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## Jurisdictional Theory "Made in Japan": Convergence of U.S. and Continental European Approaches

Akihiro Hironaka

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# Jurisdictional Theory “Made in Japan”: Convergence of U.S. and Continental European Approaches

*Akihiro Hironaka\**

## ABSTRACT

*Recent Japanese cases concerning international jurisdiction illustrate a convergence of two distinct legal approaches to the treatment of jurisdictional issue—a rule-based, inflexible approach in Continental European countries and a standard-based, flexible approach in the United States. Japan’s unique framework, as explained in this Article, might provide a useful perspective to solve the difficult question currently imposed on the Hague Conference: How is it possible to achieve comprehensive harmonization of the jurisdictional systems of the world?*

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## I. INTRODUCTION\*\*

In designing legal systems that govern judicial decisions on jurisdictional issues, two competing underlying policies must be considered: one is predictability and ease of administration, and the

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\*\* This Article is based on a part of the author's unpublished LL.M. paper submitted to Professor Joseph W. Singer and the author's unpublished seminar paper submitted to Professor Arthur T. von Mehren, both in the spring 2003 term at Harvard Law School. The author would like to thank both professors for their insightful comments on the earlier drafts of these papers and on his presentation at the seminar. The author also would like to thank his classmates from all over the world who participated in Professor von Mehren's seminar for their comments on the presentation, and Georg Stengel (Associate, von Boetticher Hasse Lohmann) for his comments from a German law perspective. In addition, many thanks to Shane McNamara (of Nishimura & Partners) and Paula Maute (in Cambridge) for editorial assistance. The opinions presented in this Article are the personal views of the author and not those of his clients, Nishimura & Partners, or its clients. The comments, analysis, and opinions in this Article are based on the law as of May 1, 2004.

other is fairness in litigation.<sup>1</sup> It is generally accepted that the former policy underlies the Continental European *rule*-based approach, while the latter policy underlies the U.S. *standard*-based approach. Jurisdictional issues under a *rule*-based approach are decided based on provisions codified by a legislature. Under this approach, as typified in Germany, judges are supposed to apply the provisions faithfully to each case and are given little discretion in deciding jurisdictional issues. Jurisdictional issues under a *standard*-based approach are decided in accordance with a certain standard, such as “minimum contacts.”<sup>2</sup> Under this approach, typified in the United States, judges are supposed to evaluate various relevant factors presented in each case and decide whether each case falls within the given standard. Under the *standard*-based approach, judges are given broad discretion in evaluating the relevant factors. This approach occasionally results in similar fact patterns being decided in different ways by different judges.<sup>3</sup> In the negotiations for the Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, it was evident that the fundamental difference between these two major regimes is impeding efforts to harmonize jurisdictional systems globally and comprehensively.<sup>4</sup>

In Japan, the framers of the modern government created provisions concerning jurisdiction in 1890 in the Code of Civil Procedure, which was modeled after the German Code of Civil Procedure.<sup>5</sup> Even under the current Japanese Code of Civil Procedure<sup>6</sup> (*Minji Soshō-hō* or CCP), many jurisdictional provisions have their counterparts in the current German Code of Civil

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1. Arthur T. von Mehren, *Theory and Practice of Adjudicatory Authority in Private International Law: A Comparative Study of the Doctrine, Policies and Practices of Common- and Civil-Law Systems*, 295 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 68 (2003) (discussing “ease of administration and predictability” and “litigational fairness” as two sets of basic policies that control the design of jurisdictional provisions applicable in multi-state litigation).

2. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (“[D]ue process requires only that . . . [the defendant] have certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”).

3. See, e.g., Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 24, 57-59 (1992) (defining rules and standards).

4. Linda J. Silberman, *Can the Hague Judgments Project Be Saved?: A Perspective from the United States*, in A GLOBAL LAW OF JURISDICTION AND JUDGMENTS: LESSONS FROM THE HAGUE 167-68 (John J. Barcelo & Kevin M. Clermont eds., 2002).

5. Yasuhei Taniguchi, *The 1996 Code of Civil Procedure of Japan—A Procedure for the Coming Century?*, 45 AM. J. COMP. L. 767, 767 (1997).

6. MINJI SOSHŌ-HŌ [CODE OF CIVIL PROCEDURE], Law No. 109 of 1996 (effective Jan. 1, 1998, hereinafter CCP); see CIVIL PROCEDURE IN JAPAN (Yasuhei Taniguchi et al. eds., rev. 2d ed. 2000).

Procedure.<sup>7</sup> With this background, one might expect Japanese courts to take a Continental European approach in determining jurisdictional issues. In 1981, the Japanese Supreme Court used a *rule*-based, inflexible approach in applying the CCP provisions in its leading decision, *Malaysian Airline System Berhad v. Gotō*.<sup>8</sup> The Japanese lower courts, however, gradually shifted their position from a formalistic *rule*-based approach to an ad hoc, *standard*-based approach, as is used by U.S. courts. Finally, in 1997, the Japanese Supreme Court endorsed this ad hoc approach in *K.K. Family v. Miyahara*.<sup>9</sup> But even under the current ad hoc approach, Japanese courts are generally supposed to consider the jurisdictional rules codified in the CCP. Thus, the current status of the Japanese jurisdictional system presents a unique convergence of two distinct legal regimes: that of Continental Europe and that of the United States. This Article describes Japan's unique jurisdictional system in order to provide a new perspective in this area.

## II. JAPANESE VENUE PROVISIONS IN THE CODE OF CIVIL PROCEDURE

### A. Introductory Remarks

The basic structure of the CCP's provisions concerning venue<sup>10</sup> (the geographical allocation of judicial business among courts) has not

7. See ELIOTT J. HAHN, JAPANESE BUSINESS LAW AND THE LEGAL SYSTEM 81 (1984) (stating that Japan's rules of jurisdiction are virtually identical to those of Germany).

8. 35 MINSHŪ 1224 (Sup. Ct., Oct. 16, 1981); see *infra* Part III.B.

9. 51 MINSHŪ 4055 (Sup. Ct., Nov. 11, 1997); see *infra* Part III.D.

10. I use the term "*venue* provisions" in this Article to mean provisions concerning the allocation of judicial business codified in the CCP. "*Venue*" refers to venues to which *domestic* cases are allocated within Japan. Japanese courts had interpreted that the framers designed these provisions for *domestic* cases only, and they applied these venue provisions to *international* cases *mutatis mutandis*, as is explained below. But the Japanese Supreme Court implicitly denied this premise in a recent decision in *K.K. Family v. Miyahara*, 51 MINSHŪ 4055, 4058 (Sup. Ct., Nov. 11, 1997) and implied that these provisions were designed to be applied to *international* cases as well. See Hiroshi Takahashi, *Annotated Case No. 54*, in HEISEI 11 NENDO SAIKŌ SAIBANSHO HANREI KAISETSU [ANNOTATION ON SUPREME COURT DECISIONS OF THE 199 TERM] 1320, 1334-35 (2002); see also Yasuhiro Fujita, *Iwayuru "Kokusai Minji Soshō-hō" naru Gainen no Yūgai-mueki-sei ni tsuite* [On the Harmfulness and Meaninglessness of the Concept "Law of International Civil Procedure"], 283 HANREI TAIMUZU 30 (1973); Yasuhiro Fujita, *"Kokusai Saiban Kankatsu Hōki" to Sono Hikakuhō teki Kenkyū* [Provisions of "International Judicial Jurisdiction" and Their Study from a Perspective of Comparative Law], 856 HANREI TAIMUZU 10 (1994). But I maintain the wording "*venue* provisions" in this Article to distinguish clearly rules codified in the CCP from ad hoc jurisdictional standards introduced by judicial decisions after *Malaysian Airline Sys. Berhad v. Gotō*, 35 MINSHŪ 1224 (Sup. Ct., Oct. 16, 1981), which I discuss in *infra* Part III.C.1. On the other hand, I use the word "*jurisdiction*" to express competence of courts in *international* cases.

changed since the enactment of the original code of civil procedure<sup>11</sup> in 1890, although some important additions and amendments were made in 1926.<sup>12</sup> Even with the overhaul of the civil procedure system by the enactment of the current CCP in 1996, the substance of most venue provisions remained untouched.<sup>13</sup> This means that the basic venue provisions have remained the same for more than 110 years. Since the 1981 *Malaysian Airline* case,<sup>14</sup> these CCP venue provisions have been applied or applied *mutatis mutandis* in international jurisdictional matters.<sup>15</sup>

The venue provisions in the original code of civil procedure enacted in 1890 were modeled after the German Code of Civil Procedure, in which the venue provisions are classified into two categories: (1) general venue (*futsū-saibanseki* or *allgemeiner Gerichtsstand*) and (2) special venue (*tokubetsu-saibanseki* or *besonderer Gerichtsstand*). This basic framework is still maintained in the current CCP.<sup>16</sup>

### B. General Venue

First, the CCP provides that a lawsuit may be filed at a place where "general venue" of the defendant exists.<sup>17</sup> "General venue" means a geographical region or area in which a court has authority to adjudicate the case irrespective of the type or substance of the case.<sup>18</sup> In each case where the defendant is a natural person, the general venue of the defendant is in which the defendant has a "residence" (*jūsho*).<sup>19</sup> In each case in which the defendant is a *domestic* corporation established for commercial purposes, the general venue of the defendant is its "principal place of business."<sup>20</sup> In each case in which the defendant is a *foreign* corporation, the general venue of the defendant is its "principal place of business in Japan."<sup>21</sup> These provisions are based on the *actor sequitur forum rei* principle, which originated in Roman law and is widely accepted in many countries.

