INTERNATIONAL JURISDICTION OF JAPANESE COURTS IN A COMPARATIVE PERSPECTIVE

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Abstract

This article examines the 2011 reform of the Japanese Code of Civil Procedure (CCP), which introduced new provisions on international adjudicatory jurisdiction. After considering the salient features of major jurisdiction rules in the CCP, the author analyzes the regulation of international parallel litigations. The rele-

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In this article the following abbreviations of Japanese statutes are used: AGRAL = Act on the General Rules on the Application of Laws (Law No. 78 of 21 June 2006); CCE = Code of Civil Execution (Law No. 4 of 30 March 1979); CCP = Code of Civil Procedure (Law No. 109 of 26 June 1996); CPRA = Civil Provisional Remedies Act (Law No. 91 of 22 December 1988) (an English translation of Japanese statutes is available at: <www.japaneselawtranslation.go.jp/law/> (not regularly updated)).

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vant rules of the Brussels I Regulation (Recast) are taken into consideration from a comparative perspective. In conclusion, the author points out that the basic structure of Japanese jurisdiction rules is in line with that of the Brussels I Regulation (Recast), whereas some important jurisdictional grounds clearly deviate from the latter.

1. INTRODUCTION

On 2 May 2011, the Japanese legislature adopted comprehensive rules on international adjudicatory jurisdiction in civil and commercial matters by promulgating the Act for Partial Revision of the Code of Civil Procedure (CCP) and the Civil Provisional Remedies Act (CPRA).[1] It incorporates, *inter alia*, a new Article 3-2 to Article 3-12 CCP and Article 11 CPRA.

Prior to this date, there were no written rules on international jurisdiction except for limited special rules in international instruments.[2] Hence, jurisdiction rules have been principally established by case law since the 1981 *Malaysia Airlines* case,[3] referring to *naturalis ratio* (*jôri*) based on the ideas of fairness between the parties and an equitable and expeditious administration of justice.

In the concrete application of *jôri*, courts granted international jurisdiction

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1. Act for Partial Revision of the Code of Civil Procedure (CCP) and the Civil Provisional Remedies Act (CPRA) (Law No. 36 of 2 May 2011; entry into force on 1 April 2012). For an English translation, see M. Dogauchi, 'Act for Partial Revision of Code of Civil Procedure and Civil Provisional Remedies Act', 12 *Japanese Yearbook of Private International Law* (*JYPIL*) (2010) pp. 225-241 and 54 *Japanese Yearbook of International Law* (*JYIL*) (2011) pp. 723-732; Y. Okuda, 'New Provisions on International Jurisdiction of Japanese Courts', 13 *Yearbook of Private International Law* (*YPIL*) (2011) pp. 369-380; K. Takahashi, 'Japan's Newly Enacted Rules on International Jurisdiction: With a Reflection on Some Issues of Interpretation', 13 *JYPIL* (2011) pp. 147-160 (see also ebook ISBN: 9781466057562); for a German translation, see Y. Nishitani, 'Neue Regelungen über die internationale Zuständigkeit in Zivil- und Handelssachen in Japan', 33 *IPRax* (2013) pp. 298-301 and 33 *Zeitschrift für Japanisches Recht/Journal of Japanese Law* (*ZJapanR/J Jap. L*) (2012) pp. 205-214; for an explanation of the new act, see the relevant articles in 54 *JYIL* (2011) pp. 260-332 and 55 *JYIL* (2012) pp. 263-322, as well as in Japan Federation of Bar Associations, ed., *New Legislation on International Jurisdiction of the Japanese Courts: Practitioner's Perspective* (Tokyo, Shôjihômu 2012) (hereinafter '*New Legislation*') pp. 93-152; M. Dogauchi, 'Forthcoming Rules on International Jurisdiction', 12 *JYPIL* (2010) pp. 212-224; *idem*, 'New Japanese Rules on International Jurisdiction: General Observation' (hereinafter 'General Observation'), 54 *JYIL* (2011) pp. 260-277; Y. Nishitani, 'Die internationale Zuständigkeit Japans in Zivil- und Handelssachen', 33 *IPRax* (2013) pp. 289-295; *idem*, 'Wann sind die Gerichte in Japan zuständig? – Einführung zu den neuen internationalen Zuständigkeitsregelungen', 33 *ZJapanR/J Jap. L* (2012) pp. 197-204; Okuda, loc. cit., pp. 367-380; Takahashi, loc. cit., pp. 146-170; D. Yokomizo, 'The New Act on International Jurisdiction in Japan: Significance and Remaining Problems', 34 *ZJapanR/J Jap. L* (2013) pp. 95-113; M. Yoshida, 'Neue Regelungen zur internationalen Zuständigkeit der Gerichte in Japan', 58 *RIW* (2012) pp. 118-123; cf. T. Kono, 'The Reform of International Civil Procedure Law in Japan', 30 *ZJapanR/J Jap. L* (2010) pp. 147-155.

2. See Y. Nishitani, 'Internationales Privat- und Zivilverfahrensrecht', in H. Baum and M. Bälz, eds., *Handbuch Japanisches Handels- und Wirtschaftsrecht* (Cologne, Carl Heymanns Verlag 2011) paras. 111-112.

3. Supreme Court 16 October 1981, Minshû 35-7, 1224 = Japanese Annual of International Law (JAIL) 26 (1983), 122 (*Malaysia Airlines* case); see also *infra* n. 60.

insofar as a specific court in Japan, such as the Tokyo District Court, had local jurisdiction pursuant to the domestic jurisdiction rules provided in the CCP. The local jurisdiction of a particular court in Japan was considered to presuppose the existence of international jurisdiction (the 'reverse presumption theory').[4] Later, lower courts introduced a corrective rule that entitled the judge to decline jurisdiction under 'special circumstances', where the exercise of jurisdiction would run counter to fairness between the parties and an equitable and expeditious administration of justice. This corrective rule aiming to deter an exorbitant jurisdiction was confirmed by the Supreme Court in 1997.[5] However, by examining relevant factors and weighing interests of the parties on a case by case basis, legal certainty and foreseeability for the parties could not be guaranteed.[6]

Apparently, Japan needed clear-cut statutory rules to determine international jurisdiction. The legislature, however, refrained from taking action in a thorough reform of the CCP in 1996 because detailed rules could not be developed within a limited timeframe. In addition, negotiations on the Hague Judgments Project were ongoing, so its final outcome was still being awaited. It was not until the Hague Convention limited to choice of court agreements was adopted in 2005 (hereinafter 'Hague Convention')[7] that Japan proceeded with its domestic legislation.[8]

After the preparatory work was completed in 2008,[9] the Ministry of Justice established a Division on International Jurisdiction within the Legislative Council on 3 September 2008. The consultations took place in the Division from October 2008 through January 2010.[10] With respect to its Interim Draft dated 28 July 2009,

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4. H. Kaneko, *Shinshû Minji-Soshôhô Taikei* (New Civil Procedure Law System), 2nd edn. (Tokyo, Sakai Shoten 1965) p. 59. In contrast to German case law, the double functionality of domestic jurisdiction rules of CCP was not assumed as such. See S. Ikehara, 'Kokusaiteki Saiban Kankatsuken' (International Judicial Jurisdiction), in C. Suzuki and A. Mikazuki, eds., *Shin Jitsumu Minji-Soshôhô Kôza* (New Series on Practice of Civil Procedure Law) (Tokyo, Nihon Hyôronsha 1982) pp. 14-19.

5. Supreme Court 11 November 1997, Minshû 51-10, 4055 = JAIL 41 (1998), 117 (*Family* case); see also *infra* n. 129.

6. Nishitani, *supra* n. 2, at paras. 113-115; A. Petersen, *Das internationale Zivilprozeßrecht in Japan* (Cologne, Carl Heymanns Verlag 2003) pp. 41-88.

7. Convention of 30 June 2005 on Choice of Court Agreements (not yet in force); for its background, see T.C. Hartley and M. Dogauchi, *Explanatory Report on the 2005 Hague Choice of Court Agreements Convention* (2007) pp. 16-17, available at: <www.hcch.net/upload/expl37e.pdf>; see also M. Pertegás, 'The Revision of the Brussels I Regulation: A View from the Hague Conference', in E. Lein, ed., *The Brussels I Review Proposal Uncovered* (London, British Institute of International and Comparative Law (BIICL) 2012) pp. 194-195.

8. Minutes of the 1st meeting, *infra* n. 10; see Dogauchi, 'General Observation', *supra* n. 1, at p. 268; Yoshida, *supra* n. 1, at pp. 119-120.

9. Shôjihômu Kenkyûkai, ed., *Kokusai Saibankankatsu ni kansuru Chôsa Kenkyû Hôkokusho* (Report of Research on International Judicial Jurisdiction) (hereinafter '*Hôkokusho*'), available at: <www.moj.go.jp/content/000012193.pdf>, published in *New Business Law* (*NBL*) No. 883 pp. 37-41, No. 884 pp. 64-74, No. 885 pp. 64-69, No. 886 pp. 81-90, No. 887 pp. 114-119, No. 888 pp. 72-81 (2008).

10. Minutes of the meetings are available at: <www.moj.go.jp/shingi1/shingi_kokusaihousei_index.html>.

academics, practitioners, industry, and other stakeholders were given an opportunity to submit their opinion.[11] The Division's proposal of 15 January 2010 was approved by the Legislative Council on 5 February 2010[12] and elaborated into a bill.[13] Due to a political impasse, however, it was not until 28 April 2011 that the National Diet adopted the bill. The new statute entered into force on 1 April 2012.

This legislative work largely relied on existing case law and academic opinions in Japan, aiming primarily at adopting rules parallel to the domestic jurisdiction rules (Arts. 4-22 CCP). In a comparative perspective, the legislature took into consideration the 2000 Brussels I Regulation of the European Union (EU) (hereinafter 'Brussels I'),[14] the 1988 and 2007 Lugano Convention,[15] the 1999 Draft Hague Convention,[16] and the 2005 Hague Convention, as well as German and several other foreign domestic legislations.[17] Furthermore, the legislature always examined whether a corresponding exercise of jurisdiction by the courts of a foreign state would be acceptable so as to recognize their judgments in Japan pursuant to Article 118 CCP.[18] This is because the indirect jurisdiction of foreign courts (Art. 118 No. 1 CCP) in principle follows the same rules as the direct jurisdiction of Japanese courts (the 'mirror image theory').[19]

This article examines the salient features of major jurisdiction rules in the CCP. In order to illustrate their characteristics, the 2000 Brussels I Regulation and its 2012 revision (hereinafter 'Brussels I Recast'),[20] as well as the 1999 Draft Hague Convention and the 2005 Hague Convention, are comparatively taken into consideration (section 2). This article then explains the regulation of international

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11. *Kokusai Saibankankatsu Hôsei ni kansuru Chûkan Shian* (Interim Draft on the Legislation on International Jurisdiction) of 28 July 2009 (hereinafter 'Interim Draft'); for its background, see '*Kokusai Saibankankatsu Hôsei ni kansuru Chûkan Shian Hosoku Setsumei*' (Complementary Explanation to the Interim Draft on the Legislation on International Jurisdiction) (hereinafter '*Hosoku Setsumei*'), available at: <www.e-gov.go.jp/>.

12. English translation at T. Kono, et al., 'MOJ Proposal on International Jurisdiction (February 2010)', 30 *ZJapanR/J Jap. L* (2010) pp. 156-161.

