alleged that the defendants had manufactured the airplane with defects and had sold it knowingly. The defendants argued that the court lacked international jurisdiction and, regarding the merits of the case provisionally, that the cause of the accident was the improper maintenance on the part of the Taiwanese airline company.

The court held that "if 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. 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." Recognising that international jurisdiction would be sustained in considering the normal rules,¹¹ the court proceeded to the "special circumstances' consideration.

The court considered the two dimensions separately. As to 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 to obtain crucial evidence located in Taiwan by way of judicial assistance because of the lack of the 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 questions that the court considered were, first, whether the Taiwanese court should not dismiss the case on account of lack of international jurisdiction; secondly, whether the plaintiffs had enough

¹⁰ *Sei Mukoda et al. v. The Boeing Co. Inc.*, 1196 *Hanrei Jiho* 87; 31 Japanese Annual of International Law 216 (1988).

¹¹ The 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 provides for jurisdiction on the basis of the existence of a branch of foreign company, the place of performance of obligation and the existence of jurisdiction over co-defendant.

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 judgement they would obtain in Taiwan. Upon the consideration of these factors, the court held that dismissing the case would not unreasonably impede the fairness between the parties even if the plaintiffs were obliged to bring an action in Taiwan. Accordingly, the court dismissed the case on the grounds 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 to attain equity in individual cases in a flexible way, but there are some differences.¹²

First, whereas not only the private factors but also public factors are to be considered in the doctrine of *forum non conveniens*, such as administrative difficulties caused by the number of cases, jury duty of the community members and local interest in having localised controversies decided at home,¹³ only the private factors are to be considered in the Japanese "special circumstances" consideration, such as relative ease of access to source of proof, availability of compulsory process for attendance of unwilling witnesses, the cost of obtaining attendance thereof, the enforceability of a judgement, and other relative advantages and obstacles to a fair, proper and prompt trial.

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

Thirdly, the "special circumstances" consideration is applied not only to decline jurisdiction but also to sustain jurisdiction. In a divorce case, the Supreme Court judgement on 24 June 1996¹⁴ 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

¹² 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 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 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, Tokyo District Court on 20 June 1986, *supra* note 10, did consider this condition when it dismissed the case. Therefore, this difference is not as significant as it might seem at first.

¹³ See, *Gulf Oil Corp. v. Gilbert*, 330 U.S.501 (1947).

¹⁴ *D. Kono v. Taro Kono*, *Minshu*, Vol.50, No.7, p.1451; 40 Japanese Annual of International Law 132 (1997).

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 ordered by a German court, the service of process and summons of which was done by publication, did not satisfy with the conditions for being recognised in Japan, and on the other hand the existence of this decree prevented him from filing an action for divorce again in Germany. The denial of jurisdiction by Japanese court would mean 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. It was held that under these circumstances it was in accordance with the principle of justice to admit jurisdiction.

3. "Court-Claim Nexus" or "Court-Defendant Nexus": Jurisdiction on Objectively Joint Claims

It has been frequently mentioned 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. As mentioned above, Japan belongs to the civil law group. However, in the field of international jurisdiction, it seems that the "court-claim nexus" is not so cared about in Japan. The criteria held by the Supreme Court of Japan for international jurisdiction are, as mentioned above, fairness between parties and a proper and prompt trial. It is very similar to an American way of dealing with international jurisdiction. According to *International Shoe*,¹⁵ "due process requires only that in order to subject a defendant to a judgement *in personam*, ...he has certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notion of fair play and substantial justice.'"