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11. MINJI SOSHŌ-HŌ [CODE OF CIVIL PROCEDURE], Law No. 29 of 1890 (effective Jan. 1, 1891).

12. Law No. 29 of 1926.

13. Compare CCP arts. 4, 5 and 7 with arts. 1-21 of the original CCP.

14. *Malaysian Airline Sys. Berhad v. Gotō*, 35 MINSHŪ 1224 (Sup. Ct., Oct. 16, 1981).

15. Of course, these provisions are applied directly in *domestic* cases.

16. See CCP arts. 4, 5 and 7.

17. CCP art. 4(1).

18. HAJIME KANEKO, SHINSHŪ MINJI SOSHŌ-HŌ TAIKEI [SYSTEM OF CODE OF CIVIL PROCEDURE] 80 (enl. ed. 1965).

19. CCP art. 4(2).

20. CCP art. 4(4); see 1 TSUNAHIRO KIKUI & TOSHIO MURAMATSU, MINJI SOSHŌ-HŌ [Code of Civil Procedure] 65 (completely rev. & supplemented ed. 1993).

21. CCP art. 4(5).

The last provision concerning foreign corporations explained above has no counterpart in the German Code of Civil Procedure.<sup>22</sup> It was added in the 1926 revisions to the CCP.<sup>23</sup> This important provision recognizes broad grounds for jurisdiction over foreign corporations. For example, a Japanese corporation, Alpha Auto in Tokyo, transacted with the New York head office of a U.S. corporation, Beta Bank, and the Tokyo office of Beta Bank was not involved in the transaction. A dispute later arose between Alpha Auto and Beta Bank, and Alpha Auto wanted to file a lawsuit against Beta Bank. Because the CCP provides that there is a general jurisdiction for a foreign corporation at its principal place of business in Japan, Alpha Auto may file a lawsuit in Japan even if Beta Bank's Tokyo office was not involved in the transaction and dispute. The reasonableness of such treatment may be arguable,<sup>24</sup> but this would be the outcome of any case in which the provision is formalistically applied. In fact, this is the outcome that the legislator intended when it added the provision in 1926.<sup>25</sup>

### C. Special Venue

#### 1. Concept

Second, a lawsuit may be filed at any place where "special venue" exists. "Special venue" exists when the court has authority to adjudicate according to the type or substance of the case as stated in

22. A separate provision, art. 5(v), provides that "a suit against a person maintaining an office or place of business and that concerns the affairs of such office or place of business . . . may be filed before the court governing . . . the place where the office or place of business is located." CCP art. 5(v). Contrary to art. 4(5) explained in the text above, this provision requires a relationship between the dispute and the business of the local office. *Id.*; see also Zivilprozeßordnung [ZPO] art. 21(1) (F.R.G.), Council Regulation 44/2001, art. 5(5), 2001 O.J. (L 12) 1, 4; Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, art. 5(5). This CCP art. 5(v) is a special venue provision, which I explain later in this Article, and is not a general venue provision.

23. Fujita, "Kokusai Saiban Kankatsu Hōki" to Sono Hikakuhō teki Kenkyū, *supra* note 10, at 15.

24. At the Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, participating countries seriously debated whether cases in which the defendant performed some business activities in the forum state but where the dispute was not related to those activities should be subject to the jurisdiction of the place of such activities. But the debate was not reconciled. See *Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference 6 - 20 June 2001*, Hague Conference on Private International Law, art. 18(2)(e), available at <http://www.hcch.net/e/workprog/jdgm.html>.

25. See Fujita, "Kokusai Saiban Kankatsu Hōki" to Sono Hikakuhō teki Kenkyū, *supra* note 10, at 16 (explaining that an old case, in which a Russian bank having a branch in Japan was sued in Japan for a transaction in China, motivated the legislator to add the general venue provision for foreign corporations).

the CCP.<sup>26</sup> Special venue is admitted in addition to general venue. The venue provision that provides that a tort action may be filed at the place of the tort is an example of a provision for special venue.<sup>27</sup> The provisions that specify “the place of property”<sup>28</sup> and “the place of business”<sup>29</sup> as places of venue are also examples of special venue in the CCP.

This distinction between “general venue” and “special venue” under Japanese law is not the same as the distinction between “general jurisdiction” and “specific jurisdiction” under U.S. case law.<sup>30</sup> The grounds for “special venue” under Japanese law, like those of German law, are specified in accordance with the type of litigation. The determination of venue may be made *ex ante*, without regard to the particular case before the court.<sup>31</sup> On the other hand, “specific jurisdiction” under U.S. law is determined *ex post* and on a case-by-case basis in light of the circumstances of each specific case before the court.<sup>32</sup>

## 2. Example of a Problematic Provision: Place of Performance of Obligation

Some venue provisions, if applied formalistically to international cases, might lead to unreasonable results, especially for particular defendants in certain circumstances. The following problem, caused by disharmony between procedural law and substantive law brought about in the process of implantation of European legal systems in Japan, relates to one particular provision.

Article 5(i) of the CCP provides that “a suit concerning a property right” may be filed before the court that governs “the place of performance of the obligation.”<sup>33</sup> This provision is one of the special venue provisions, and it is modeled after the German Code of Civil Procedure, which currently provides that “[t]he court of the place at which the obligation in dispute is to be performed shall have jurisdiction over disputes arising out of contractual relations or the

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26. KANEKO, *supra* note 18, at 81.

27. CCP art. 5(ix).

28. CCP art. 5(iv). This provision is modeled after ZPO art. 23.

29. CCP art. 5(v). As explained, if this place is the *principal* place of business in Japan, then the plaintiff may maintain its suit at such place as general venue described in art. 4(5).

30. See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984); see also Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966) (offering descriptions of general and specific jurisdiction in U.S. courts).

31. Von Mehren, *supra* note 1, at 64.

32. See *id.* at 65.

33. CCP art. 5(i).



existence thereof.”<sup>34</sup> In Germany, if the “place at which the obligation in dispute is to be performed” is not designated in the contract, then the place of the *obligor* is deemed to be such place.<sup>35</sup> Therefore, in this situation, the plaintiff in a coercive action must file a lawsuit where the defendant resides if the “place at which the obligation in dispute is to be performed” is not designated in the contract.<sup>36</sup> Such a conclusion is consistent with the *actor sequitur forum rei* principle.

In contrast, if a contract fails to designate the place of the performance of the obligation, Japanese substantive law dictates that the place of the *obligee* is the place of performance.<sup>37</sup> This means that the plaintiff in a coercive action may file a lawsuit where the plaintiff resides if the parties failed to designate the place of the performance of the obligation in the contract. In addition, according to several lower court decisions in domestic cases, even if the parties agreed on the place of performance of the obligation, when one party fails to perform the obligation and the other party seeks pecuniary damages, the place of the *obligee*, rather than the place of performance designated in the contract for the original obligation, has been deemed to be the place of payment of such pecuniary damages.<sup>38</sup> Therefore, in this view, the court’s venue is the place of the *obligee* in this situation as well.

This conclusion substantially undermines the *actor sequitur forum rei* principle. This conclusion has generally been accepted with reluctance as a defect of the CCP in the context of domestic litigation.<sup>39</sup> But the burden placed on the defendant by this flaw in the CCP is much greater in international litigation than in domestic litigation. Therefore, as discussed later, several courts have hesitated to apply this provision to international litigation.<sup>40</sup>

Furthermore, it becomes an issue whether this provision concerning the place of performance of the obligation should be applied not only to contract cases but also to tort cases. The problem arose because the 1926 revision expanded the CCP provision’s scope

34. ZPO art. 29(1); see CHARLES E. STEWART, GERMAN COMMERCIAL CODE & CODE OF CIVIL PROCEDURE IN ENGLISH 196 (2001).

35. Bürgerliches Gesetzbuch [BGB] art. 269 (F.R.G.).

36. BGB art. 269.

37. MINPŌ [CIVIL CODE], Law No. 89 of 1896, art. 484; SHŌHŌ [COMMERCIAL CODE], Law No. 48 of 1899, art. 516.

38. In the case of domestic litigation, see *X v. Y*, 15 MINSHŪ 2149 (Daishin’in, Nov. 8, 1936); *K.K. Nakamura Yōkei Fukajō v. Chin*, 909 HANREI TAIMUZU 269, 271 (Tokyo Dist. Ct., Aug. 30, 1995). Other courts took the position that the place of performance of obligation to pay such pecuniary damages is also governed by the parties’ agreement concerning the original obligation. See *Kurimoto v. Shinoda*, 20 TAIHAN MINROKU 21, 922 SHINBUN 26 (Daishin’in, Jan. 20, 1914); see also *X v. Y*, 2465 SHINBUN 12, 14 HYŌRON MINSO 429 (Daishin’in, Apr. 25, 1925).