13. Bill No. 34 of the Cabinet (submitted to the House of Councillors in the National Diet on 2 March 2010).

14. Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ* 2001, L 12/1; for its recast, see *infra* n. 20.

15. Convention on jurisdiction and the enforcement of judgments in civil and commercial matters done at Lugano on 16 September 1988, *OJ* 1988, L 319/9; replaced by the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 30 October 2007, *OJ* 2007, L 339/3.

16. Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters adopted by the Special Commission on 30 October 1999, available at: <www.hcch.net/upload/wop/jdgmpd11.pdf>.

17. *Hôkokusho*, *supra* n. 9, at p. 3; Dogauchi, 'General Observation', *supra* n. 1, at pp. 269-276.

18. *Hosoku Setsumei*, *supra* n. 11, at pp. 2-3.

19. Cf. Supreme Court 28 April 1998, Minshû 52-3, 853 = JAIL 42 (1999), 144 (*Sadhwani* case); for the recognition and enforcement of foreign judgments in Japan, see Nishitani, *supra* n. 2, at paras. 174-192.

20. Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), *OJ* 2012, L 351/1.

parallel litigations in Japan (section 3) before coming to a conclusion with some final remarks (section 4).

2. INTERNATIONAL ADJUDICATORY JURISDICTION IN THE CCP

2.1 **General jurisdiction**

General jurisdiction as far as a natural person is concerned is granted at the defendant's domicile pursuant to the traditional principle of '*actor sequitur forum rei*' (Art. 3-2(1), 1st alternative CCP). In the absence of the defendant's domicile in Japan or abroad, general jurisdiction is recognized based on his/her residence (2nd alternative). In the absence of his/her residence in Japan or abroad, his/her last domicile in Japan constitutes general jurisdiction unless he/she has had another domicile abroad in the meantime (3rd alternative). These rules make sure that at least one state in the world has general jurisdiction over the defendant.[21] Domicile points to the centre of life of a natural person as a specific notion of Japanese international civil procedure law.[22] It clearly contrasts with Article 59(1)(2) Brussels I (Art. 62(1)(2) Brussels I Recast), which invokes the domestic law of each Member State to define the notion of domicile.

With regard to a legal person or any other association or foundation, general jurisdiction is granted at the place of its principal office (Art. 3-2(3), 1st alternative CCP). When the registered principal office and the factual principal office are located in a different state, both constitute general jurisdiction.[23] This broad notion of principal office largely corresponds to the definitions enumerated in Article 60(1)(2) Brussels I (Art. 63(1)(2) Brussels I Recast).[24] If the entity has no office or its location is unknown, general jurisdiction is conferred based on the domicile of its representative or any other person in charge of leading its business in Japan (Art. 3-2(3), 2nd alternative CCP).[25]

2.2 **Special jurisdictions**

2.2.1 *Place of performance*

International jurisdiction based on the place of performance relates exclusively to contractual obligations (Art. 3-3 No. 1 CCP), whereas the domestic jurisdiction

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21. *Hôkokusho*, *supra* n. 9, at pp. 6-8.

22. *Hosoku Setsumei*, *supra* n. 11, at p. 4; T. Sato and Y. Kobayashi, eds., *Heisei 23nen Minji Soshôhô tô Kaisei: Kokusai Saiban Kankatsu Hôsei no Seibi* (2011 Reform of the CCP etc.: Legislation on International Jurisdiction) (Tokyo, Shôjihômu 2012) pp. 23-24.

23. *Hôkokusho*, *supra* n. 9, at p. 11.

24. Unlike Arts. 2-4 Brussels I (Arts. 4-6 Brussels I Recast), the concept of domicile refers only to natural persons under Art. 3-2(1)(3) CCP.

25. *Hosoku Setsumei*, *supra* n. 11, at p. 7.

of the place of performance covers both contractual and non-contractual obligations (Art. 5 No. 1 CCP). The legislature restricted its scope for the purpose of international jurisdiction following the previous prevailing opinion,[26] which is in line with Article 5(1) Brussels I (Art. 7(1) Brussels I Recast). In fact, the defendant can hardly ascertain for certain the place of performance of non-contractual obligations designated by the law governing the tort, unjust enrichment or *negotiorum gestio* (Art. 14-21 AGRAL). Moreover, the jurisdiction of the place of the tort is more suitable to tort claims than the place of performance of its obligations, as it lies closer to the subject-matter of the claim and the evidence (Art. 3-3 No. 8 CCP).[27]

Despite this distinction, some authors contend that tort claims arising out of a breach of contractual obligations fall within the place of performance jurisdiction (Art. 3-3 No. 1 CCP),[28] whereas the prevailing opinion grants jurisdiction to the concurrent place of the tort (Art. 3-3 No. 8 CCP).[29] In any event, as opposed to the exclusivity of contractual and tort claims under Article 5(1) and (3) Brussels I (Art. 7(1) and (2) Brussels I Recast),[30] they can be joined and heard together pursuant to Article 3-6, 1st sentence CCP (*infra* section 2.6). Damages claims for *culpa in contrahendo* are subject to the place of tort jurisdiction (Art. 3-3 No. 8 CCP),[31] along the lines of the *Tacconi* ruling of the Court of Justice of the European Union (CJEU)[32] and Article 12(1) Rome II.[33]

Pursuant to Article 3-3 No. 1 CCP, the place of performance is determined in relation to the contractual obligation in question; this is the same as under Article

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26. See Nishitani, *supra* n. 2, at paras. 122-125; S. Watanabe and M. Nagata, 'Gimu Rikôchi no Kankatsuken' (Jurisdiction of the Place of Performance), in A. Takakuwa and M. Dogauchi, eds., *Kokusai Minji Soshôhô: Zaisanhô Kankei* (International Civil Procedure Law: Proprietary Claims) (Tokyo, Seirin Shoin 2002) pp. 75-76; also Tokyo District Court 15 February 1984, Hanrei Jihô (HJ) 1135, 70; Tokyo District Court 1 June 1987, Kin-yû Shôji Hanrei 790, 32; Tokyo District Court 25 April 1995, HJ 1561, 84; Tokyo District Court 31 October 2006, Hanrei Times (HT) 1241, 338; *contra* Tokyo District Court 28 August 1989, HJ 1338, 121.

27. *Hosoku Setsumei*, *supra* n. 11, at pp. 8-9.

28. T. Sawaki and M. Dogauchi, *Kokusaishihô Nyûmon* (Introduction to Private International Law), 7th edn. (Tokyo, Yûhikaku 2012) p. 277.

29. N. Tada, 'International Civil Jurisdiction Based on the Place of the Tort', 55 *JYIL* (2012) p. 287 at p. 295; Tokyo District Court 19 June 1989, HT 703, 246; Tokyo District Court 4 April 2006, HJ 1940, 130.

30. See, *inter alia*, S. Leible, 'Art. 5 Brussels I', in T. Rauscher, ed., *Europäisches Zivilprozess- und Kollisionsrecht: Kommentar* (Munich, Sellier 2011) paras. 59-59a.

31. Sawaki and Dogauchi, *supra* n. 28, at p. 277.

32. CJEU 17 September 2002 – Case C-334/00 *Tacconi* v. *Sinto Maschinenfabrik GmbH* [2002] ECR I-7383; for a thorough criticism, see, *inter alia*, P. Mankowski, 'Art. 5 Brussels I', in U. Magnus and P. Mankowski, eds., *Brussels I Regulation*, 2nd edn. (Munich, Sellier 2012) paras. 53-58.

33. Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), *OJ* 2007, L 199/40; for further discussion, see, *inter alia*, C. Budzikiewicz, 'Art. 12 Rome II', in H.-P. Mansel, et al., eds., *Nomos Kommentar: BGB, Vol. 6: Rom-Verordnungen zum Internationalen Privatrecht* (Baden-Baden, Nomos Verlag, forthcoming 2013); A. Dickinson, *Rome II Regulation* (Oxford, Oxford University Press 2008) paras. 12.01-12.23; cf. the contractual characterization of *culpa in contrahendo* in Art. 9(1)(g) of the Draft Hague Principles on Choice of Law in International Contracts (as adopted by the Special Commission in November 2012, available at: <www.hcch.net/>).

5(1)(a) and (c) Brussels I (Art. 7(1)(a) and (c) Brussels I Recast). The legislature did not envisage a specific rule comparable to Article 5(1)(b) Brussels I (Art. 7(1)(b) Brussels I Recast), which uniformly points to the place of the characteristic performance in contracts for the sale of goods or the provision of services.[34] Article 3-3 No. 1 CCP not only covers validity and primary claims of the contract, but also claims pertaining to accessory duties and remedies for non-performance, including restitution and damages. Even in the event of non-performance, jurisdiction lies at the place of performance of the underlying contractual obligation. In a sales contract, for example, the seller's claim for restitution of the delivered goods in default of the buyer's payment is subject to Japan's jurisdiction insofar as the buyer's payment was to be performed in Japan, independently of the place of performance of the restitution itself.[35]

In order to guarantee the parties' foreseeability, Article 3-3 No. 1 CCP restricts the relevant place of performance to the one designated in the contract[36] or determined by the applicable law that has been explicitly or implicitly chosen by the parties (Art. 7 AGRAL).[37] It is a comparatively unique rule and modifies the *Tessili* doctrine of the CJEU,[38] as the applicable law determined by an objective connecting factor in the absence of a choice of law (Art. 8 AGRAL) does not constitute the place of performance jurisdiction. Arguably, the place of performance under Article 31 or 57(1) CISG[39] is also to be disregarded unless the parties explicitly or implicitly refer to it in their contract or choose a national law including CISG to govern their contract (cf. Art. 1(1)(b) CISG).[40]

2.2.2 *Situs of property*

2.2.2.1 Seizable property

With regard to the situs of property, it is reasonable to confer international jurisdiction when the subject-matter of the claim is located in Japan (Art. 3-3 No. 3,

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34. Also Art. 6 (a)-(c) of the 1999 Draft Hague Convention; Watanabe and Nagata, *supra* n. 26, at p. 77.

35. *Hosoku Setsumei*, *supra* n. 11, at pp. 9-11; A. Saito, 'International Civil Jurisdiction Based on the Place of Performance of Obligation Relating to a Contract', 54 *JYIL* (2011) p. 295 at pp. 304-308; also Osaka District Court 25 March 1991, HJ 1408, 100; *contra* Nagoya High Court 12 November 1979, HT 402, 102.

36. Also Tokyo High Court 31 May 1993, Minshû 51-10, 4073; Tokyo District Court 25 April 1995, *supra* n. 26.

37. Minutes of the 2nd meeting, *supra* n. 10; Sawaki and Dogauchi, *supra* n. 28, at pp. 278-279.

38. CJEU 6 October 1976 – Case C-12/76 *Tessili* v. *Dunlop* [1976] ECR 1473.

39. United Nations Convention of 11 April 1980 on Contracts for the International Sale of Goods (CISG) (accession of Japan: 1 July 2008).

40. Sato and Kobayashi, eds., *supra* n. 22, at pp. 37-38; *contra* Sawaki and Dogauchi, *supra* n. 28, at p. 279. According to the majority of authors, a choice of non-state law including conventions such as CISG is not permissible in court proceedings. See Y. Nishitani, 'Ist das Kollisionsrecht für den internationalen Rechts- und Wirtschaftsverkehr ein ausreichendes Instrumentarium? – Unter besonderer Berücksichtigung der "*lex mercatoria*"', in K. Riesenhuber and K. Takayama, eds., *Rechtsangleichung: Grundlagen, Methoden und Inhalte – Deutsch-Japanische Perspektiven* (Berlin, de Gruyter Verlag 2006) pp. 311-327.