Behind such way of thinking in Japan, Article 7 of the Civil Procedure Code seems to play an important role, which provides that, in the case where jurisdiction with regard to one of the claims jointly made in one lawsuit is admitted, jurisdiction over other claims are also sustained, even if jurisdiction over such other claims cannot be admitted should that are filed separately. This jurisdiction is called jurisdiction on objectively joint claims, which was inserted in the Civil Procedure Code in 1926. It is explained that this provision does not put an inadequate burden on the defendant because, in any event, he has to defend at least one of the alleged claims by the plaintiff in the court. According to Article 136, the plaintiff can file several claims in one action insofar as the same procedure can be applied to all claims. It means that there is no requirement at all for the connection of claims jointly filed in one action. This provision seems very important in that, at least in domestic cases, it cut the nexus between the court and the claim that is built in the special venue provisions such as venue of the place of tort. With regard to international jurisdiction, according to some commentators, it is said that the connection among claims should be required in order to admit jurisdiction over claims. However, even if such condition be required, some of the claims may not have any nexus with the court.

Thus, in such a defamation case as *Shevill*,¹⁶ the conclusion would be different in Japan.. In *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 her,

¹⁵ *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

¹⁶ Judgment on March 7, 1995. Case-C-68/93.

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 Convention¹⁷. 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 for the place where the harmful event occurred." The House of Lords referred the question to the EC Court of Justice. The EC 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 the Japanese court sustains jurisdiction on the claim for damages for the harm caused in Japan, it has also jurisdiction on other claims for damages for the harmful event occurred in other countries insofar as the same plaintiff files these claims against the same defendant. Even in accordance with the above narrower view that requires the connection among claims, the conclusion would be the same as there is such connection in such a case.

In consideration of the above situations, the "court-defendant nexus" seems to be regarded important to decide international jurisdiction in Japan, notwithstanding that Japanese law in principle based on the German law as a whole.

c. Recognition and Enforcement of Foreign Judgements

In respect of the rules on recognition and enforcement of foreign judgements, Japanese ones seem to be quite ordinary.¹⁸ As to recognition, Article 118 of the Civil Procedure Code provides for as follows:

A final and conclusive judgement 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 law or a 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 repugnant to *order public* in Japan in its contents and proceedings upon which it was based; and
- iv. reciprocity is given.

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

- (1) An action for execution order for a judgement rendered by a foreign court shall be under the jurisdiction of the district court of the general venue for

¹⁷ Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended.

¹⁸ See, generally, M. Takeshita, "The Recognition of Foreign Judgments by the Japanese Courts", 39 Japanese Annual of International Law 55 (1996).

- 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 judgement.
 - (3) An action in accordance with paragraph 1 shall be dismissed where the finality and conclusiveness of the judgement rendered by the foreign court is not proved, or where it does not fulfil 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 judgement rendered by the foreign court.

According to the court cases in which these provisions were applied, the following points should be mentioned here.

- Provisional measures ordered by a foreign court do not fulfil the requirement of finality and conclusiveness of the judgement.¹⁹
- The overdue interest not mentioned in the foreign judgement can be enforced insofar as it can be enforced in the original country, because whether it is written in the judgement itself or not depends on just a technical matter of the legal system of each country.²⁰
- Although Article 118 (i) of the Civil Procedure Code provides in a negative way, foreign court shall have jurisdiction in accordance with Japanese rules that are the same as those applied in deciding jurisdiction of Japanese courts.²¹
- Although service of process as provided for in Article 118 (ii) of the Civil Procedure Code may not have to 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 defence.²²
- Considering the importance of securing the 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, service that does not abide by the ways of the treaty does not satisfy the condition mentioned in Article 118 (ii) of the Civil Procedure Code.²³

¹⁹ 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.

²⁰ 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.

²¹ The Supreme Court judgment on 28 April 1998, *supra*.note 20.

²² The Supreme Court judgment on 28 April 1998, *supra*.note 20.

²³ The Supreme Court judgment on 28 April 1998, *supra*.note 20. 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 a way was not permitted in accordance with the Hague 1965 Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, that was to be applied to this case. Accordingly, the court held that such a way did not satisfy Article 118 (ii). However, in this case, as the defendant appeared in the foreign court, Article 118 (ii) was held satisfied.