39. See KANEKO, *supra* note 18, at 83 (questioning legitimacy of this provision).

40. See *infra* Part III.C.1.

from contracts cases to all cases involving "rights of property,"<sup>41</sup> including torts.<sup>42</sup> Without hesitation, Japanese courts have applied this provision to domestic tort cases.<sup>43</sup> But because of the flaw in this provision explained above, most courts<sup>44</sup> denied the applicability of this provision to international tort cases because there is a special provision for tort cases in the CCP.<sup>45</sup>

Scholars have asserted that several CCP venue provisions, like this provision, are problematic when applied formalistically in international cases.<sup>46</sup> As will be explained below, these criticisms have influenced many courts to depart from mechanical application of CCP venue provisions after *Malaysian Airline*.

### III. JAPANESE CASE LAW REGARDING INTERNATIONAL JURISDICTION

#### A. Before *Malaysian Airline*

Before the Japanese Supreme Court decision in *Malaysian Airline System Berhad v. Gotō*,<sup>47</sup> lower courts were split in how they determined international jurisdictional issues. The courts had not agreed on whether they should be strictly bound by CCP provisions in deciding jurisdictional issues in international cases.

One tendency of courts before *Malaysian Airline*, even though it was not necessarily prevailing, was to balance various interests or considerations and not be bound strictly by the CCP venue provisions.<sup>48</sup> In this sense, the inclination toward litigational fairness—rather than the formalistic application of venue provisions—existed in Japanese case law before *Malaysian Airline*. For example, in *Yabutani v. Boeing Co.*,<sup>49</sup> explained below, when the

41. 1 KIKUI & MURAMATSU, *supra* note 20, at 67.

42. *Id.* at 70.

43. *See id.*

44. Enterprise Konma K.K. v. K.K. Saniclean Honbu, 1561 HANREI JIHŌ 84, 91 (Tokyo Dist. Ct., Apr. 25, 1995); Kojima v. Chin, 790 KIN'YŪ SHŌJI 32 (Tokyo Dist. Ct., June 1, 1987); Greenlines Shipping Co. v. California First Bank, 525 HANREI TAIMUZU 132, 137 (Tokyo Dist. Ct., Feb. 15, 1984).

45. CCP art. 5(ix); *see supra* Part II.C.1.

46. CCP art. 4(5) (the principal place of business in Japan, explained above), art. 5(iv) (the place of defendant's property, a provision similar to ZPO art. 23), and art. 7 (joinder of claims or parties) are examples of such problematic provisions. For further explanation of CCP art. 7, *see infra* note 119.

47. 35 MINSHŪ 1224 (Sup. Ct., Oct. 16, 1981).

48. *See* KAZUNORI ISHIGURO, GENDAI KOKUSAI SHIHŌ-JŌ [CONTEMPORARY CONFLICT OF LAWS I] 319-20 (1986) (commenting that *Yabutani, infra*, is a case in which the court tried to balance interests and that the court's decision in *Yabutani* is in contrast with the formalistic approach seen in *Malaysian Airline*).

49. 754 HANREI JIHŌ 58, 312 HANREI TAIMUZU 241 (Tokyo Dist. Ct. Interlocutory J., July 24, 1974), an excerpt translated in 19 JAPANESE ANN. INT'L L. 225 (1975).

court interpreted the phrase "the place of the tort," the court aimed to balance the various interests of the parties and the convenience of adjudication.<sup>50</sup>

In this case, the plaintiffs claimed in a lawsuit against Boeing that they suffered damage as a result of an airplane crash that occurred in Tokyo Bay on February 4, 1966, allegedly because of a defect in the airplane. In this case, the Tokyo District Court, after balancing the various factors involved in the case, found the jurisdiction of Japanese courts as the place of the accident.

[W]e believe that Japan should be . . . considered ["the place of the tort"]. Of course, . . . the "place of accident" may not properly be considered a "place of the tort" if . . . the "place of the accident" is too isolated to be foreseen by the tortfeasor and the disadvantage suffered by the tortfeasor of having to defend the lawsuit brought at that place is markedly greater than the benefits. . . . In the present case, however, the fact that *the defendant . . . is a corporation possessing a large amount of capital and engaged in the manufacture, etc., of aircraft capable of flying freely all over the world*, with moreover many aircraft manufactured by it publicly known to be in use in Japan, together with the fact that the nature of aircraft is such that an accident affecting human life or limb would be inevitable if the aircraft manufactured by the defendant were defective, leads us to the conclusion that Japan, the place where the effects of the accident occurred, is clearly far from an isolated place not at all foreseen by the defendant. (Emphasis added to compare with *Okuma, infra*.)<sup>51</sup>

The decision in *Yabutani* implied that the court would not apply the CCP's provision of "the place of the tort" if the accident had occurred at a place that "is too isolated to be foreseen by" the foreign defendant. The court denied an approach applying venue provisions formalistically to international cases. Formalistic application of venue provisions would not have allowed the court to make its conclusion depending on specific circumstances particular to the case, such as the nature of the defendant or the defendant's foreseeability of certain occurrences.

### B. *Malaysian Airline System Berhad v. Gotō*

In *Malaysian Airline*,<sup>52</sup> the Supreme Court of Japan handed down a decision regarding international jurisdiction in a monetary

50. Another example of a case in which a court balanced various interests in its jurisdictional determination is *Yamazaki v. K.K. Takenaka Kōmuten*, 925 HANREI JIHŌ 78 (Tokyo Dist. Ct. Interlocutory J., Mar. 20, 1979).

51. *Yabutani*, 754 HANREI JIHŌ at 62-63, 312 HANREI TAIMUZU at 246. This translation is based on a translation in JAPANESE ANN. INT'L L., *supra* note 49, at 228-29, with some modification.

52. *Malaysian Airline Sys. Berhad v. Gotō*, 35 MINSHŪ 1224 (Sup. Ct., Oct. 16, 1981), an excerpt translated in 26 JAPANESE ANN. INT'L L. 122 (1983).

damages case for the first time since the Second World War. This decision set a precedent concerning international jurisdiction.

The *Malaysian Airline* case was filed in connection with an airplane crash in Johor Bahru, Malaysia, on December 4, 1977.<sup>53</sup> The plaintiff, Tomio Gotō, boarded a plane operated by Malaysian Airline from Penang to Kuala Lumpur, both cities in Malaysia.<sup>54</sup> The head office of Malaysian Airline was in Kuala Lumpur.<sup>55</sup> Malaysian Airline had an office in Tokyo, but Mr. Gotō bought his ticket in Malaysia.<sup>56</sup> Therefore, the Tokyo office was not involved in the air transportation contract between Mr. Gotō and Malaysian Airline. The plane crashed<sup>57</sup> and Mr. Gotō died in the accident.<sup>58</sup> His wife and children filed a suit in the Nagoya District Court in Japan seeking payments of around ¥40 million for damage allegedly caused by a breach of the air transportation contract and inherited by the plaintiffs from Mr. Gotō.<sup>59</sup> The defendant challenged the international jurisdiction of a Japanese court.<sup>60</sup> In this case, the flight had been booked in Malaysia, and transportation was made within that country; therefore, no issue was raised concerning the provisions in the Warsaw Convention for the Unification of Certain Rules Relating to International Transportation by Air.<sup>61</sup> The Nagoya District Court did not find jurisdiction in this case,<sup>62</sup> but the Nagoya High Court (the intermediate appellate court)<sup>63</sup> and the Supreme Court did.<sup>64</sup>

The Supreme Court first held that the venue provisions in the CCP do not apply to international cases<sup>65</sup> and that jurisdictional rules must be controlled by "general principles of justice" (*jōri*) based on equity between the parties and a fair and speedy trial.<sup>66</sup> But the court further held that if any ground for venue provided in the CCP is

53. 35 MINSHŪ at 1226.

54. *Id.*

55. *Id.* at 1227.

56. *Id.* at 1226.

57. The airplane was hijacked and the chief pilot was shot and killed. The airplane crashed as a consequence.

58. *Malaysian Airline Sys. Berhad*, 35 MINSHŪ at 1226.

59. *Id.*

60. *Gotō v. Malaysian Airline Sys. Berhad*, 35 MINSHŪ 1236, 1239-41 (Nagoya Dist. Ct., Mar. 15, 1979).

61. See ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND THE QUEST FOR REASONABLENESS: ESSAYS IN PRIVATE INTERNATIONAL LAW 48 n.7 (1996).

62. *Gotō*, 35 MINSHŪ at 1239.

63. *Gotō v. Malaysian Airline Sys. Berhad*, 35 MINSHŪ 1241, 1242 (Nagoya High Ct., Nov. 12, 1979).

64. *Malaysian Airline Sys. Berhad*, 35 MINSHŪ at 1227.

65. The Supreme Court implicitly denied in a recent case the premise that the CCP venue provisions were intended to be applied in domestic cases only. See *supra* note 10.