1st alternative CCP).[41] However, international jurisdiction based on the situs of the defendant's seizable property in general is questionable (2nd alternative). The Brussels I Regulation not only precludes the general situs jurisdiction, but even outlaws the relevant rule in Member States' domestic legislation (Austria and Germany)[42] as exorbitant jurisdiction (Arts. 3(2) and 4(2) Brussels I (Arts. 5(2) and 6(2) Brussels I Recast)).[43] By the same token, Article 18(2)(a) of the 1999 Draft Hague Convention placed the situs jurisdiction on the blacklist.

Nevertheless, the Japanese legislature justified the situs jurisdiction under Article 3-3 No. 3, 2nd alternative CCP in view of guaranteeing the enforcement of claims against the defendant's assets in accordance with the corresponding domestic jurisdiction rule (Art. 5 No. 4 CCP).[44] The situs jurisdiction may well have an impact on cross-border litigations, since the party who has tangible or intangible seizable property, including claims or intellectual property (hereinafter 'IP') rights in Japan, is in principle subject to the jurisdiction of the Japanese courts.[45]

To restrict the scope of the situs jurisdiction, the relevant subject-matter of the claim is limited to the payment of money. Furthermore, the situs jurisdiction is precluded when the value of property is extremely low (Art. 3-3 No. 3, 2nd alternative CCP). The value is not assessed in relation to the amount in dispute as under § 99(1) JN in Austria,[46] but according to absolute criteria that at least allow minor assets such as samples of goods or utensils to be disregarded.[47] For a lack of clear criteria, a nexus between the claim and the seizable property or the forum is not required,[48] as opposed to Austrian and German case law.[49]

In fact, the 2009 Interim Draft had envisaged two other methods of limiting the situs jurisdiction. One proposal was to grant the situs jurisdiction only for the direct jurisdiction of Japanese courts, while declining to recognize a foreign judgment rendered on the basis of the situs jurisdiction.[50] It aimed to restrict the effects of Japanese judgments that followed the situs jurisdiction within the territory of

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41. K. Yamamoto, 'International Jurisdiction Based on the Location of Property', 54 *JYIL* (2011) p. 311 at pp. 312-313.

42. § 99(1) Austrian *Jurisdiktionsnorm* (Austrian Court Jurisdiction Act, hereinafter 'JN'); § 23 German *Zivilprozessordnung* (German Code of Civil Procedure, hereinafter 'ZPO'); see Annex I of the Brussels I Regulation.

43. Art. 25 of the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast) of 14 December 2010 (COM(2010) 748/3) (hereinafter 'Commission Proposal') had provided for the situs jurisdiction as a subsidiary jurisdiction in relation to third states. This rule was not adopted, however; see *infra* n. 164.

44. *Hôkokusho*, *supra* n. 9, at p. 20; Sato and Kobayashi, eds., *supra* n. 22, at p. 45.

45. Yamamoto, *supra* n. 41, at pp. 313, 319-320.

46. *Oberster Gerichtshof* 6 June 1991, IPRax 1992, 164 (roughly 20% of the value of the claim).

47. Minutes of the 13th meeting, *supra* n. 10; Sato and Kobayashi, eds., *supra* n. 22, at pp. 45-46; *contra* Sawaki and Dogauchi, *supra* n. 28, at p. 280.

48. *Hosoku Setsumei*, *supra* n. 11, at p. 14.

49. *Oberster Gerichtshof* 29 October 1992, JBl. 1993, 666; *Bundesgerichtshof* 2 July 1991, BGHZ 115, 90.

50. Interim Draft II-1, 1st alternative, *supra* n. 11.

Japan, expecting that foreign states would reciprocate by refusing to recognize such Japanese judgments.[51] This proposal was not approved, however, due to the fact that it was too complicated and sent a wrong message that Japan advocates protectionism.[52] The other proposal was to make the provisional seizure of property a prerequisite for the situs jurisdiction following Article 4 of the Swiss IPRG.[53] This proposal was also not adopted, as it would have placed an excessive burden on the obligee and would have unduly restricted the situs jurisdiction when provisional measures were not available due to a lack of an urgent need for protection (Art. 15 CPRA). Moreover, it would not have functioned to prevent an abusive seizure of insignificant property constituting jurisdiction.[54]

Although Article 3-3 No. 3, 2nd alternative CCP adopted the above-mentioned limitations, the risk of exorbitant jurisdiction is still inherent. As a last resort *de lege lata*, the Japanese judge could possibly circumvent the exercise of exorbitant jurisdiction by referring to the corrective rule of Article 3-9 CCP and exceptionally dismissing the claim (*infra* section 2.7).[55]

2.2.2.2 Immovable property

As for disputes over immovable property, the situs has international jurisdiction pursuant to Article 3-3 No. 11 CCP. It is conceived, though, as non-exclusive jurisdiction for all kinds of litigation, including rights *in rem*, which is in clear contrast to Article 22(1) Brussels I (Art. 24(1) Brussels I Recast).[56] The reasoning was that the exclusive jurisdiction limited to disputes *in rem* would require a delineation of its scope, while rights or claims *in rem* cannot be defined categorically. Nor can claims for restitution anchored in contract be clearly discerned from claims for restitution *in rem*. Furthermore, it was opined that Japanese fora should always be available to parties domiciled in Japan, even for disputes concerning

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51. *Hosoku Setsumei*, *supra* n. 11, at p. 13; advocated also by H. Takahashi, 'Kokusai Saiban Kankatsu: Zaisankankei Jiken wo Chûshin ni shite' (International Jurisdiction: Especially on Proprietary Claims), in T. Sawaki and Y. Aoyama, eds., *Kokusai Minji Soshôhô no Riron* (Theories of International Civil Procedure Law) (Tokyo, Yûhikaku 1987) p. 61.

52. Yamamoto, *supra* n. 41, at p. 318.

53. *Bundesgesetz über das Internationale Privatrecht* (Swiss Private International Law Act), Interim Draft II-1, 2nd alternative, *supra* n. 11.

54. Yamamoto, *supra* n. 41, at p. 318.

55. In contrast to domestic jurisdiction (Art. 5 No. 4, 2nd alternative CCP), the international situs jurisdiction based on securities in person or property has rightly been excluded. The reasoning was that (i) securities in property can be executed without an enforcement title pursuant to Arts. 180-195 CCE, which makes jurisdiction on the merit superfluous; and (ii) the obligor should not be subject to Japan's jurisdiction only because the guarantor is domiciled in Japan. For maritime securities, however, the situs of the ship constitutes the jurisdiction of the Japanese courts in accordance with established maritime business practice (Art. 3-3 No. 6 CCP). *Hosoku Setsumei*, *supra* n. 11, at p. 14; Yamamoto, *supra* n. 41, at pp. 313-314.

56. Also Art. 12(1) of the 1999 Draft Hague Convention and Art. 2(2)(l) Hague Convention; see Hartley and Dogauchi, *supra* n. 7, at pp. 33-34.

immovable property located abroad.[57] As a result, it is only for disputes over entries in public registers that the situs of immovable property is exclusively competent (Art. 3-5(2) CCP).[58] Needless to say, the principle of non-exclusivity would often entail limping legal relationships, as foreign states may well not enforce a Japanese judgment deciding on rights *in rem* in immovable property located in their territory.

2.2.3 *Location of the office and business activities*

Pursuant to Article 3-3 No. 4 CCP, the courts at the place of the defendant's office (other than the principal office) have international jurisdiction insofar as the action relates to his/her business conducted at that office. This provision is generally understood as correcting the 1981 precedent in the *Malaysia Airlines* case,[59] in which Japan's general jurisdiction was conferred based on the Tokyo branch office of the defendant Malaysian company for a damages claim arising out of its business in Malaysia.[60] Article 3-3 No. 4 CCP should be understood as only addressing the business directly conducted at the relevant office, not the business in abstract terms that could have been undertaken by that office.[61] In principle, this jurisdictional ground is in accordance with Article 5(5) Brussels I (Art. 7(5) Brussels I Recast). The notion of an office under Article 3-3 No. 4 CCP is, however, nar-

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57. *Hosoku Setsumei*, *supra* n. 11, at pp. 23-24; minutes of the 7th meeting, *supra* n. 10.

58. Art. 3-5 CCP encompasses disputes over entries in public registers in general, which is broader than Art. 22(3) Brussels I (Art. 24(3) Brussels I Recast) whose scope is limited to the 'validity' of such entries.

59. M. Dogauchi, 'Nihon no Atarashii Kokusai Saibankankatsu Rippô ni tsuite' (Forthcoming Rules on International Jurisdiction), 12 *JYPIL* (2010) p. 186 at p. 194; Sawaki and Dogauchi, *supra* n. 28, at p. 276; M. Nagata, 'Kokusai Saibankankatsu Kitei no Rippô to Kokusai Torihiki he no Eikyô' (New Rules for International Jurisdiction in Japan and Their Effects on International Transactions), 13 *Kokusai Shôtorihiki Gakkai Nenpô* (Yearbook of the Academy for International Business Transactions) (2011) p. 205 at pp. 206-208; cf. minutes of the 13th meeting, *supra* n. 10.

60. In the *Malaysia Airlines* case (*supra* n. 3), the victim Mr. Goto, a Japanese national domiciled in Japan, had purchased his flight ticket in Malaysia and boarded a domestic flight operated by Malaysia Airlines in Penang heading for Kuala Lumpur. Following a violent hijacking, Mr. Goto was killed along with all the other passengers and crew members. His wife and two children, all Japanese nationals domiciled in Japan, filed a damages claim against Malaysia Airlines before the Nagoya District Court. The Supreme Court granted 'general' jurisdiction to the Japanese courts following ex-Art. 4(3) CCP, which conferred local jurisdiction on the basis of a foreign company's office within Japan (the 'reverse presumption theory'). See Nishitani, *supra* n. 2, at para. 113; A. Lowenfeld, 'International Litigation and the Quest for Reasonableness', 245 *Hague Recueil* (1994-I) pp. 83-87.