- Voluntary appearance under Article 118 (ii) of the Civil Procedure Code is different from appearance as the basis of the jurisdiction. When the defendant appeared in order to oppose to the jurisdiction of the foreign court, Article 118 (ii) is satisfied insofar as he had an opportunity to defend the merits of the case, though Article 118 (i) is not satisfied by such appearance.²⁴
- It is incompatible with the fundamental principles or basic tenets of the Japanese system of damages to order the offender to pay money to the victim in addition to the damages for the actual loss on account of punishment and general prevention. Under Japanese system damages in tort case purports to restore a victim to the state in which it would have been if the tort was not done by the offender by assessing the actual loss in terms of the pecuniary sum. It is left to the criminal or administrative sanctions in Japan to punish the offender and to deter similar conduct in the future. Therefore, the enforcement of the part of the foreign judgement ordering punitive damages is not permitted under Article 118 (iii) of the Civil Procedure Code.²⁵
- If the share is determined within the confines of the actual expenses incurred, even if one of the parties is to bear the entire expenses, including lawyer's fee, it is not contrary to *order public* under Article 118 (iii) of the Civil Procedure Code.²⁶
- Reciprocity is satisfied if there are substantive similarity between the conditions for recognition and enforcement of the same kind of judgements in Japan and those in the foreign country.²⁷

III. Some Problems from the Japanese Viewpoint

a. General View

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

- (1) Rules of jurisdiction of Japan
- (2) Rules of jurisdiction of foreign countries
- (3) Recognition and enforcement of foreign judgements in Japan
- (4) Recognition and enforcement of Japanese judgements in foreign countries

With regard to (1), as introduced in II.b, the Japanese rules on international jurisdiction are so vague. The "special circumstance" consideration plays a decisive role in many cases.²⁸

²⁴ The Supreme Court judgment on 28 April 1998, *supra*.note 20.

²⁵ 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.

²⁶ The Supreme Court judgment on 28 April 1998, *supra*.note 20.

²⁷ 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 20.

²⁸ The Supreme Court judgment on 11 November 1997, *supra* note 7. In this case, the plaintiff, a Japanese company, bought automobiles in Europe through the defendant, a Japanese person living in Germany, and imported them to Japan. For the dispute arose concerning the settlement of the fund deposited by the plaintiff to the defendant, the plaintiff filed a suit

The disadvantage of such ruling may be indicated from the fact that many cases were settled after the decision on international jurisdiction by the first instance courts. It seems to mean that, without having the actual decision on jurisdiction, parties could not agree on the basis of settlement.

Accordingly, Japan will have benefit from a new world-wide 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 gray area.

With regard to (2), Japan has concern about the excessive jurisdiction exercised by foreign courts. Among others, in the United States, indeed that a trend to limit its scope of jurisdiction can be noticed,²⁹ there are still huge risks for Japanese parties to be summoned in the United States courts to defend unrelated claims with their activities in the country (doing business as the basis for general jurisdiction). The service of a writ upon the defendant is also a potential risk for the Japanese parties who attend conferences or meetings in the United States. On the other hand, according to Article 4 (1) of the Brussels and Lugano Conventions, when the defendant does not have his domicile in one of these Contracting States, international jurisdiction is determined by the law of individual states. These are several countries that have rules of excessive jurisdiction, such as French and Luxembourg rules on basis of nationality of the plaintiff, French, Luxembourg and Belgian rules on the basis of nationality of the defendant, Belgian and Dutch rules on the basis of 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 of conclusion of a contract, English rules on the basis of the governing law of a contract being English law³⁰ and so on.

Accordingly, Japan concerns about the contents of the black list as provided for in Article 18 of the Preliminary Draft Convention.