66. *Malaysian Airline Sys. Berhad v. Gotō*, 35 MINSHŪ 1224, 1226 (Sup. Ct., Oct. 16, 1981).

found for the Japanese court, then, according to “general principles of justice,” the defendant is subject to the international jurisdiction of Japan.”<sup>67</sup> In that sense, the venue provisions in the CCP are applied *mutatis mutandis* to international cases. In this case, the defendant had appointed its representative in Japan and had a “principal place of business in Japan”—i.e., the Tokyo office.<sup>68</sup> Therefore, there was a ground for venue under art. 4(3) (of the original CCP, which corresponds to art. 4(5) of the current CCP), which provides general venue for a foreign corporation that has a place of business in Japan. The Supreme Court approved the Nagoya High Court’s decision finding jurisdiction over the case.<sup>69</sup>

A majority of scholars criticized the reasoning of the decision from two perspectives. These criticisms led to changes in Japanese practices in international jurisdictional matters.

The first criticism focused on a concern that the reasoning behind this decision could lead the courts to assume excessively broad jurisdiction over foreign defendants.<sup>70</sup> They claimed that the mere fact that Malaysian Airline had an office in Japan did not justify the Court’s decision that it had jurisdiction over the airline company when the dispute had no relationship with the business of that office.<sup>71</sup> The scholars criticized the way in which the Supreme Court formalistically applied the CCP’s venue provision to international cases.<sup>72</sup> They asserted that the venue provisions in the CCP should not have been applied without appropriate modification, because the provisions are intended to be applied in domestic cases only.<sup>73</sup> They further asserted that the Supreme Court should have limited the applicability of the “general venue” provision concerning the “principal place of business in Japan” to cases in which the defendant’s office in Japan had some relationship to the dispute.<sup>74</sup>

67. *Id.* at 1226-27.

68. *Id.* at 1227.

69. *Id.*

70. See, e.g., Yoshimitsu Aoyama, *Kokusai Saiban Kankatsuken* [International Judicial Jurisdiction], 16 HÔGAKU KYÔSHITSU 83, 83 (1981) (on file with author) (criticizing the reasoning of the decision, but supporting its conclusion); Sueo Ikehara, *Kokusaiteki Saibankankatsuken* [International Jurisdiction], in 7 SHIN JITSUMU MINJI SOSHÔ KÔZA [NEW LECTURES ON PRACTICE OF CIVIL PROCEDURE] 3, 24-25 (Chûichi Suzuki & Akira Mikazuki eds., 1982); see also Masato Dôgauchi, *Kokusai Saiban Kankatsuken* [International Judicial Jurisdiction], in 1 CHÛSHAKU MINJI SOSHÔ-HÔ [COMMENTARY ON CODE OF CIVIL PROCEDURE] 86, 100-01 (Kôji Shindô & Takeshi Kojima eds., 1991).

71. See Aoyama, *supra* note 70, at 83; Ikehara, *supra* note 70, at 24-25; Dôgauchi, *supra* note 70, at 100-01.

72. *Id.*

73. See *supra* notes 10, 60.

74. Compare ZPO art. 21(1), and Council Regulation 44/2001, art. 5(5), 2001 O.J. (L 12) 1, 4, and Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, art. 5(5). See also LOWENFELD, *supra* note 61, at 50. This interpretation virtually makes CCP art. 4(5) (general venue at a

The second criticism addressed the fact that the Supreme Court did not explicitly admit the possibility of an exception to the formalistic application of venue provisions in the CCP.<sup>75</sup> In general, when Japanese courts establish certain legal rules or principles to be invoked in following court decisions, they tend to mention explicitly possible exceptions to such rules or principles as “safety valves” by inserting language such as “other than in cases where exceptional circumstances exist.” But in *Malaysian Airline*, the Supreme Court did not explicitly state such a possibility in the language of the decision. Scholars criticized this, claiming that such inflexible treatment, relying only on the venue provisions of the CCP cannot accommodate various situations in international cases and cannot achieve fairness in all cases.<sup>76</sup>

In sum, these critics expressed a concern over the courts’ inflexibility in being bound by the CCP’s venue provisions when determining international jurisdiction. But the position of the Supreme Court in *Malaysian Airline* may be supported for its predictability and ease of administration of jurisdictional rules.

### C. *Developments of Lower Court Decisions after Malaysian Airline*

#### 1. Introductory Remarks

After *Malaysian Airline*, some Japanese lower courts followed the position of the Supreme Court by using a formalistic application of the CCP venue provisions.<sup>77</sup> But in response to the two criticisms on the Supreme Court’s reasoning in *Malaysian Airline*, many lower courts rejected the formalistic attitude of that decision.

First, many lower courts rejected the formalistic application of the CCP venue provisions. These courts considered factors relevant to international litigation, such as the burden placed on foreign but not domestic defendants.<sup>78</sup> For this reason, these courts generally

principal place of business in Japan) useless in international cases, because a separate provision, CCP art. 5(v) (special venue at a place of business) allows a court at the place of business to adjudicate any case in which that place has some relationship with the dispute.

75. *E.g.*, Dōgauchi, *supra* note 70, at 100-01; Masato Dōgauchi, *Saikō Saibansho Minji Hanrei Kenkyū* [Notes on Civil Cases of the Supreme Court], 105 HŌGAKU KYŌKAI ZASSHI 974, 983, 985-86 (1988).

76. Dōgauchi, *supra* note 70, at 100-01; Dōgauchi, *supra* note 75, at 983, 985-86.

77. *E.g.*, X v. Takahashi, 476 HANREI TAIMUZU 118, 118 (Tokyo Dist. Ct., Apr. 22, 1982) (ruling on the venues concerning the “place of performance of obligation” and the “place of the tort”); K.K. Yamashō v. Trans-Asiatic, Inc., 460 HANREI TAIMUZU 118, 119-20 (Tokyo Dist. Ct. Interlocutory J., Nov. 27, 1981) (ruling on the venue concerning the “place of performance of obligation”).

78. *See, e.g.*, Greenlines Shipping Co. v. California First Bank, 525 HANREI TAIMUZU 132, 135 (Tokyo Dist. Ct., Feb. 15, 1984).

held that the venue rules of the CCP must be modified in favor of foreign defendants when applied to international cases. For example, a lower court rejected the idea that a foreign defendant's maintenance of an office in Japan is ground for jurisdiction even if the activity at that office has no relationship with the dispute.<sup>79</sup> Other courts, however, formalistically applied the provision.<sup>80</sup> Many courts modified the CCP's other problematic venue provisions when applying them to international cases.

The provision concerning "the place of performance of the obligation," as explained above,<sup>81</sup> is one example of such a problematic venue provision. At least one lower court applied this provision formalistically to international cases.<sup>82</sup> Another lower court restricted the applicability of this provision when it became an issue in an international case, despite the fact that there is no limitation in the language itself. The court suggested that this provision is to be applied only when the parties agreed on "the place of performance" unambiguously in the contract itself.<sup>83</sup>

Second, many lower courts acted in accordance with the second criticism of *Malaysian Airline* explained above, asserting that even when a ground for venue pursuant to the CCP exists in Japan, international jurisdiction should be denied in certain circumstances. Proponents of the second criticism asserted that the courts should consider making exceptions to the outcome of the application of the CCP venue provisions. A lower court that agreed with this criticism held:

If any ground for venue provided in the CCP exists in Japan, unless there are *exceptional circumstances* (*tokudan no jijō*) that will lead a court to violate basic principles of civil trial [i.e., equity between parties

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79. *Id.* (denying jurisdiction because there was no relationship between the activity of the office in Japan and the dispute).

80. Tokyo Kaijō Kasai Hoken K.K. v. KLM Royal Dutch Airlines, 1075 HANREI JIHŌ 137, 140 (Tokyo Dist. Ct. Interlocutory J., Sept. 27, 1982) (aff'g jurisdiction without finding a relationship between the business of the office and the dispute).

81. See *infra* Part II.C.2.

82. *Takahashi*, 476 HANREI TAIMUZU at 118.

83. Barclays Bank Plc. v. K.K. Japan Planning Ass'n, 1509 HANREI JIHŌ 101, 104, 837 HANREI TAIMUZU 300, 303 (Tokyo Dist. Ct., Jan. 31, 1994) (holding that in a case where the *indirect* international jurisdiction is at issue in the proceedings of enforcement of a foreign judgment, this provision cannot be applied when the "place of performance of obligation" is determined by the choice-of-law rule of the forum state). "Indirect" jurisdiction is jurisdiction that is required as a precondition for recognition and enforcement of a foreign judgment under CCP art. 118(i) and MINJI SHIKKŌ-HŌ [CODE OF CIVIL EXECUTION], Law No. 4 of 1979, art. 24(3), as opposed to "direct" jurisdiction, which is required as a precondition for adjudication of such cases as are primarily discussed in this Article.

and speedy and fair trial], the principles of justice (*jōri*) require the court to exercise jurisdiction over the case. (Emphasis added.)<sup>84</sup>

Several lower courts followed this position, which has gradually become the mainstream approach. These decisions have employed an “exceptional circumstances” approach to defeat the jurisdiction of Japanese courts even when grounds for venue exist (i.e., denials of jurisdiction because of “exceptional circumstances.”) Some commentators have further asserted that, even when there is no ground for venue in Japan under the CCP, when “exceptional circumstances” exist, the court should find jurisdiction over the case (i.e., acceptance of jurisdiction because of “exceptional circumstances.”)<sup>85</sup> Several courts have held that certain problematic venue provisions should be applied only when “exceptional circumstances” exist,<sup>86</sup> and this position can be considered a type of such acceptance of jurisdiction because of “exceptional circumstances.”