61. Otherwise, Japan would have the branch office jurisdiction (Art. 3-3 No. 4 CCP) under the same facts as in the *Malaysia Airlines* case (*supra* n. 3 and n. 60). J. Yokoyama, *Kokusaishihô* (Private International Law) (Tokyo, Sanseidô 2012) p. 334; *contra* Y. Muto, 'Jurisdiction over Actions Based on Place of Domicile, Residence and Business Office', in *New Legislation*, *supra* n. 1, at pp. 98-99.

rower than the 'branch, agency or other establishment' of the latter that also comprises subsidiaries with independent legal personality.[62]

On the other hand, Article 3-3 No. 5 CCP provides a new jurisdictional ground for the defendant's business activities. It primarily targets foreign companies that are continuously doing business in Japan. Since 2002, these foreign companies are no longer required to establish an office in Japan, but only to designate a principal representative (Art. 817(1)(2) Company Act),[63] so Article 3-3 No. 4 CCP would not suffice to consistently subject them to Japan's jurisdiction. The jurisdiction based on business activities is comparable to the US doing business jurisdiction and represents a foreign body in the civil law system, including the Brussels I Regulation (Recast). It is to be noted, however, that the US activity-based jurisdiction principally comprises all kinds of disputes as a general jurisdiction[64] and is often considered to be exorbitant,[65] whereas Article 3-3 No. 5 CCP provides only for special jurisdiction and is limited to disputes arising out of the defendant's business activities in Japan.[66]

When, e.g., a foreign company directly enters into transactions with Japanese companies through its website without its Japanese office being involved, disputes arising out of those business activities can be decided by the Japanese courts pursuant to Article 3-3 No. 5 CCP. On the other hand, when the Tokyo office of a foreign company administers all business activities in Asia without directly undertaking transactions in Japan, disputes arising out of those business activities in Hong Kong are subject to Japan's jurisdiction in accordance with Article 3-3 No. 4 CCP.[67]

2.2.4 *Place of the tort*

Tort claims are governed by the jurisdiction of the place of the tort pursuant to Article 3-3 No. 8 CCP. This rule is generally acknowledged under Article 5(3) Brussels I (Art. 7(2) Brussels I Recast) and Article 10(1) of the 1999 Draft Hague

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62. CJEU 9 December 1987 – Case C-218/86 *SAR Schotte* v. *Parfums Rothschild* [1987] ECR 4905; see, *inter alia*, Mankowski, *supra* n. 32, at paras. 281-285.

63. Company Act (Law No. 86 of 26 July 2005); see Y. Nomura, 'Activity-Based Jurisdiction of Japanese Courts – A Bold but Unnecessary Departure –', 55 *JYIL* (2012) p. 263 at pp. 269-272.

64. See *International Shoe Co.* v. *Washington*, 326 US 310 [1945]; *Perkins* v. *Benguet Consol. Mining Co.*, 342 US 437 [1952]; *World-Wide Volkswagen Co.* v. *Woodson*, 444 US 286 [1980]; *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 US 408 [1984]; *Goodyear Dunlop Tires Operations* v. *Brown*, 131 S. Ct. 2846 [2011]; see also *infra* n. 76.

65. The admissibility of doing business jurisdiction was one of the most disputed points in the original Hague Judgments Project. Art. 18(2)(e) of the 1999 Draft Hague Convention placed it on the blacklist. See P. Nijgh and F. Pocar, *Report on the Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters adopted by the Special Commission* (2000), available at: <www.hcch.net/upload/wop/jdgmpd11.pdf>, pp. 80-81.

66. Dogauchi, 'General Observation', *supra* n. 1, at pp. 273-274; Nagata, *supra* n. 59, at pp. 208-209; Nomura, *supra* n. 63, at pp. 277-286.

67. *Hosoku Setsumei*, *supra* n. 11, at p. 16.

Convention. In fact, the place of the tort is closely connected with the subject-matter of the claim and the evidence. Moreover, it facilitates access to justice and enhances the protection of the victim.[68] The scope of Article 3-3 No. 8 CCP encompasses all tort claims, including damages and injunctions. It also extends to the negative declaration of liability[69] despite a previous minor opinion which precluded it to prevent the tortfeasor from strategically instituting proceedings at his/her own domicile.[70] On the other hand, the indemnification among tortfeasors should be left out of the scope of tort jurisdiction.[71]

The notion of the place of the tort comprises both the place where the harmful act was committed (*locus delicti commissi*) and the place where the injury has arisen (*locus damni*). In the case of a complex tort under Article 5(3) Brussels I (Art. 7(2) Brussels I Recast), both places serve as a jurisdictional ground without restrictions.[72] Article 3-3 No. 8, 2nd sentence CCP, however, deviates therefrom and precludes the *locus damni* jurisdiction when the occurrence of the injury at that place could not have been predicted, following the same principle as Article 10(1)(b) of the 1999 Draft Hague Convention. Hence, the place in which indirect or immaterial injury occurred generally does not constitute jurisdiction,[73] even if one follows a minor opinion to include it in the broad concept of *locus damni*.[74]

The foreseeability requirement under Article 3-3 No. 8, 2nd sentence CCP aims to balance the parties' interests and to live up to their risk calculation. Moreover, it duly restricts the indirect jurisdiction of foreign courts in recognizing their judgments in Japan, especially in product liability cases.[75] The foreseeability does not address an abstract possibility that injury could occur by releasing a product into

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68. Tada, *supra* n. 29, at pp. 290-291.

69. See Nishitani, *supra* n. 2, at para. 132; Tada, *supra* n. 29, at pp. 296-297; Tokyo District Court 27 November 1998, HT 1037, 235.

70. Ikehara, *supra* n. 4, at p. 32; M. Dogauchi, 'Zenchû: Kokusaiteki Saiban Kankatsuken' (Preliminary Notes: International Jurisdiction), in C. Suzuki and Y. Aoyama, eds., *Chûshaku Minjisoshôhô* (Commentaries on Civil Procedure Law), Vol. 1 (Tokyo, Yûhikaku 1991) pp. 122-124.

71. See Nishitani, *supra* n. 2, at paras. 129-131; H. Sano, 'Fuhôkôichi no Kankatsuken' (Jurisdiction of the Place of the Tort), in A. Takakuwa and M. Dogauchi, eds., *Kokusai Minji Soshôhô: Zaisanhô Kankei* (International Civil Procedure Law: Proprietary Claims) (Tokyo, Seirin Shoin 2002) p. 93; *contra* Tada, *supra* n. 29, at pp. 294-295.

72. See, *inter alia*, CJEU 30 November 1976 – Case C-21/76 *Bier* v. *Mines de potasse d'Alsace* [1976] ECR 1735; 1 October 2002 – Case C-167/00 *Verein für Konsumenteninformation* v. *Henkel* [2002] ECR I-8111; 5 February 2004 – Case C-18/02 *DFDS Torline* v. *SEKO* [2004] ECR I-1417; 10 June 2004 – Case C-168/02 *Kronhofer* v. *Maier et al.* [2004] ECR I-6009; 16 July 2009 – Case C-189/08 *Zuid-Chemie* v. *Philippo's* [2009] ECR I-6917.

73. See Sato and Kobayashi, eds., *supra* n. 22, at p. 69; in this sense also Ikehara, *supra* n. 4, at p. 31; Dogauchi, *supra* n. 70, at p. 131; Tokyo District Court 15 February 1984, *supra* n. 26; Tokyo District Court 31 October 2006, *supra* n. 26.

74. Sawaki and Dogauchi, *supra* n. 28, at p. 285; Tada, *supra* n. 29, at pp. 299-302; also S. Watanabe, 'Kokusai Saiban Kankatsu' (International Jurisdiction), in Y. Taniguchi and H. Inoue, eds., *Shin Hanrei Kommentar: Minji Soshôhô* (New Commentaries on Case Law: Civil Procedure Law), Vol. 1 (Tokyo, Sanseidô 1993) p. 75; Shizuoka District Court (Numazu Branch) 30 April 1993, HT 824, 241.

75. *Hosoku Setsumei*, *supra* n. 11, at pp. 21-22.

the '*stream of commerce*',[76] and neither does it comprehend subjective factors such as the tortfeasor's intent. It rather means a normative foreseeability of the occurrence of the injury under normal circumstances[77] as under Article 17, 2nd sentence AGRAL.[78] While international jurisdiction is subject to an *ex officio* examination (Art. 3-11 CCP), the plaintiff victim has the burden of proving the objective factual relationships underlying the wrongful act and the violation of the legally protected right to constitute the jurisdiction of the place of the tort (Art. 3-3 No. 8, 1st sentence CCP).[79] On the other hand, the facts accounting for the unforeseeability of the occurrence of injury at the *locus damni* (2nd sentence) are to be proven by the defendant tortfeasor.[80]

For defamation or violation of privacy and personal rights cases whereby a single infringing act can cause harm in several states by distribution, the *Shevill* ruling of the CJEU[81] restricted the scope of the *locus damni* jurisdiction to the damage that occurred in the respective state, while granting jurisdiction to award damages for the entire harm at the publisher's establishment.[82] This 'mosaic' approach of the *locus damni* jurisdiction is of little interest to Japan, not only because there is no need to deter *forum shopping,* but also because all closely related claims between the same parties can be objectively joined pursuant to Article 3-6, 1st sentence CCP (*infra* section 2.6).[83]

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76. See the discussion in the US compared with the criterion of '*purposeful availment*' at: Volkswagen, *supra* n. 64; *Asahi Metal Industry Co.* v. *Superior Court of Cal.*, 480 US 102 [1987]; *J. McIntyre* v. *Nicastro*, 131 S. Ct. 2780 [2011]; *Goodyear*, *supra* n. 64.

77. See Sato and Kobayashi, eds., *supra* n. 22, at pp. 70-71; minutes of the 2nd, 7th and 11th meeting, *supra* n. 10.

78. For an interpretation of Art. 17, 2nd sentence AGRAL, see 'Kokusaishihô no Gendaika ni kansuru Yôkô no Gaiyô' (Summary of the Proposal for the Modernization of Private International Law), in Bessatsu NBL Henshûbu, ed., *Hô no Tekiyô ni kansuru Tsûsokuhô Kankeishiryô to Kaisetsu* (Materials and Explanations for the Act on the General Rules on the Application of Laws) (Tokyo, Shôjihômu 2006) p. 57.

79. Sato and Kobayashi, eds., *supra* n. 22, at p. 72; also Supreme Court 8 June 2001, Minshû 55-4, 727 (*Ultraman* case). In contrast to German procedural rules, facts relating both to the jurisdictional ground and the merit (*doppelrelevante Tatsachen*) shall also be proven by the parties when deciding on jurisdiction. Nishitani, *supra* n. 2, at paras. 133-135; cf. H. Schack, *Internationales Zivilverfahrensrecht*, 5th edn. (Munich, C.H. Beck 2010) pp. 156-157.

80. Minutes of the 2nd meeting, *supra* n. 10.

81. CJEU 7 March 1995 – Case C-68/93 *Shevill* v. *Presse Alliance SA* [1995] ECR I-415.

82. As an exception for defamation via the Internet, the plaintiff can claim compensation for the whole damage both at the place of his/her centre of interest as well as at the defendant's establishment. See CJEU 25 October 2011 – Case C-509/09 *eDate Advertising GmbH* v. *X & Olivier Martinez* and Case C-161/10 *Robert Martinez* v. *MGN Limited* (not yet published in ECR); see *OJ* 2011, C 370/ 9 = NJW 2012, 137.

83. Y. Nakanishi, 'Shuppanbutsu ni yoru Meiyo Kison Jiken no Kokusai Saibankankatsu ni kansuru Ôshû Shihô Saibansho 1995-3-7 Hanketsu ni tsuite' (On the decision of 7 March 1995 rendered by the ECJ with regard to international jurisdiction concerning defamation caused by publication), 142/5 & 6 *Hôgaku Ronsô* (Kyoto Law Review) (1998) pp. 181-219; Tada, *supra* n. 29, at p. 303.