With regard to (3), Japan has no serious problem. Japan has recognised and enforced many foreign judgements, 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 the United States. However, there are problems in the rules of some European countries. For instance, out of the scope of the Brussels and Lugano Conventions, Belgium and Luxembourg are to review the merits of foreign judgements; Italy also checks the merits of foreign judgements in the process of the executor; France and Luxembourg make it a condition that foreign judgements have applied the law as designated in accordance with choice of law rules of the recognising state; France rejects at least

in Japan claiming for the return of the deposited money. The plaintiff asserted the jurisdiction of Japan was to be sustained on the basis that Japan was the place of performance of the obligation to return the money. The defendant denied this assertion. The Supreme Court denied the 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 evidences 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 skipped to apply the third step as mentioned in II.b.2, which is to check whether any one of the Japanese courts would have jurisdiction in accordance with the provisions in the Civil Procedure Code. Although this step is criticized in that all of such provisions are not proper starting point for deciding international jurisdiction and that there should be other proper basis of jurisdiction not provided for in the Civil Procedure Code, it is not deniable that this step has an advantage that it secure predictability to the parties. As the result of this skipping, it is said that predictability was so impeded by this judgment.

²⁹ See, *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987).

³⁰ R. S. C. Order 11, r.1(1)(d)(i) and (iii).

in theory the jurisdictional basis of foreign court in the case where one of the parties is a French, for jurisdiction based on Articles 14 and 15 are considered to be exclusive; and the Netherlands and Scandinavian countries reject to recognise or enforce foreign judgements without mutual treaty.

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 judgements recognised and enforced smoothly in some European countries.

Bearing these concerns in mind, the preliminary draft convention made in October 1999 will be examined in the following sections.

b. Japan's Relatively Easy Position Towards Certain Difficult Matters

As mentioned in II, whereas Japanese law in this field is in principle based on the civil law tradition, Japan has a very unique rule of jurisdiction on objectively joint claims, and its case law on international jurisdiction is very flexible and places emphasis on the "court-defendant nexus". Therefore, it would not so hard for Japan to accept even the provisions over which civil law countries and common law countries conflict with each other. For example, as Japan has a provision on *lis pendens* in the Civil Procedure Code and has the rule on the "special circumstances" consideration in deciding international jurisdiction, Japan would be able to accept both Article 21 (*lis pendens*) and Article 22 (exceptional circumstances for declining jurisdiction like *forum non conveniens*). With regard to the activity-based jurisdiction, it would be not seriously difficult for Japan to accept such proposals submitted by the United States in relation to Article 6 or Article 9, since Japanese law considers important the "the court-defendant nexus" in deciding international jurisdiction. It seems that Japan can also in principle support Article 7 (consumer contract) as amended in Ottawa in March 2001.

However, there are still some problems in relation to certain provisions as mentioned in the next section.

c. Problems for Japan

1. Article 1: Substantive Scope

Nuclear liability should be excluded from the substantive scope of application.

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,³¹ and the Convention on Civil Liability for Nuclear Damage ("the Vienna Convention") of 1963 made under the auspices of the IAEA.³² According to these conventions, only the country where the installation is situated has the exclusive jurisdiction over the action for damages in the case of nuclear accident³³ and the

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

³² The Vienna Convention was revised in 1997, but this new convention has not yet been 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.

³³ See, Article 13 of the Paris Convention and Article XI of the Vienna Convention.

court may apply its own law to the matters not controlled by the conventions.³⁴ This system can secure not only the uniform solution of 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 forced liability insurance system, such system is considered reasonable.

For the party states to these conventions, Article 37 (disconnecting clause) will guarantee the application of such conventions' special mechanism for nuclear liability. However, for the countries that are not the 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 countries would have jurisdiction over actions for damages and they would apply their own laws respectively in accordance with their choice of law rules providing for the application of the law of the place of damage. Such a conclusion would be unreasonable in consideration of the nuclear liability system. Accordingly, in order for those non-contracting countries to the nuclear liability conventions to have a right to make special jurisdictional rules for nuclear liability, the matters relating to nuclear liability should be excluded from the substantive scope of application of the future convention.