In sum, although in *Malaysian Airline* the Supreme Court established the formula that “grounds for venue in the CCP = grounds for international jurisdiction,” lower courts subsequently held that “grounds for venue in the CCP ≠ grounds for international jurisdiction.”<sup>87</sup> This inequality manifested itself in both the modification or exemption of some CCP venue provisions and in the denial (or acceptance) of international jurisdiction by allowing exceptions on the basis of “exceptional circumstances.”

## 2. Examples of the “Exceptional Circumstances” Approach

Scholars commonly refer to lower courts’ use of “exceptional circumstances” after *Malaysian Airline* as the “exceptional circumstances” approach (*tokudan no jijō* approach).<sup>88</sup> As the “exceptional circumstances” approach became dominant, courts placed less and less importance on the interpretation of the venue

84. *Tokyo Kaijō Kasai Hoken K.K.*, 1075 HANREI JIHŌ at 140 (finding jurisdiction over the case holding that there is no such “exceptional circumstance” in the case).

85. Masato Dōgauchi, *Gaikoku Kōkūki Seizō Kaisha ni taisuru Seizōbutsu Sekinin Soshō no Kokusaiteki Saiban Kankatsuken* [International Jurisdiction of Product Liability Case against Foreign Manufacturer of Airplane], 310 HANREI HYŌRON 41, 44 (1984); HIDEYUKI KOBAYASHI, KOKUSAI TORIHIKI FUNSŌ [INTERNATIONAL TRANSACTION DISPUTE] 131 (3d ed. 2003).

86. *Nagan (Panama) S.A. v. Attica Shipping Co. S.A.*, 1275 HANREI JIHŌ 77, 80, 669 HANREI TAIMUZU 219, 222 (Tokyo Dist. Ct., July 28, 1987), an excerpt translated in 32 JAPANESE ANN. INT’L L. 161 (1989).

87. See Dōgauchi, *supra* note 70, at 101-02, 106. Professor Dōgauchi used this formula to express only the first tendency (the CCP venue provision ≠ grounds for international jurisdiction) described in my explanation above.

88. Dōgauchi, *supra* note 70, at 105; KOBAYASHI, *supra* note 85, at 125.



provisions in the CCP. Some courts even began circumventing interpretation of these provisions. In their decisions, such courts shifted their reasoning from a focus on interpretation of CCP provisions to balancing interests in determining the existence of "exceptional circumstances." The following two cases exemplify this tendency.

a. *Ōkuma v. Boeing Co.*

The court's decision in *Ōkuma v. Boeing Co.*<sup>89</sup> clearly demonstrates a formalistic interpretation of one of the CCP provisions regarding "the place of the tort" and the balancing of interests in the determination of "exceptional circumstances."

*Ōkuma* was a case instituted by families of victims of a 1964 helicopter crash that killed eight people and seriously injured one person in Fukuoka, Japan.<sup>90</sup> The helicopter was owned by the Air Self-Defense Force of Japan.<sup>91</sup> Investigators speculated that the accident was caused by a defect in a metal socket that supported the rear blades of the helicopter.<sup>92</sup> The defendant in this lawsuit was Boeing, but Boeing had not manufactured the helicopter or its components.<sup>93</sup> Another company, Vetrol, manufactured the particular metal helicopter socket. Boeing had acquired Vetrol based on an agreement in 1960 under which Boeing assumed the assets and debts of Vetrol.<sup>94</sup> Boeing's acquisition of Vetrol was completed before the 1964 crash of the helicopter.<sup>95</sup> Vetrol manufactured the helicopter at issue and sold it to the U.S. Air Force between 1955 and 1958.<sup>96</sup> The U.S. Air Force then sold the helicopter to the Air Self-Defense Force of Japan in 1960.<sup>97</sup>

The Tokyo District Court determined relatively easily that Japan was the "place of the tort."<sup>98</sup> The court held:

[T]here is a suspicion that a defect of the part of the helicopter manufactured by Vetrol caused the damage to the plaintiffs suffered as a result of the accident in Japan, and that the defendant assumed the liability to pay damages that would have been borne by Vetrol. Thus, it can be said that the damage of the plaintiffs occurred in Japan as a result of a tort of Vetrol, which eventually became a tort of the defendant. Therefore, the basis of jurisdiction prescribed in art. 15(1)

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89. 1113 HANREI JIHŌ 26 (Tokyo Dist. Ct. Interlocutory J., Mar. 27, 1984), an excerpt translated in 28 JAPANESE ANN. INT'L L. 248 (1985).

90. *Id.* at 27, 31.

91. *Id.* at 31.

92. *Id.* at 31-32.

93. *Id.*

94. *Ōkuma*, 1113 HANREI JIHŌ at 32.

95. *Id.*

96. *Id.* at 31.

97. *Id.*

98. *Id.* at 32.

[currently, art. 5(ix)] of the CCP exists in Japan, for Japan is deemed to be the place of the tort.<sup>99</sup>

The court further discussed whether there was an “exceptional circumstance” that required the court to deny its jurisdiction.

*[T]he defendant is a corporation that has substantial capital and is manufacturing aircrafts that fly all over the world and is performing other business activities, and its wholly owned subsidiary company, Boeing International Corp., has its office in Japan. . . . [In addition, t]he plaintiffs have their residences in Japan, where the tort was committed; and the Investigation Committee of the Air Self-Defense Force of Japan examined the cause of the crash in this case. In light of these facts, it cannot be said that the trial of this case would bring so much disadvantage for the defendant as to deprive it of the opportunity to protect itself; and it would bring no inconvenience for the court as to infringe upon the equity between parties and fair and speedy trial concerning the examination of the evidence. (Emphasis added.)<sup>100</sup>*

Holding as above, the court denied that “exceptional circumstances” existed and ruled that it had jurisdiction in this case.<sup>101</sup> By comparing the italicized portions in the interpretation of “the place of the tort” in *Yabutani* to the determination of “exceptional circumstances” in *Ōkuma*, it becomes clear that the weight of reasoning shifted from the interpretation of the CCP venue provision to the determination of “exceptional circumstances.”

#### b. Mukōda v. Boeing Co.

*Mukōda v. Boeing Co.*,<sup>102</sup> a Taiwanese air crash case, further exemplifies Japanese courts’ rationale and problems with the “exceptional circumstances” approach. In this case, Boeing manufactured the aircraft and United Airlines Inc. (UA) purchased it.<sup>103</sup> In 1976, after UA had used the aircraft for seven years, it sold the aircraft to Far Eastern Air Transport (FEAT), a Taiwanese airline company.<sup>104</sup> The aircraft crashed in Taiwan, about three minutes after departure from the airport in Taipei.<sup>105</sup> In this accident, eighteen Japanese, eighty-seven Taiwanese, four Canadians, and one American died.<sup>106</sup>

99. *Id.*

100. *Id.*

101. *Id.*

102. 1196 HANREI JIHŌ 87, 604 HANREI TAIMUZU 138 (Tokyo Dist. Ct., June 20, 1986), an excerpt translated in 31 JAPANESE ANN. INT’L L. 216 (1988).

103. 1196 HANREI JIHŌ at 92, 604 HANREI TAIMUZU at 142.

104. *Id.*

105. *Id.*

106. Hiroshi Matsuoka, *Taiwan ni okeru Kōkūki jiko ni kanrenshite Beikoku Hōjin ni taishite Teiki sareta Fuhō Kōi ni motozuku Songai Baishō Seikyū Soshō no Kokusai Saiban Kankatsu* [International Judicial Jurisdiction Over a Case Filed

After the accident, the Taiwanese authority, the China Civil Aeronautics Authority, organized a subcommittee to investigate the cause of the crash.<sup>107</sup> The members of the subcommittee included Taiwanese committee members as well as two U.S. investigators from the U.S. National Transportation Safety Board.<sup>108</sup> The Taiwanese subcommittee submitted a report on the result of the research, but it did not decisively state that the cause of the crash was a defect in the airplane.<sup>109</sup> The report suggested that the possibility of insufficient maintenance by FEAT caused the crash.<sup>110</sup> The aircraft's wreckage was submitted to a U.S. authority for investigation, and it was returned to the Taiwanese authority thereafter.<sup>111</sup>

Before a lawsuit was filed in Japan, the plaintiffs filed lawsuits against Boeing, UA, and FEAT<sup>112</sup> in a U.S. district court.<sup>113</sup> But the U.S. court dismissed their actions based on the doctrine of *forum non conveniens*, holding that a Taiwanese court was an appropriate forum.<sup>114</sup>

The families of the Japanese victims filed this lawsuit against Boeing and UA in Japan.<sup>115</sup> The plaintiffs claimed that the crash was caused by Boeing's defects in design and manufacture of the aircraft and its failure to repair and reinforce its defective parts.<sup>116</sup> Further, they claimed that UA should not have knowingly sold the defective aircraft to FEAT.<sup>117</sup>

The Tokyo District Court found a venue ground in the CCP based on the fact that UA had a Tokyo office. The court followed the formalistic application of the venue provisions concerning the "principal place of business in Japan" as in *Malaysian Airline*.<sup>118</sup> But the court circumvented decisions as to the applicability of art. 5 of the original CCP (which corresponds to art. 5(i) of the current CCP,

*Against U.S. Corporations Seeking Damages Caused by Torts Concerning an Air Crash Accident in Taiwan*], 343 HANREI HYÖRON 33, 33 (1987).