2.3 Exclusive jurisdiction

Article 3-5 CCP provides for exclusive jurisdiction *ex lege*. Aiming to realize the public interest, Japanese courts have exclusive jurisdiction for disputes over a registration to be made in Japan (Art. 3-5(2) CCP) and the existence or validity of IP rights granted and registered in Japan (Art. 3-5(3) CCP) (*infra* section 2.5.1). These rules are largely in line with Article 22(3) and (4) Brussels I (Art. 24(3) and (4) Brussels I Recast).[84]

The same consideration of the public interest applies to the validity of the constitution or dissolution of a company (or other entity) and the nullity of the decisions of its organs (Art. 3-5(1) CCP). This provision, however, goes further than Article 22(2) Brussels I (Art. 24(2) Brussels I Recast) to comprise liability and discharge of officers of a company as well, aiming at uniform decisions and procedural convenience for companies and shareholders.[85] On the other hand, actions against individual members of a company are subject to ordinary, non-exclusive jurisdiction (Art. 3-3 No. 7 CCP).[86]

Although their wording is restricted to Japan's jurisdiction, Article 3-5(1)-(3) CCP are understood to have reflexive effect on foreign courts. Consequently, when one of the corresponding jurisdictional grounds of Article 3-5 CCP lies in a foreign state, its indirect jurisdiction is confirmed and the direct jurisdiction of the Japanese courts is denied by definition.[87] This principle clearly contrasts with the general understanding of Article 22 Brussels I (Art. 24 Brussels I Recast).[88]

2.4 Choice of court agreement

Pursuant to Article 3-7(1) CCP, the parties may agree upon the exclusive or non-exclusive jurisdiction[89] of a court/courts in Japan or a foreign state, unless special

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84. Sato and Kobayashi, eds., *supra* n. 22, at pp. 107-109.

85. *Hosoku Setsumei*, *supra* n. 11, at pp. 17-20.

86. Sato and Kobayashi, eds., *supra* n. 22, at p. 105.

87. *Contra* D. Yokomizo, 'Kokusai Senzoku Kankatsu' (International Exclusive Jurisdiction), 245 *Nagoya Daigaku Hôsei Ronshû* (Nagoya University Journal of Law and Politics) (2012) pp. 123-145.

88. For the negation of the reflexive effect under the Brussels I Regulation, see CJEU 7 February 2006 – Opinion 01/03, *Lugano Convention* [2006] ECR I-1145, para. 153; A. Dickinson, 'The Revision of the Brussels I Regulation: Surveying the Proposed Brussels I *bis* Regulation – Solid Foundation but Renovation Needed', 12 *YPIL* (2010) p. 247 at p. 302; T.C. Hartley, 'The Brussels Regulation and Non-Community States', in J. Basedow, et al., eds., *Japanese and European Private International Law in Comparative Perspective* (Tübingen, Mohr Siebeck Verlag 2008) pp. 23-24; K. Takahashi, 'Review of the Brussels I Regulation: A Comment from the Perspectives of Non-Member States (Third States)', 8 *Journal of Private International Law* (2012) p. 1 at pp. 8-11; I. Pretelli, 'Proposal for a regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)', published by the European Parliament (<www.europarl.europa.eu/>) pp. 22-24; *contra* J. Weber, 'Universal Jurisdiction and Third States in the Reform of the Brussels I Regulation', 75 *RabelsZ* (2011) p. 619 at pp. 630-633.

89. Unlike Arts. 1(1) and 3(b) Hague Convention or Art. 23(1) Brussels I (Art. 27(1) Brussels I

rules of exclusive jurisdiction *ex lege* (Arts. 3-5 and 3-10 CCP) or consumer/employee protection (Art. 3-7(5)(6) CCP) apply.[90] Article 3-7(2) CCP provides that a choice of court agreement must be made with respect to a particular legal relationship and in writing, just as under Article 23(1) Brussels I (Art. 25(1) Brussels I Recast) and Article 3(a)(c) Hague Convention. In the 1975 precedent in the *Chisadane* case,[91] the formal requirement was held to have been fulfilled by an exclusive jurisdiction clause printed on the back of a bill of lading, even in relation to the insurer of its final holder.[92] The Brussels I Regulation (Recast) would arguably yield the same result to uphold commercial usage in maritime transport.[93]

It is disputed in Japan how best to determine the substantive validity of a choice of court agreement, which is severable from the main contract. A previous opinion advocated that criteria proper to Japanese international civil procedure law should apply, although without specifying their content.[94] For the sake of legal certainty, recent authors have increasingly pointed to the law chosen by the parties to govern the choice of court agreement. In its absence, the law with the closest connection applies, which usually coincides with the law governing the main contract (cf. Arts. 7 and 8 AGRAL).[95] While these solutions take the private international law of the seized forum as a starting point, the Hague Convention (Arts. 5(1), 6(a)

Recast), Art. 3-7 CCP does not stipulate that the choice of court agreement must be primarily understood as exclusive. This may well result in questions of interpretation in practice. S. Nakano, 'Agreement on Jurisdiction', 54 *JYIL* (2011) p. 278 at pp. 284-285.

90. For further discussion, Nakano, *supra* n. 89, at pp. 283-294.

91. Supreme Court 28 November 1975, Minshu 29-10, 1554 (*Chisadane* case); see *infra* n. 92.

92. In the *Chisadane* case (*supra* n. 91), a Dutch shipping company issued a bill of lading with an exclusive jurisdiction clause designating the court in Amsterdam to a Brazilian company who had sold sugar to a Japanese company. As the sugar was damaged during transport, the latter's insurer paid the insurance and filed a damages claim by subrogation against the Dutch company before the Kobe District Court. The Supreme Court honoured the jurisdiction clause and dismissed the claim for the following reasons: (i) The designated court and the existence of an agreement were made clear in the bill of lading so that the formal requirement was fulfilled. (ii) The case was not subject to the exclusive jurisdiction of Japan and the chosen court had jurisdiction under Dutch law. (iii) In light of international maritime business, the Dutch company's choice for the court of Amsterdam where its principal office was located was reasonable and did not violate public policy. For further detail, see Nakano, *supra* n. 89, at pp. 280-283; Nishitani, *supra* n. 2, at para. 142.

93. Art. 23(1)(c) Brussels I (Art. 25(1)(c) Brussels I Recast); see, *inter alia*, A. Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford, Oxford University Press 2008) paras. 7.54-7.55; U. Magnus, 'Art. 23', in Magnus and Mankowski, eds., *supra* n. 32, para. 126. Cf. the limited scope of application of the Hague Convention (Art. 2(2)(f)(g)).

94. Ikehara, *supra* n. 4, at p. 36; Y. Kaise, *Kokusaika Shakai no Minjisoshô: Asu no Hô (droit de demain) wo mezashite* (Civil Litigation in Cross-Border Society: Toward Law of Tomorrow) (Tokyo, Shinzansha 1993) p. 291.

95. T. Kanzaki, 'Gôi ni yoru Kankatsuken' (Jurisdiction by Agreement), in A. Takakuwa and M. Dogauchi, eds., *Kokusai Minji Soshôhô: Zaisanhô Kankei* (International Civil Procedure Law: Proprietary Claims) (Tokyo, Seirin Shoin 2002) pp. 138-140; Nakano, *supra* n. 89, at pp. 287-288; K. Yamamoto, 'Kokusai Minji Soshôhô' (International Civil Procedure Law), in H. Saitô, et al., eds., *Chûkai Minji Soshôhô* (Commentaries on Civil Procedure Law), Vol. 5, 2nd edn. (Tokyo, Daiichi Hôki 1991) pp. 403-404.

and 9(a)) and the Brussels I Regulation Recast (Art. 25(1)) seek uniformity and coordination among Contracting States or Member States by referring to the law of the designated forum, including its private international law.[96]

A choice of court agreement that is unfair or contrary to good morals is considered to be null and void by way of interpretation following the *Chisadane* ruling.[97] In order to avoid a denial of justice, an exclusive jurisdiction clause designating foreign courts is not honoured to the extent that the chosen court cannot hear the case due to legal or factual hindrances, such as a lack of jurisdiction or force majeure (Art. 3-7(4) CCP).[98]

Article 3-7 CCP does not require that the case or the parties have an objective connection with the designated forum.[99] The parties may therefore choose the courts of a neutral state, just as under Article 23 Brussels I (Art. 25 Brussels I Recast).[100] The Hague Convention principally follows this reasoning, although it allows a Contracting State to refuse to hear the case in the absence of such a connection (Art. 19 Hague Convention), aiming to accommodate certain states that are concerned about incurring an undue burden to hear a remote, purely foreign case.[101]

2.5 **Specific areas**

2.5.1 *Intellectual property rights*

Pursuant to Article 3-5(3) CCP, disputes concerning the existence/non-existence or the validity of IP rights that are established by registration (Art. 2(2) Intellectual Property Act)[102] are governed by the exclusive jurisdiction of the country of registration, just as under Article 22(4) Brussels I (Art. 24(4) Brussels I Recast). The country of registration was considered the most adequate forum because patents, trademarks, and other comparable IP rights are granted by an administrative act and are subject to specific proceedings for their invalidation or revocation with *erga omnes* effect.[103] Furthermore, insofar as the action relates to the registra-

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96. See Recital 20 Brussels I Recast; Hartley and Dogauchi, *supra* n. 7, at p. 43; also C. Heinze, 'Choice of Court Agreements, Coordination of Proceedings and Provisional Measures in the Reform of the Brussels I Regulation', 75 *RabelsZ* (2011) p. 581 at pp. 584-587; U. Magnus, 'Choice of Court Agreements in the Review Proposal for the Brussels I Regulation', in Lein, ed., *supra* n. 7, at pp. 86-87.

97. Sato and Kobayashi, eds., *supra* n. 22, at pp. 140-141; minutes of the 11th meeting, *supra* n. 10; cf. *Hosoku Setsumei*, *supra* n. 11, at p. 30.

98. *Hosoku Setsumei*, *supra* n. 11, at p. 29; also *Chisadane* case, *supra* nn. 91 and 92.

99. Cf. Okayama District Court 25 January 2000, Kôtsûjiko Minji Saibanreishû (Civil Law Decisions in Traffic Accidents) 33-1, 157; *contra* Kaise, *supra* n. 94, at pp. 289-291.

100. Magnus, *supra* n. 93, at para. 47.

101. Hartley and Dogauchi, *supra* n. 7, at paras. 229-230.

102. Intellectual Property Act (Law No. 122 of 4 December 2002).

103. *Hosoku Setsumei*, *supra* n. 11, at pp. 36-37. It does not comprise disputes over the ownership of IP rights, which do not require any special technique or expertise on the part of the courts of the country of registration. Sato and Kobayashi, eds., *supra* n. 22, at p. 111.

tion, all categories of IP rights – including copyrights that come into existence without formalities but can be registered in order to be opposed to third parties – are subject to the exclusive jurisdiction of the country of protection or registration (Art. 3-5(2) CCP) (*supra* section 2.3).[104]

In contrast, the infringement of IP rights is governed by the ordinary, non-exclusive jurisdiction rules of tort (Arts. 3-2 and 3-3 No. 8 CCP).[105] The *locus delicti commissi* is the place where infringing and preparatory acts are undertaken, and the *locus damni* is the country of protection or registration.[106] The question whether the validity of patents can be claimed by way of an exception and determined incidentally in infringement proceedings – usually limited to *inter partes* effects – is characterized as a matter of substantive law governed by the law of the country of registration.[107] It is therefore admissible for Japanese[108] and US[109] patents but not for German patents.[110] In this respect, the Japanese legislature did not follow the position of the CJEU that confers exclusive jurisdiction to the country of registration with respect to the incidental decision on the validity of patents.[111]

When invalidity proceedings are pending in the foreign country of registration, the judge should be authorized to suspend the infringement proceedings in Japan by referring to Article 168(2) Patent Act *mutatis mutandis*.[112] In the case of an infringement of parallel patents in different countries, especially through a Japanese parent company and its foreign subsidiaries, all the claims can be heard together before the Japanese courts by way of an objective and subjective joinder of claims (Art. 3-6, 1st and 2nd sentence CCP (*infra* section 2.6)) ('*spider in the web*').[113]

2.5.2 *Consumer contracts and individual labour relationships*

The legislature adopted special rules for the protection of weaker parties in consumer and employment contracts. When the business operator or employer brings a suit against the consumer or employee, the available forum is restricted to that

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104. Sato and Kobayashi, eds., *supra* n. 22, at p. 109.