2. Torts or Delicts

Article 10 (2) should be deleted.

It is undoubtedly important in the Internet age to freeze an activity before the injury thereof has not yet occurred. However, it would be dangerous to have Article 10 (2) in the future Hague Convention, 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. Problem is that every country can be the place of injury that has not yet happened and that the plaintiff might be able to file a suit everywhere. Perhaps in accordance with the laws of most countries, an action for suspending certain act without real or threatening danger of injury would be dismissed on account of lack of interest for filing. However, even in such a case, each contracting state has obligation to admit jurisdiction since Article 10 (2) is in the white list. And, if one of such countries does render a judgement in such circumstances, other contracting states have to enforce such a judgement without reviewing the merits of the case. Jurisdictional rule in such circumstances had better be left to national laws.

3. Intellectual Properties

Jurisdiction on patent and other industrial property rights should be excluded from the substantive scope of the convention.

There are a variety of opinions within Japan concerning jurisdiction on cases concerning industrial property rights, especially on patent. In order to avoid forced unification of opinions, which might cause strong opposition to the future convention from the losing side, we had better to leave this matter to national law for a while.

4. Provisional and Protective Measures

Foreign provisional and protective measures should be excluded from the definition of the "judgement" under the future convention. It means that Article 23 (b) should be deleted. And then, Article 13 as a whole should be deleted.

³⁴ See, Article 11 and Article 14 of the Paris Convention and Article VIII of the Vienna 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 obligation for contracting states to enforce foreign such measures without doing detailed survey on the practice of ordering such measures in every countries. Without knowing each other's system, an enforcing country would have to require deposit from the plaintiff that should be enough to cover the damage, might such measures be cancelled afterwards. Such requirement would diminish the merits of the system of mutual enforcement of such measures.

It goes without saying that Article 13 (2) and (3) are inappropriate in the mixed convention since they are not linked with the recognition and enforcement provisions.

5. Third Party Claims

Article 16 on jurisdiction on third party claims should be deleted. Without deleting it, the obligation of each country under this convention would become unbalanced, since some countries, including Japan, do not have this kind of basis of jurisdiction

6. Denial of Justice as an Exception to Black List Provision

The following provision should be added to Article 18:

2a. Preceding paragraphs shall not be applied where the application thereof would deny the justice under the special circumstances.

It would be impossible to foresee every situation that might happen in international dispute. The judicial system of a state might be suspended by revolution. Also as happened in a Japanese case as introduced in II.2, a plaintiff might have no possibility to file a suit in a country whose jurisdiction is sustained in accordance with ordinary rules on jurisdiction.³⁵ Whereas among the domestic courts transferring the cases is possible to secure the justice, in international field such way cannot be utilised. Accordingly, we have to have some mechanism to avoid denial of justice in the future convention.

7. Ground for Refusal of Recognition or Enforcement

In Article 28 (1) (d) should be altered as follows:

d) the document which instituted the proceedings or an equivalent document, including the essential elements of the claim, was not notified to the defendant in sufficient time and in such way as to enable him to arrange for his defence, or was not notified in conformity with the applicable international convention or other international instrument.

For example, the Hague Service Convention specifies certain ways to be followed. Should there be no such ground of refusal of recognition and enforcement, any violation against such convention rules cannot be effectively sanctioned. In consideration of the importance of securing the clear and stable procedure, such ground should be added in Article 28 (1) in the future convention.

³⁵ See, the text accompanying *supra* note 14.

IV. Conclusion

It is important to connect each country's mechanism of adjudication in order to secure more predictable and more stable legal order on the earth. As far as I know, the Japanese government seems very positive towards the Hague Project on this matter. I believe Japan will do its best to find an adequate balance of rules to be accepted by many countries by the end of the second Diplomatic Conference to be held in 2002.