107. 1196 HANREI JIHÖ at 92, 604 HANREI TAIMUZU at 142.

108. *Mukōda v. Boeing Co.*, 1196 HANREI JIHÖ 87, 93, 604 HANREI TAIMUZU 138, 143 (Tokyo Dist. Ct., June 20, 1986).

109. 1196 HANREI JIHÖ at 92-93, 604 HANREI TAIMUZU at 142-43.

110. 1196 HANREI JIHÖ at 93, 604 HANREI TAIMUZU at 143.

111. *Id.*

112. Plaintiffs reached a settlement with FEAT in the amount of around ¥9 million per victim, which is nearly the upper limit under Taiwanese law, and the plaintiffs dismissed the complaint. Therefore, FEAT was not a defendant in the subsequent case at a Japanese court. KOBAYASHI, *supra* note 85, at 6. Professor Kobayashi was one of the attorneys for UA in *Mukōda* in a Japanese court.

113. *Nai-Chao v. Boeing Co.*, 555 F. Supp. 9, 10-11 (N.D. Cal. 1982), *aff'd*, *Cheng v. Boeing Co.*, 708 F.2d 1406 (9th Cir. 1983).

114. *Id.* at 11.

115. *Mukōda v. Boeing Co.*, 1196 HANREI JIHÖ 87, 87-88, 604 HANREI TAIMUZU 138, 138-39 (Tokyo Dist. Ct., June 20, 1986).

116. 1196 HANREI JIHÖ at 89, 604 HANREI TAIMUZU at 139.

117. *Id.*

118. 1196 HANREI JIHÖ at 92, 604 HANREI TAIMUZU at 142.

providing the venue as the place of the performance of the obligation) and art. 21 of the original CCP (which corresponds to art. 7 of the current CCP, providing the venue for the joinder of parties).<sup>119</sup> The court denied jurisdiction without clarifying its position on the applicability of art. 5 and art. 21 of the CCP to international cases, holding that “exceptional circumstances” to deny jurisdiction existed in this case.<sup>120</sup>

First, the court emphasized that important pieces of evidence and witnesses were located in Taiwan, and that the Japanese court had no means to obtain this evidence through judicial assistance because the Japanese and Taiwanese governments had no official diplomatic relationship with each another.<sup>121</sup> Second, although the plaintiffs asserted that they had exhausted their litigation funds through the lawsuits in the United States and that no funds remained to pursue another lawsuit in Taiwan, the court held that the plaintiffs had not submitted any evidence proving their assertion concerning their financial status.<sup>122</sup> Third, the court held that, even if the amount of damages in Taiwan would be lower than those in Japan, such a fact should not be considered in the determination of jurisdiction.<sup>123</sup> This third point of the decision can be interpreted as indicating that the court specifically noted the relationship between the applicable law and the choice of forum.<sup>124</sup>

The rationale in this decision was quite unconvincing. First, the court emphasized the unavailability of the evidence in Taiwan

119. *Id.* Art. 21 of the original CCP provided that if any one of the CCP venue grounds exists as to either of the claims in cases of joinder of *claims* or *parties*, the court has jurisdiction with respect to all of the claims. Under art. 7 of the current CCP, however, in cases of joinder of *parties*, the court has jurisdiction for all claims only when the claims by or against the parties are closely related. The treatment concerning joinder of *claims* was left unchanged with the enactment of the current CCP. Under either version of the provision concerning joinder of *parties*, a defendant of a case may be subject to jurisdiction of a court of Japan for the reason that his or her co-defendant is subject to jurisdiction of a court of Japan. For example, in a case in which A and B are co-defendants, B may be subject to jurisdiction of a court of Japan because A is subject to jurisdiction of a court of Japan. Many legal scholars have argued that this ground for venue for joinder of *parties* is too broad and exorbitant to admit as a ground for jurisdiction in international cases. See Yoshiaki Sakurada, *Shukanteki Heigō ni yoru Kankatsu-ken* [Jurisdiction due to Joinder of Parties], in SHIN - SAIBAN JITSUMU TAIKEI III [NEW - SYSTEM OF PRACTICE OF LITIGATION III] 127, 128-29 (Akira Takakuwa & Masato Dōgauchi eds., 2002).

120. *Mukōda v. Boeing Co.*, 1196 HANREI JIHŌ 87, 92-94, 604 HANREI TAIMUZU 138, 142-44 (Tokyo Dist. Ct., June 20, 1986).

121. 1196 HANREI JIHŌ at 93, 604 HANREI TAIMUZU at 143.

122. 1196 HANREI JIHŌ at 94, 604 HANREI TAIMUZU at 144.

123. *Id.*

124. Compare with the treatment, in the U.S., of *forum non conveniens* on this point in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254-55 (1981) (deciding that the unfavorable change in law may be given substantial weight in a decision of *forum non conveniens* when the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all).

because of the lack of an official diplomatic channel between Japan and Taiwan.<sup>125</sup> But commentators pointed out that the difficulty of obtaining evidence in Taiwan could have been resolved through unofficial channels between the two countries.<sup>126</sup> Furthermore, in this case several U.S. government officials participated in the subcommittee that investigated the cause of the accident, and the U.S. authority itself inspected the aircraft wreckage.<sup>127</sup> Even if a Taiwan court was more convenient than the Japanese court, inconvenience in the Japanese court was not a strong enough factor to exclude Japanese plaintiffs from obtaining relief at the place most convenient to them, because Japanese courts could have obtained necessary evidence from the U.S. authority that had been involved in the investigation.

Second, compared with the burden faced by the defendants, the plaintiffs' need to obtain a remedy in Japan was much more severe. In this case, the U.S. defendants did not challenge the jurisdiction of the Taiwanese courts. The U.S. defendants' burden would not have been much different if they had been required to appear in a Japanese court rather than a Taiwanese court. On the other hand, pursuing litigation in a Taiwanese court would have been much more burdensome than appearing in a Japanese court for the Japanese victims' families.

Third, although the decision concerning the relationship between the applicable law and the choice of forum in this decision is consistent with the prevalent Japanese theory, in determining whether "exceptional circumstances" existed, the court should have allowed some possibility for special consideration of the likelihood that substantially less damages would be awarded in Taiwan than in Japan. In this case, the plaintiffs resided in Japan and defendants were U.S. corporations; no Taiwanese was involved. If the standards of damages between the United States and Japan were at issue, then the reasoning in the decision might have been more plausible. But because none of the parties had a continuous relationship with Taiwan, invoking Taiwanese standards of damages in this case was somewhat fortuitous for the U.S. defendants. In the determination of "exceptional circumstances" in this case, the court should have considered that adjudication in a Taiwan court would have

125. *Mukōda*, 1196 HANREI JIHŌ at 93, 604 HANREI TAIMUZU at 143-44.

126. Hiroshi Yamamoto, *Taiwan ni okeru Taiwan Kokunai Kōkūgaisha Ryokakuki Tsuiraku Jiko no Nihonjin Izoku ni yoru Ryokakuki Seizō, Hanbaigaisha ni taisuru Songaibaishō Seikyū Soshō no Kokusai Saiban Kankatsu* [*International Judicial Jurisdiction Over a Case Where Families of Japanese Victims of Taiwanese Airplane Crash Accident in Taiwan Claimed Damages Against the Manufacturer and Seller of the Airplane*], 74 HŌGAKU KYŌSHITSU 132, 133 (1986); Matsuoka, *supra* note 106, at 39.

127. *Mukōda v. Boeing Co.*, 1196 HANREI JIHŌ 87, 93, 604 HANREI TAIMUZU 138, 143 (Tokyo Dist. Ct., June 20, 1986).

considerably lowered the amount of damages for the Japanese plaintiffs.<sup>128</sup>

Fourth, and most important, this decision appears to have been affected by the fact that the U.S. court had already dismissed the case based on the doctrine of *forum non conveniens*. Of course, neither the U.S. court nor the Japanese court was located at the place of the accident. But the interests these courts had in this case were clearly different. The U.S. court had no interest in adjudicating this case because the U.S. defendants did not request it, most of the plaintiffs in this case were not U.S. citizens,<sup>129</sup> and the accident took place far from the United States. On the other hand, the Japanese court should not have ignored its strong interest in providing plaintiffs who resided in Japan with an opportunity to obtain remedy efficiently. It might be said that this indifference as to convenience of Japanese plaintiffs is a characteristic tendency of Japanese courts. The *Family* case, discussed below, is an example of this tendency.