105. *Hôkokusho*, *supra* n. 9, at pp. 66-67; Sato and Kobayashi, eds., *supra* n. 22, at pp. 69, 111, 113-114.

106. See Y. Nishitani, 'Supreme Court 26 September 2002, *Fujimoto v. Neuron Co. Ltd.* ("*Card Reader*" case)', in M. Bälz, et al., eds., *Business Law in Japan* (Alphen aan den Rijn, Kluwer Law International 2012) pp. 679-689.

107. *Hôkokusho*, *supra* n. 9, at pp. 67-68; *Hosoku Setsumei*, *supra* n. 11, at pp. 37-38; minutes of the 4th meeting, *supra* n. 10.

108. Art. 104-3 Patent Act (Law No. 121 of 13 April 1959).

109. 35 USC 282.

110. §§ 65(1), 81, and 139 *Patentgesetz* (German Patent Act, PatG); § 148 ZPO.

111. CJEU 13 July 2006 – Case C-4/03 *GAT* v. *LuK* [2006] ECR I-6509; Case C-539/03 *Roche Nederland* v. *Primus et al.* [2006] ECR I-6535.

112. See *Hôkokusho*, *supra* n. 9, at p. 68; minutes of the 4th meeting, *supra* n. 10.

113. Nishitani, *supra* n. 106, at p. 685; *contra* CJEU in the *Roche* case, *supra* n. 111.

of the consumer's or employee's domicile (Arts. 3-4(3) CCP), analogously with Articles 16(2) and 20(1) Brussels I (Arts. 18(2) and 22(1) Brussels I Recast). Exceptions thereto are only provided in cases where the parties enter into a choice of court agreement (Art. 3-7(5)(6) CCP) or appearance (Art. 3-8 CCP).[114]

Conversely, the consumer can file an action against the business operator before the courts of the state in which the consumer was domiciled at the time of the filing of the action or at the conclusion of the contract (Art. 3-4(1) CCP) besides the competent courts pursuant to Articles 3-2 and 3-3 CCP. The employee can sue the employer at the place of the performance of labour under the contract[115] or, if that is not ascertainable, at the place of the office through which the employee was employed (Art. 3-4(2) CCP), in addition to the venues provided by Articles 3-2 and 3-3 CCP.[116] While these rules largely correspond to Articles 16(1) and 19(1)(2) Brussels I (Arts. 18(1) and Article 21(1)(a)(b) Brussels I Recast), the Japanese courts are more broadly available due to the applicable special jurisdictions (Art. 3-3 CCP) and the joinder of claims (Arts. 3-6 and 146(3) CCP) (*infra* section 2.6).

Unlike the Japanese and the EU conflict of laws rules (Art. 11(6) AGRAL; Art. 6(1) Rome I)[117] or the EU jurisdiction rule (Art. 15(1)(c) Brussels I (Art. 17(1)(c) Brussels I Recast)),[118] Article 3-4(1) CCP protects a 'passive' as well as an 'active' consumer who on his/her initiative travels to a foreign state in which the business operator is established and concludes a contract or receives complete performance there. For the purpose of international jurisdiction, even an active consumer was considered to deserve protection.[119] Disadvantages that a foreign business operator may incur are to be mitigated by referring to the corrective rule under Article 3-9 CCP (*infra* section 2.7).[120]

With regard to a choice of court agreement after the dispute has arisen out of a consumer or employment contract, (i) the parties are free to designate a competent court (Art. 3-7(5)(6) CCP). Prior to that date, a choice of court agreement is valid if (ii) the parties confer non-exclusive jurisdiction on the courts of a state

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114. It is disputed whether Art. 3-6 CCP on the joinder of claims should be applicable as well. See T. Kanzaki, 'Jurisdiction over Consumer Contracts and Individual Labor-Related Civil Disputes', 55 *JYIL* (2012) p. 306 at pp. 312-313, 315-316.

115. When the employee performs his/her labour at several ascertainable places, all of them constitute jurisdiction. A. Fukuda, 'Kokusai Saibankankatsu ni kansuru Minji Soshôhô tô no Kaisei no Gaiyô' (Outlines of the CCP Reform with Respect to International Jurisdiction), 1931 *Kin-yû Hômu Jijô* (Financial Law Journal) (2011) p. 79; Kanzaki, *supra* n. 114, at pp. 311-312; minutes of the 8th meeting, *supra* n. 10.

116. Kanzaki, *supra* n. 114, at pp. 310-312.

117. Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), *OJ* 2008, L 177/6.

118. For a comparison of the notion of 'passive' consumers under these provisions, see Y. Nishitani, 'Die Reform des internationalen Privatrechts in Japan', 27 *IPRax* (2007) p. 552 at p. 555.

119. *Hosoku Setsumei*, *supra* n. 11, at pp. 43-44; Sato and Kobayashi, eds., *supra* n. 22, at p. 88; *contra Hôkokusho*, *supra* n. 9, at pp. 73-74.

120. Dogauchi, *supra* n. 59, at pp. 197-198; Kanzaki, *supra* n. 114, at pp. 317-319; Okuda, *supra* n. 1, at p. 374.

where the consumer was domiciled at the time of the conclusion of the consumer contract or the employee carried out his/her labour at the time of the termination of the employment contract (Art. 3-7(5) No. 1 or (6) No. 1 CCP).[121] This is also the case if (iii) the consumer or employee institutes proceedings at the chosen forum or invokes the choice of court agreement when sued in a different forum (Art. 3-7(5) No. 2 or (6) No. 2 CCP). While (i) and (ii) are comparable to Article 17(1)(2) and Article 21(1)(2) Brussels I (Art. 19(1)(2) and Art. 23(1)(2) Brussels I Recast), alternative (iii) is a unique Japanese rule. This provision is justified as the subsequent consent of the consumer or employee to renounce his or her right to sue or be sued before a different court.[122]

2.6 **Plurality of parties or claims**

Once Japanese courts are competent to decide a claim, other claims between the same parties that are closely related to the principal claim can be joined ('objective joinder of claims': Art. 3-6, 1st sentence CCP). As opposed to the domestic jurisdiction rule (Art. 7, 1st sentence CCP), a close connection between the claims is required, aiming at the protection of the defendant and procedural economy.[123] In its analogy, Japan's jurisdiction can be extended to a counterclaim that is closely related to the subject-matter of the principal claim or the allegations and evidence for the defence (Art. 146(3), 1st sentence CCP).[124] Furthermore, plaintiffs or defendants can be joined with the principal parties insofar as rights or obligations constituting the subject-matter of the claim are common between them or arise out of the same factual or legal grounds ('subjective joinder of claims': Art. 3-6, 2nd sentence and Art. 38, 1st sentence CCP).[125] This broad scope of both the objective and subjective joinder of claims is a specific aspect of Japanese rules compared with Article 6(1)-(4) Brussels I (Art. 8(1)-(4) Brussels I Recast).[126]

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121. An exclusive forum selection clause is understood *ex lege* as non-exclusive (Art. 3-7(5) No. 1 and (6) No. 1 CCP). The choice of court agreement in employment contracts under (ii) can only be made at the time of terminating the contract, e.g., together with a non-competition clause. Sawaki and Dogauchi, *supra* n. 28, at pp. 294-295; Kanzaki, *supra* n. 114, at pp. 313-314.

122. See Sato and Kobayashi, eds., *supra* n. 22, at pp. 147-148; Kanzaki, *supra* n. 114, at pp. 314-315. On the other hand, Japan lacks a provision that corresponds to Art. 17(3) Brussels I (Art. 19(3) Brussels I Recast), which upholds an exclusive jurisdiction clause in favour of the common domicile or habitual residence of the consumer and the business operator at the time of the conclusion of the contract.

123. *Hosoku Setsumei*, *supra* n. 11, at pp. 47-48; see also the *Ultraman* case, *supra* n. 79.

124. Sato and Kobayashi, eds., *supra* n. 22, at pp. 125-126.

125. It is not required, though, that the parties be joined *ex lege* as under Art. 40 CCP. *Hosoku Setsumei*, *supra* n. 11, at p. 50; for the previous state of the discussion, see Nishitani, *supra* n. 2, at paras. 143-144.

126. Pursuant to Art. 6 Brussels I (Art. 8 Brussels I Recast), the subjective joinder of claims is limited to defendants at the domicile of one of them (No. 1) and third-party proceedings (No. 2). But for a counterclaim (No. 3), the objective joinder of claims is admissible only in relation to a contractual claim related to rights *in rem* over immovable property at its situs (No. 4).

As an exception, the objective or subjective joinder of claims is not admissible for claims governed by the exclusive jurisdiction of foreign states *ex lege* (Art. 3-5 CCP *mutatis mutandis*; Arts. 3-10 and 146(3), 2nd sentence CCP). This principle, however, does not apply to an exclusive choice of court agreement designating a foreign court, as the legislature unduly held that choice of court agreements do not implicate public interests and are therefore subservient to the judicial policy to decide related issues in the same proceedings at once.[127] Consequently, e.g., the obligee who has agreed with a guarantor to confer exclusive jurisdiction on a foreign court can inappropriately constrain the latter to defend before the Japanese courts by suing the main obligor domiciled in Japan.[128]

2.7 Dismissal of actions on account of special circumstances

Article 3-9 CCP prescribes a corrective rule in accordance with previous case law.[129] Pursuant to this provision, Japanese courts can wholly or partly dismiss the claim if granting jurisdiction would run counter to fairness between the parties or hinder an equitable and expeditious administration of justice. The judge is thereby supposed to consider the nature of the case, the degree of the defendant's burden to submit a defence, the location of the evidence, and any other circumstances.[130] As was decided in the *Entô Kôkû* case (1986),[131] even if Japan has international jurisdiction, a damages claim arising out of an air crash in Taiwan can be dismissed pursuant to Article 3-9 CCP on the ground that the judge does not have access to the evidence located in Taiwan in the absence of diplomatic relations and available judicial assistance.[132]

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127. Sato and Kobayashi, eds., *supra* n. 22, at pp. 121-123, 127-128.

128. Y. Hayakawa, et al., in *New Legislation*, *supra* n. 1, at p. 28; Sato and Kobayashi, eds., *supra* n. 22, at pp. 127-128.

129. In the *Family* case (*supra* n. 5), the plaintiff X, a Japanese company, signed a contract with the defendant Y, a Japanese national domiciled in Germany. X commissioned Y to purchase automobiles in Europe and be engaged in market research. X brought an action before the Chiba District Court for the restitution of funds entrusted to Y. As a general framework, the Supreme Court primarily relied on domestic jurisdiction rules (the 'reverse presumption theory'), while introducing a corrective rule to refuse Japan's jurisdiction under 'special circumstances' where exercising jurisdiction would run counter to the ideas of fairness between the parties and an equitable and prompt administration of justice. In its application, however, the Supreme Court did not ascertain any specific jurisdictional grounds in Japan. Rather, it only referred to the following special circumstances to refuse Japan's jurisdiction: (i) it would be beyond Y's expectation that the claim for restitution be made before a Japanese court, while the parties did not agree on the place of performance in Japan or the choice of Japanese law; (ii) Y's home and principal place of business, as well as the evidence for the defence, were located in Germany; and (iii) X imported automobiles from Germany, so it would not be excessively burdensome for X to bring a suit there.

130. On the other hand, jurisdiction by necessity (*forum necessitatis*) can be granted *de lege lata* to guarantee the plaintiff's right to be heard. Sato and Kobayashi, eds., *supra* n. 22, at p. 181.

131. Tokyo District Court 20 June 1986, HJ 1196, 87.

132. Sawaki and Dogauchi, *supra* n. 28, at p. 312.

The application of Article 3-9 CCP is only excluded when Japanese courts have exclusive jurisdiction pursuant to the parties' agreement (Art. 3-9 CCP)[133] or *ex lege* (Art. 3-10 CCP). Even the general jurisdiction based on the defendant's domicile or principal office (Art. 3-2(1)(3) CCP) or appearance (Art. 3-8 CCP) is subject to Article 3-9 CCP. For example, it was held appropriate to allow the judge to exceptionally dismiss a damages claim against a Japanese company based on its product liability if a number of comparable product liability actions are already pending before a foreign court, and filing further claims there appears to be more reasonable than opening a new forum in Japan.[134]

Such a corrective rule comparable to the *forum non conveniens* doctrine of common law jurisdictions is generally a foreign body in the civil law system,[135] including the Brussels I Regulation (Recast), as indicated by the *Owusu* ruling of the CJEU.[136] Article 3-9 CCP, however, differs from *forum non conveniens*, as it requires the judge to deny the existence of jurisdiction under special circumstances instead of discretionally refraining from exercising it on the ground that another court appears to be a better forum. In other words, a Japanese judge has the duty to dismiss the claim whenever the requirements of Article 3-9 CCP are fulfilled.[137] Thus, corresponding special circumstances are also taken into consideration in determining the indirect jurisdiction of foreign courts (Art. 118 No. 1 CCP).[138]

3. INTERNATIONAL PARALLEL LITIGATIONS

With regard to international parallel litigations, the Division on International Jurisdiction extensively deliberated whether to adopt a specific rule to regulate them. In the 2009 Interim Draft, it was suggested[139] that, in accordance with the *lis alibi pendens* doctrine,[140] the judge be authorized to stay proceedings involving the

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133. In view of the corrective rule for domestic jurisdiction that also governs an exclusive choice of court agreement (Arts. 11 and 17 CCP), it was extensively discussed whether and how far Art. 3-9 CCP should control it as well. For the sake of the parties' intent and foreseeability, an exclusive choice of court agreement was eventually excluded from the scope of Art. 3-9 CCP. Minutes of the 13th to 15th meeting, *supra* n. 10; Sato and Kobayashi, eds., *supra* n. 22, at p. 162.

134. Sato and Kobayashi, eds., *supra* n. 22, at p. 164.

135. It is notable that Member States of the Hague Conference on Private International Law had agreed upon adopting the *forum non conveniens* doctrine in the original Judgments Project (Art. 22 of the 1999 Draft Hague Convention).

136. CJEU 1 March 2005 – Case C-281/02 *Owusu* v. *Jackson* [2005] ECR I-1383.

137. For further discussion, see Dogauchi, 'General Observation', *supra* n. 1, at pp. 275-276; Takahashi, *supra* n. 1, at pp. 160-167; *contra* Y. Aoyama, et al., 'Kokusai Saiban Kankatsu: Minjisoshôhô Kaisei wo ukete' (International Jurisdiction: Following the Reform of CCP), 30 *Nomos (Kansai University)* (2012) pp. 173-176.

138. Hayakawa, et al., *supra* n. 128, at pp. 11-12.

139. Interim Draft VIII-1 (A)(B), *supra* n. 11; *Hosoku Setsumei*, *supra* n. 11, at pp. 56-59.

140. M. Dogauchi, 'Kokusai Soshô Kyôgô' (International Parallel Litigation), in A. Takakuwa and M. Dogauchi, eds., *Kokusai Minji Soshôhô: Zaisanhô Kankei* (International Civil Procedure Law:

same cause of action between the same parties as in the foreign action if the latter has first been instituted and a recognizable judgment on the merit is expected to be rendered (Art. 118 CCP). Like Article 27 Brussels I (Art. 29 Brussels I Recast), this rule aimed to coordinate parallel litigations at a pre-stage by giving priority to the court first seized, because once a foreign judgment is recognized, its effects are automatically equated with those of a Japanese judgment, including the *res judicata* effect.[141]

Different stakeholders, however, criticized the proposal of the Interim Draft on the grounds that the probability of the recognition of a future foreign judgment could hardly be ascertained, and the same result as staying the proceedings could be attained by flexibly postponing court hearings. It was also contended that Japanese companies involved in cross-border parallel litigations would be unduly disadvantaged before a foreign court which would not reciprocate by staying proceedings.[142] A revised suggestion that the order to stay proceedings be restricted for up to a four-month period, which would be renewable but not subject to an appeal, was not successful either. While judges expressed concern in view of a proper and expeditious administration of justice, lawyers preferred to maintain the option to litigate before Japanese courts in a strategic way.[143] Because of a lack of unanimity, the Division eventually refrained from adopting the provision.

When seeking a solution *de lege lata*, it is expedient to refer to previous court decisions.[144] In the *Masaki Bussan* case (1991),[145] a Japanese company X had produced noodle machines and sold them to a US company Y. Y sued X before the Californian court for the indemnification of damages that Y could incur in a separate product liability action filed by the victim. X then instituted an action for a negative declaration of liability against Y before the Tokyo District Court, aiming to hamper the enforcement of a future US judgment. Although the Japanese courts were competent as the *locus delicti commissi* of the alleged liability, the

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Proprietary Claims) (Tokyo, Seirin Shoin 2002) pp. 146-148; T. Sawaki, 'Kokusaiteki Soshô Kyôgô' (International Parallel Litigation), in C. Suzuki and A. Mikazuki, eds., *Shin Jitsumu Minjisoshôhô Kôza* (New Series on the Practice of Civil Procedure Law), Vol. 7 (Tokyo, Nihon Hyôronsha 1982) p. 116; also Tokyo District Court 30 May 1989, HJ 1348, 91 (*Miyakoshi Kikô* case); cf. Tokyo District Court 28 January 1999, HT 1046, 273.

141. See Y. Hayakawa, 'Lis Pendens', 54 *JYIL* (2011) pp. 324-332; Nishitani, *supra* n. 2, at paras. 171-173.

142. Sato and Kobayashi, eds., *supra* n. 22, at pp. 176-177.

143. Sato and Kobayashi, eds., *supra* n. 22, at p. 177; minutes of the 13th meeting, *supra* n. 10; cf. Dogauchi, 'General Observation', *supra* n. 1, at p. 276.

144. Tokyo District Court 15 February 1984, *supra* n. 26; Tokyo District Court 28 August 1989, *supra* n. 26; Tokyo District Court 29 January 1991, HJ 1390, 98 (*Masaki Bussan* case); Tokyo District Court 27 November 1998, HT 1037, 235; Tokyo District Court 20 March 2007, HJ 1974, 156; also K. Ishiguro, 'Gaikoku ni okeru Soshôkeizoku no Kokunaiteki Kôka: Kokusaiteki Soshô Kyôgô wo Chûshin to shite' (Effects of Foreign Proceedings in Japan: Especially on International Parallel Litigations), in T. Sawaki and Y. Aoyama, eds., *Kokusai Minji Soshôhô no Riron* (Theories of International Civil Procedure Law) (Tokyo, Yûhikaku 1987) pp. 323-364.

145. Tokyo District Court 29 January 1991, *supra* n. 144.

judge declined to exert jurisdiction by applying the 'special circumstances' test.[146] He opined that California was a more appropriate forum on the grounds that X's claim depended on the outcome of the Californian proceedings that were already at an advanced stage, the evidence was located in the US, and a defence before a Japanese court would result in an excessive burden for Y.

Following this reasoning, international parallel litigations could indeed be regulated by self-restricting the exercise of jurisdiction pursuant to Article 3-9 CCP, analogously with the US *forum non conveniens* approach.[147] In its application, Japanese judges should particularly consider the stage of the foreign proceedings, the connection between the subject-matter of the claim and the forum, the location of the evidence, and the probability of the recognition of a subsequent foreign judgment in Japan pursuant to Article 118 CCP.[148] Conversely, anti-suit injunctions that prohibit the party from introducing or maintaining actions in the courts of a foreign state are not permissible under Japanese law in general.[149]

4. FINAL REMARKS

As the examination above indicates, Japanese jurisdiction rules constitute a unique mixed system based on the civil law system and entangled with some common law elements. Its structure is mainly in line with that of the Brussels I Regulation (Recast) and other civil law legislation, consisting of general jurisdiction based on the defendant's domicile or principal office (Art. 3-2(1)(3) CCP) and the special jurisdictional grounds according to the type of claims (Arts. 3-3 to 3-9 CCP). On the other hand, some particular rules deviate from the Brussels I regime. They are namely the rules on conferring jurisdiction on the grounds of (i) the location of seizable property (Art. 3-3 No. 3 CCP), (ii) the place of business activities (Art. 3-3 No. 5 CCP) or (iii) the objective joinder of claims (Art. 3-6, 1st sentence CCP), and (iv) the corrective rule that requires the judge to exceptionally refuse to exert jurisdiction (Art. 3-9 CCP). Rules (ii) and (iv) have certain common features with the US activity-based jurisdiction and the *forum non conveniens* doctrine of common law countries respectively.

By clearly delineating Japan's adjudicatory jurisdiction, the legislature envisaged enhancing and guaranteeing transparency and legal certainty in cross-border

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146. See the *Family* case, *supra* nn. 5 and 129.

147. See, *inter alia*, G. Berman, 'Parallel Litigation: Is Convergence Possible?', 13 *YPIL* (2011) p. 21 at pp. 27-28.

148. See Sato and Kobayashi, eds., *supra* n. 22, at p. 159.

149. For possible anti-suit injunctions in support of cross-border insolvency proceedings in Japan, see S. Watanabe, 'Gaikoku Soshô Sashitome Meirei: Nihon no Saibansho ha Meirei Dekiruka' (Injunction of Foreign Actions: Can it be ordered by Japanese Courts?), in Y. Matsui, et al., eds., *Global-ka suru Sekai to Hô no Kadai: Heiwa, Jinken, Keizai wo tegakari ni* (Globalised World and the Challenge for Law: In respect of Peace, Human Rights and the Economy) (Tokyo, Tôshindô 2006) pp. 244-253.

litigations.[150] However, the broad jurisdictional grounds of the CCP in fact run the risk of creating exorbitant jurisdiction. In particular, the branch office jurisdiction under Article 3-3 No. 4 CCP is generally considered to break away from the *Malaysia Airlines* ruling (1981),[151] which granted Japan's jurisdiction based on the defendant's Tokyo branch office that was not involved in the business concerned. Nonetheless, Japanese courts would arguably have jurisdiction under the same facts *de lege lata* by virtue of the consumer's domicile (Art. 3-4(1) CCP) or the location of the defendant's property (Art. 3-3 No. 3 CCP).[152]

This legislative policy is not only attributable to a certain homeward trend, but also to the reference to domestic jurisdiction rules in the CCP as a starting point. The domestic jurisdictional grounds under Articles 4 to 13 CCP have a considerably broad scope in comparison with their model in §§ 12 to 34 German ZPO. In fact, the exercise of domestic jurisdiction is mitigated by a broad discretionary transfer of action to an appropriate forum within Japan, which even controls an exclusive choice of court agreement (Arts. 11 and 17 CCP).[153] However, due to a lack of a cross-border transfer of action, Japanese judges will often have to have recourse to the corrective rule under Article 3-9 CCP to prevent the exercise of exorbitant jurisdiction. Needless to say, it may well jeopardize foreseeability and legal certainty that were the primary goal of this new legislation.