#### D. *Family K.K. v. Miyahara*

The so-called "exceptional circumstances" approach that developed after *Malaysian Airline* gradually became the mainstream of Japanese lower court decisions, and it was finally endorsed by the 1997 Supreme Court decision in *Family K.K. v. Miyahara*.<sup>130</sup>

The plaintiff in this case was a Japanese corporation that imported automobiles.<sup>131</sup> The defendant was a Japanese individual who had resided in Germany for more than twenty years, engaging in commercial transactions with Japanese corporations.<sup>132</sup> The plaintiff entered into an agreement with the defendant providing that the defendant would purchase automobiles on behalf of the plaintiff while the plaintiff would pay fees to the defendant for this arrangement.<sup>133</sup> The defendant requested that the plaintiff provide the defendant with cash for use in purchasing automobiles.<sup>134</sup> The plaintiff provided the defendant with ¥91,747,138 in accordance with this request.<sup>135</sup> The plaintiff began to mistrust the management of the funds by the

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128. Some of the plaintiffs subsequently filed an appeal to the Tokyo High Court, and they reached a settlement in which Boeing would pay the plaintiffs ¥2 million. KOBAYASHI, *supra* note 85, at 7.

129. *Nai-Chao v. Boeing Co.*, 555 F. Supp. 9, 19-20 (N.D. Cal. 1982), *aff'd*, *Cheng v. Boeing Co.*, 708 F.2d 1406 (9th Cir. 1983); Matsuoka, *supra* note 106, at 40.

130. 51 MINSHŪ 4055 (Sup. Ct., Nov. 11, 1997), *aff'g* LEX/DB No. 28011317 (Tokyo High Ct., May 31, 1993), *aff'g* LEX/DB No. 28033533 (Chiba Dist. Ct., Mar. 23, 1992), an excerpt translated in 41 JAPANESE ANN. INT'L L. 117 (1998).

131. *Id.* at 4056.

132. *Id.*

133. *Id.* at 4056-57.

134. *Id.* at 4057.

135. *Id.*

defendant and consequently proposed to settle accounts by a letter of credit (L/C), rather than by cash, and requested that the defendant return the outstanding amounts of the entrusted funds.<sup>136</sup> The defendant rejected the plaintiff's request to return the funds, and the plaintiff filed this lawsuit against the defendant in the Chiba District Court in Japan.<sup>137</sup> Both the district court and the Tokyo High Court ruled that Japanese courts had no jurisdiction over the case.<sup>138</sup> The plaintiff appealed to the Supreme Court.<sup>139</sup>

The Supreme Court also denied jurisdiction.<sup>140</sup> In this case, the applicability of the provision for venue at "the place of performance of the obligation"<sup>141</sup> was at issues. As discussed,<sup>142</sup> scholars asserted that the applicability of this provision should be restrictively interpreted in international litigation. The Supreme Court did not opine on this issue but instead denied jurisdiction for the reason of "exceptional circumstances."<sup>143</sup>

The Supreme Court considered the following factors in its determination of "exceptional circumstances": (1) the defendant could not expect litigation in Japan based on the purpose and substance of the contract (*the expectation of the defendant*); (2) the defendant had located its principal place of business for more than twenty years in Germany (*the nature of the defendant*); (3) pieces of evidence concerning the defense of the defendant (not the assertions of the plaintiff) were concentrated in Germany (*the convenience of the defendant*); and (4) the burden placed on the plaintiff in pursuing litigation in Germany was not too large, because the plaintiff was a corporation that engaged in the importing of automobiles from Germany (*the burden placed on the plaintiff*).<sup>144</sup>

These four factors are similar to some of the factors considered in the U.S. doctrine of *forum non conveniens*, especially those related to private interests of the litigants,<sup>145</sup> and factors considered by U.S.

136. *Id.*

137. *Id.*

138. Family K.K. v. Miyahara, LEX/DB No. 28011317 (Tokyo High Ct., May 31, 1993); Family K.K. v. Miyahara, LEX/DB No. 28033533 (Chiba Dist. Ct., Mar. 23, 1992).

139. *Family K.K.*, 51 MINSHŪ at 4056.

140. *Id.* at 4059.

141. CCP art. 5(i); *Family K.K.*, 51 MINSHŪ at 4058.

142. *See supra* Part II.C.2.

143. *Family K.K.*, 51 MINSHŪ at 4058-59.

144. *Id.*

145. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 (1981) (citing Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-509 (1947)), pointed out two factors to be considered in *forum non conveniens* determinations: private interests of the litigants and public factors. Private interests of the litigants include the:

[R]elative ease of access to sources of proof; availability of compulsory process for attendance of unwilling [witnesses], and the cost of obtaining attendance of willing . . . witnesses; possibility of view of premises, if view would be

courts concerning the reasonableness of exercising jurisdiction that were formulated in accordance with the “traditional notion of fair play and substantial justice”<sup>146</sup> (hereinafter, “reasonableness analysis”). Some Japanese commentators pointed out that factors considered in the “exceptional circumstances” approach in Japanese courts were similar to those considered in the U.S. doctrine of *forum non conveniens*.<sup>147</sup> It is interesting that in the annotation<sup>148</sup> to this case, the Judicial Research Official of the Supreme Court (*Saikōsaibansho Chōsakan*) in charge of this case cited the provision concerning *forum non conveniens* in the preliminary draft of the Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters in explaining the factors to be considered in determining whether “exceptional circumstances” exist.<sup>149</sup>

This decision is also problematic. The court in *Family* considered the location of evidence in relation to the convenience of the defendant only.<sup>150</sup> That decision did not mention the convenience

appropriate [for] the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.

*Id.* at 241 n.6. Public factors include:

[T]he administrative difficulties flowing from court congestion; the local interest in having localized controversies decided at home; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws . . . or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.

*Id.*

146. The U.S. bifurcated framework of “minimum contacts” and “reasonableness analysis” for jurisdictional decisions is exemplified in *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987). In its reasonableness analysis, the court considered the following factors: the burden on the defendant; the interests of the forum state; the plaintiff’s interest in obtaining relief; the interstate judicial system’s interest in obtaining the most efficient resolution of controversies; and the shared interest of the several states in furthering fundamental substantive social policies. *Id.* at 113 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)). A Japanese scholar observes that the U.S. bifurcated test discussed above is similar to the two-step test in Japanese jurisdictional decision-making—i.e., (1) a decision concerning each venue provision under Japan’s CCP and (2) a decision concerning “exceptional circumstances.” Yoshiaki Nomura, *Nichibei Saibankankatsu Hōri no Hikaku Wakugumi [Theoretical Framework for Comparison—Japanese and American Doctrines on Jurisdiction]*, 52 *HANDAI HŌGAKU* 647, 662 (2002).

147. See, e.g., Dōgauchi, *supra* note 70, at 107.

148. Takahashi, *supra* note 10, at 1336-37, 1345 n.41. The annually published “Annotation on Supreme Court Decisions,” which is authored by Judicial Research Officials of the Supreme Court, is a quasi primary source for Japanese jurists. For further explanations on the task of Judicial Research Officials of the Supreme Court in Japan, see *CIVIL PROCEDURE IN JAPAN*, *supra* note 6, § 8.03[5][c].

149. Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, art. 22(1)-(2) (Oct. 30, 1999), available at <http://www.hcch.net/doc/jdgmfdte.pdf>.

150. *Family K.K. v. Miyahara*, 51 *MINSHŪ* 4055, 4059 (Sup. Ct., Nov. 11, 1997).



of the court or the plaintiffs relating to the location of pieces of evidence.<sup>151</sup> If one presumes the legitimacy of considering the convenience of obtaining evidence as one factor influencing jurisdictional decisions, then there is no plausible reason to ignore the convenience of courts or plaintiffs. In addition, in relation to such a narrow interpretation, the Court did not mention the possibility of inconvenience caused by reasons other than the location of evidence—such as the possibility of inconvenience to the parties or a German court caused by the need to interpret the testimony in Japanese or to translate Japanese documentary evidence. Because the decision did not mention facts relating to this point, it is unclear whether the court thought that interpretation or translation would have increased the inconvenience in a German trial. It is likely that, if the plaintiff had requested adjudication in Germany, the parties would have had to interpret or translate the language used in the examination of witnesses or documentary evidence because all relevant parties were Japanese. Indeed, the lower courts that ruled on this case found that the agreement of this transaction was written in Japanese, although this fact did not convince the lower courts to exercise their jurisdiction.<sup>152</sup> The Supreme Court should at least have addressed this language barrier and balanced it with other factors in denying jurisdiction of the Japanese court because the location of evidence is not the only possible cause of inconvenience in the examination of evidence.

More important, the Supreme Court in *Family* decided the case independently from venue provisions and made a determination through a “black box” of “exceptional circumstances.” By doing this, the conclusion of the case became very unpredictable because the outcome of the evaluation of factors specified in this case could have resulted in either conclusion.<sup>153</sup> The problems associated with the unpredictability of the outcomes of future cases resulting from the *Family* decision are further discussed in the next section .