In the last decade, Japanese private international law has been undergoing considerable changes. The 2011 legislation on international jurisdiction in civil and commercial matters followed the enactment of the Law on the Recognition of Foreign Insolvency Proceedings (2000),[154] the Arbitration Act (2003),[155] the AGRAL (2006),[156] and the State Immunity Act (2009).[157] This trend seems to be continuing. In the current 183rd session of the National Diet, the ratification of the 1980 Hague Child Abduction Convention[158] was approved on 22 May 2013 and a bill for its implementation was adopted on 12 June 2013.[159] Further legislative work is underway for international jurisdiction in family and personal status mat-

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150. Sato and Kobayashi, eds., *supra* n. 22, at p. 2.

151. See *supra* nn. 3 and 59-61.

152. H. Takahashi, et al., 'Kokusai Saibankankatsu ni kansuru Rippô no Igi' (The Impact of the Legislation on International Judicial Jurisdiction), 1386 *Jurist* (2009) p. 4 at p. 15; minutes of the 13th meeting, *supra* n. 10.

153. See *supra* n. 133.

154. Act on the Recognition of and Assistance for Foreign Insolvency Proceedings (Law No. 129 of 29 November 2000).

155. Arbitration Act (Law No. 138 of 1 August 2003).

156. For an explanation of AGRAL, see, *inter alia*, J. Basedow, et al., eds., *Japanese and European Private International Law in Comparative Perspective* (Tübingen, Mohr Siebeck 2008); Nishitani, *supra* n. 118, at pp. 552-557.

157. Act on Japan's Civil Jurisdiction over Foreign States (State Immunity Act) (Law No. 24 of 24 April 2009).

158. Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (entry into force: 1 December 1983).

159. Bill No. 29 of the Cabinet (submitted to the House of Representatives in the National Diet on 15 March 2013); see <www.sangiin.go.jp/japanese/joho1/kousei/gian/183/gian.htm>.

ters.[160] Hopefully, Japanese private international law will attain more clarity and legal certainty through national legislation and international instruments in the future, thereby strengthening coordination with other legal systems.[161]

With regard to the EU, a comprehensive recast of the Brussels I Regulation was adopted in December 2012.[162] From the viewpoint of third states, it was remarkable that the 2010 Commission Proposal[163] had envisaged extending the jurisdiction rules of the Brussels I Regulation to non-EU defendants, thus abolishing the reference to domestic law under Article 4(1) Brussels I.[164] The Council and the Parliament, however, reversed the proposal and retained the old mechanism in contrast to other recent EU regulations.[165] Only a minor change was made for the protection of EU consumers or employees (Art. 6(1) Brussels I Recast) in view of subjecting the third-state business operator or employer to the protective jurisdiction rules (Arts. 18(1) and 21(2) Brussels I Recast).[166] As a result, third-state domiciliaries continue to be governed in principle by Member States' domestic rules including exorbitant jurisdiction, and a judgment rendered on that basis can readily be enforced in every other Member State.[167] The disadvantages of this system might be exacerbated due to the abolition of exequatur (Art. 39 Brussels I Recast), even if the public policy control has been maintained in the procedure for the refusal of enforcement (Arts. 45-51 Brussels I Recast).[168]

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160. For the preparatory research by the Ministry of Justice, see <www.moj.go.jp/MINJI/minji07_00117.html>.

161. D. Yokomizo, 'Kokusai Saibankankatsu Hôsei no Seibi: Minji Soshôhô oyobi Minji Hozenhô no ichubu wo kaisei suru Hôritsu' (Regulating International Judicial Jurisdiction: Act for a Partial Revision of CCP and CPRA), 1430 *Jurist* (2011) p. 37 at p. 44.

162. *Supra* n. 20.

163. *Supra* n. 43.

164. It was suggested that Art. 4 Brussels I be abolished and subsidiary rules on the basis of the situs of property and *forum necessitatis* be added where no Member State has jurisdiction (Arts. 25 and 26 Commission Proposal); see *supra* n. 43; also A. Borrás, 'The Application of the Brussels I Regulation to Defendants Domiciled in Third States: From the EGPIL to the Commission Proposal', in Lein, ed., *supra* n. 7, pp. 57-74; P. Kisselbach, 'The Brussels I Review Proposal – An Overview', ibid., pp. 9-10, 21-23; Dickinson, *supra* n. 88, at pp. 270-283; *idem*, 'The Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast) ("Brussels I bis" Regulation)', published by the European Parliament (<www.europarl.europa.eu/>) pp. 11-16; H.-P. Mansel, et al., 'Europäisches Kollisionsrecht 2012: Voranschreiten des Kodifikationsprozesses – Flickenteppich des Einheitsrechts', 33 *IPRax* (2013) p. 1 at pp. 8-9; Weber, *supra* n. 88, at pp. 623-626, 637-642.

165. Arts. 3-8 of Council Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, *OJ* 2009, L 7/1; Arts. 4-13 of Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, *OJ* 2012, L 201/107.

166. For thorough criticisms, see Dickinson, *supra* n. 164, at pp. 13-14.

167. See, e.g., Hartley, *supra* n. 88, at pp. 20-23.

168. Mansel, et al., *supra* n. 164, at p. 9.

The recast of the Brussels I Regulation solely sought to enhance coordination with third states in relation to *lis pendens* and related actions. A Member State court seized second has the discretion to stay its proceedings when confronted with a parallel or related action filed first before a third-state court, insofar as the latter is expected to render a recognizable judgment and the proper administration of justice so requires (Arts. 33 and 34 Brussels I Recast). Although the recognition of third-state judgments is governed by the Member State's domestic law and the reflexive effect of exclusive jurisdiction *ex lege* or by agreement (Arts. 24 and 25 Brussels I Recast) has generally been negated,[169] the Member State court is supposed to consider whether the third-state court has exclusive jurisdiction in the particular case under the criteria applicable to the Member State (Recital 24(2) Brussels I Recast). An exclusive choice for the third-state court first seized can therefore be honoured. However, in an opposite case where the action in a Member State has been anticipated, there seems to be no clear-cut rule for giving priority to the third-state court that has been exclusively designated by the parties but seized subsequently.[170] This outcome would be inconsistent with intra-Union cases, where the *Gasser* doctrine[171] has been revised to deter pre-emptive, abusive 'torpedo' actions and requires any court other than the allegedly chosen court to stay its proceedings, regardless of whether it is the first or second seized (Art. 31(2)(3) Brussels I Recast).[172]

In the international legal order, the effectiveness of exclusive choice of court agreements would certainly be improved once the EU ratifies the 2005 Hague Convention,[173] notwithstanding its limited substantive and territorial scope of application (Arts. 2 and 26 Hague Convention).[174] EU Member State courts would then be obliged to suspend or dismiss proceedings in favour of a non-EU Contracting State court chosen by the parties, unless the agreement is invalid or runs counter to public policy (Art. 6 Hague Convention).[175] Conversely, the exclusive choice for an EU Member State court could be respected in non-EU Contracting

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169. The European Parliament took a reserved position toward the reflexive-effect rule in its resolution of 7 September 2010 on the implementation and review of the Brussels I Regulation (2009/2140(INI)) para. 15; see *supra* n. 88.

170. P. Rogerson, 'Lis Pendens and Third States: The Commission's Proposed Changes to the Brussels I Regulation', in Lein, ed., *supra* n. 7, p. 119; cf. Magnus, *supra* n. 96, at pp. 100-101.

171. CJEU 9 December 2003 – Case C-116/02 *Erich Gasser GmbH* v. *MISAT Srl* [2003] ECR I-14693.

172. Cf. Heinze, *supra* n. 96, at pp. 587-596; Magnus, *supra* n. 96, at pp. 88, 95-96.

173. The EU signed the Hague Convention on 1 April 2009.

174. Cf. Dickinson, *supra* n. 88, at p. 302; *idem*, *supra* n. 164, at p. 16. The Brussels I Regulation (Recast) prevails over the Hague Convention where none of the parties is resident in a Contracting State that is not an EU Member State. Hartley and Dogauchi, *supra* n. 7, at pp. 296-301; Pertegás, *supra* n. 7, at pp. 199-200.

175. In contrast to Art. 31(2)(3) Brussels I Recast, the Hague Convention allows the court not chosen by the parties to decide itself on the validity of the choice of court agreement. See Heinze, *supra* n. 96, at pp. 591-596; B. Hess, 'Die Reform der EuGVVO und die Zukunft des Europäischen Zivilprozessrechts', 31 *IPRax* (2011) p. 125 at p. 129; cf. A. Briggs, 'What Should Be Done about Jurisdiction Agreements?', 12 *YPIL* (2010) p. 311 at pp. 319-329.

States which would otherwise not be bound to reciprocate. After all, it would be expedient for the EU's internal market that uniform rules on choice of court agreements be achieved in relation to third states.[176]

Currently, the Hague Conference on Private International Law is contemplating relaunching the Judgments Project.[177] In April 2012 the Experts' Group recommended the adoption of an internationally binding instrument that enables the effective and expeditious recognition and enforcement of foreign judgments in view of facilitating cross-border commercial activities.[178] While the preparatory work is still going on[179] and the type, model and scope are yet to be determined, the Judgments Project arguably entails an important opportunity to enhance legal certainty and coordination among different jurisdictions, including EU Member States and Japan.

176. Magnus, *supra* n. 96, at pp. 100-101.

177. *Report of the Council on General Affairs and Policy of the Conference of 17 to 20 April 2012*, p. 17, available at: <www.hcch.net/upload/wop/genaff2012report.pdf>.

178. See 'Conclusions and Recommendations of the Expert Group on Possible Future Work on Cross-border Litigation in Civil and Commercial Matters' (Work. Doc. No. 2 of April 2012) and 'Ongoing Work on International Litigation and Possible Continuation of the Judgments Project' (Prel. Doc. No. 5 of March 2012), available at: <www.hcch.net/index_en.php?act=text.display&tid=150>.

179. See 'Report of the Working Group Meeting' (Prel. Doc. No. 3 of March 2013, Annex 1) and 'Report of the Experts' Group Meeting' (Prel. Doc. No. 3 of March 2013, Annex 2); also *Report of the Council on General Affairs and Policy of the Conference of 9 to 11 April 2013*, available at: <www.hcch.net/upload/wop/genaff2013report_en.pdf>.