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151. *Id.*

152. *Family K.K. v. Miyahara*, LEX/DB No. 28033533 (Chiba Dist. Ct., Mar. 23, 1992), *aff'd*, LEX/DB No. 28011317 (Tokyo High Ct., May 31, 1993).

153. When I asked participants of a seminar (referred in *supra* note \*\*) from various countries (Belgium, Germany, Italy, Nigeria, Switzerland, and the United States) to predict the outcome of *Family* after providing a general explanation of the “exceptional circumstances” approach and the facts in *Family*, their opinions were evenly divided: three (jurisdiction granted) to four (jurisdiction denied).

#### IV. REFLECTIONS ON TENDENCIES IN RECENT JAPANESE COURT DECISIONS

##### A. Shortfalls of Recent Tendencies and Proposals for Improvement

###### 1. Unpredictability

In *Malaysian Airline*, the Supreme Court of Japan employed the formalistic approach of the CCP venue provisions, providing predictability and ease of administering jurisdictional rules. Japanese courts have shifted from this formalistic approach to a U.S.-style ad hoc approach—an approach that might achieve greater fairness in litigation. This recent Japanese approach, however, has several shortfalls.

First, an emphasis on fairness in litigation similar to that seen in the U.S. model would too greatly increase the cost of administering dispute resolution processes. Although the “exceptional circumstances” approach might result in greater litigational fairness, it also increases the unpredictability of jurisdictional decisions. The ruling in *Family* could have been determined either way by balancing the four factors. This judicial tendency toward an emphasis on fairness in litigation will give defendants frivolous pretexts to challenge jurisdiction and will increase the social costs of resolving pre-trial disputes. This is the criticism made by U.S. scholars regarding U.S. practices,<sup>154</sup> and this same criticism will also hold for future Japanese practice. Further, unless an appropriate forum for a case is clearly defined by certain rules in advance, it is difficult for parties to a transnational dispute to achieve a settlement before a lawsuit or at an early stage of litigation because choice-of-law rules might differ depending on forum and the law governing the case may differ accordingly.<sup>155</sup> The expense of introducing the U.S. approach in Japan is far too high.

The unpredictability of the outcome of cases in Japan might be even greater than in U.S. courts under ad hoc, *standard*-based approach. In *Family*, the Japanese Supreme Court considered four factors in making its jurisdictional decision.<sup>156</sup> In determining

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154. E.g., Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From Pennoyer to Burnham and Back Again*, 24 U.C. DAVIS L. REV. 19, 102 (1990) (“[w]orse than the strange results, however, is the lack of predictability and the resources consumed litigating the most elementary of questions.”).

155. See Masato Dōgauchi, *Kokusai Saiban Kankatsu* [International Jurisdiction], in SHIN - SAIBAN JITSUMU TAIKEI III [NEW - SYSTEM OF PRACTICE OF LITIGATION III] 40, 47 (Akira Takakuwa & Masato Dōgauchi eds., 2002).

156. See *supra* Part III.D.

jurisdictional issues, the Court did not prioritize these four factors, one of which is the "expectation of the defendant." The "expectation of the defendant" was just one factor weighed together with the others, and this factor was not considered a "necessary condition" to find jurisdiction over the case. On the other hand, in the United States, the existence of the "purposeful availment" concerning minimum contacts analysis is a "necessary condition" for jurisdiction.<sup>157</sup> Further, in *Asahi Metal Industry Co., Ltd. v. Superior Court*, the U.S. Supreme Court noted that "[w]hen minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant."<sup>158</sup> Thus, the Court suggested that if minimum contacts are established, then jurisdiction is denied in accordance with the "traditional notion of fair play and substantial justice" (reasonableness analysis) only in truly exceptional cases.<sup>159</sup> Therefore, the U.S. jurisdictional determination by a reasonableness analysis, at least as clarified by the Supreme Court in *Asahi* is not a "black box" as is the "exceptional circumstances" approach in the recent Japanese judgments.

To improve the predictability of cases, Japanese courts should generally not disregard the CCP venue provisions and should instead faithfully apply those provisions to international cases. As seen in *Mukōda* and *Family*, recent courts have put little emphasis on interpreting the venue provisions of the CCP.<sup>160</sup> They rely heavily on "exceptional circumstances" analysis to determine jurisdictional matters.<sup>161</sup> Generally speaking, however, each venue provision was codified to accommodate various considerations that are important in the determination of jurisdictional matters. The cleverness of this *rule*-based approach is that judges do not have to balance interests in every case presented before them. This is true even for international cases. The framers intended international cases to be resolved in accordance with these provisions.<sup>162</sup> The recent approach in Japanese cases compromises predictability and spoils the cleverness of the *rule*-based approach. If any of the venue grounds provided for in the CCP exists in Japan, jurisdiction should be denied only in extreme cases by a consideration of "exceptional circumstances." Unreasonable results that could arise from flaws in some of the CCP

157. See, e.g., *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (requiring some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state).

158. 480 U.S. 102, 114 (1987).

159. *Id.*

160. *Family K.K. v. Miyahara*, 51 MINSHŪ 4055 (Sup. Ct., Nov. 11, 1997); *Mukōda v. Boeing Co.*, 1196 HANREI JIHŌ 87, 604 HANREI TAIMUZU 138 (Tokyo Dist. Ct., June 20, 1986).

161. *Id.*

162. See *supra* note 10.

venue provisions discussed above should be avoided by employing the "exceptional circumstances" approach to consider particular unreasonableness, if any, in each specific case—not by disregarding the CCP venue provisions entirely.

Further, in determining whether "exceptional circumstances" exist, interests or considerations that were already taken into account at the time of codifying the CCP venue provisions should not be considered again in each new case. Courts are supposed to follow conclusions reached by mechanical application of venue provisions in most cases. For example, ordinary inconvenience of plaintiffs to file a case at the place of a defendant should not be considered in the determination of "exceptional circumstances," because such general inconvenience of a plaintiff is common in all cases and such a common question of inconvenience was already considered when the CCP adopted the *actor sequitur forum rei* principle. Only "exceptional" circumstances that are particular to the specific case before the court and that were not considered by the CCP's framers in codifying its venue provisions should be considered in the determination of "exceptional circumstances."<sup>163</sup> If the term "exceptional circumstances" is interpreted in such a strict manner, it will improve predictability because it will not be used as a "black box" to decide jurisdiction.

A fair and reasonable outcome of the case might be achieved by modifying CCP provisions or by balancing interests in interpreting the meaning of each provision, as seen in *Yabutani*,<sup>164</sup> rather than by employing the "exceptional circumstances" approach. But such modification is inappropriate in Japan. The problems should be resolved with prompt legislation to enact more complete jurisdictional provisions. The ad hoc restriction or changing of meaning through "interpretation" of each venue provision by courts would bring about instability in the jurisdictional system as a whole because there is no *stare decisis* rule in Japan. Although court decisions, especially those of Japan's Supreme Court, have de facto binding effects on future cases, they have no legally binding effects for lower court decisions.<sup>165</sup>

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163. See Dōgauchi, *supra* note 85, at 43-44. For example, suppose the plaintiff in a Japanese court is a Japanese victim of damage resulting from use of HIV-contaminated blood components manufactured by a U.S. corporation; his condition is very bad and his death is imminent. In such a case, the facts that (a) the plaintiff's illness renders him unable to travel to the U.S. to testify before a U.S. court and (b) the need of a prompt remedy for the plaintiff exists because of his imminent death may be considered in the determination of "exceptional circumstances" because these facts are particular to this specific case and were not considered by the legislator at the time of the enactment of the CCP.

164. *Yabutani v. Boeing Co.*, 754 HANREI JIHŌ 58, 312 HANREI TAIMUZU 241 (Tokyo Dist. Ct. Interlocutory J., July 24, 1974); see Part III.A.

165. See SHIGEMITSU DANDŌ, HŌGAKU NO KISO [BASIS FOR LEGAL STUDY] 166 (1996) (on file with author).

Consequently, for example, when intermediate appellate courts are split in the interpretation of the provision providing for venue at the defendant's "principal place of business in Japan," district courts need not follow the interpretation of the immediate upper appellate courts. Therefore, such ad hoc modifications of CCP provisions by each court will make it impossible for litigants to predict, before judgment, which rule will govern the case.

## 2. The Unreasonableness of Importing the Doctrine of *Forum Non Conveniens*

The second problem of the Japanese jurisdictional system is the frequent injection of considerations similar to those of the U.S. doctrine of *forum non conveniens* into jurisdictional decisions despite the fact that the structure of U.S. jurisdictional decisions is fundamentally different from those of Japan.

In the United States, *forum non conveniens* operates at the discretion of the court *after* the court finds jurisdiction.<sup>166</sup> Therefore, the denial of forum under this doctrine does not mean that the U.S. court has denied jurisdiction over the defendant. The court may consequently exercise certain controls over the defendant even after it denies a forum for the case under this doctrine.

Japanese courts have frequently denied jurisdiction under considerations similar to *forum non conveniens*.<sup>167</sup> In contrast to the U.S. model, Japanese courts appear to imply that, in international litigation, multiple fora may not have jurisdiction over a single case. Even if this observation that Japanese courts do not allow multiple fora to have concurrent jurisdiction over a single case is not true, Japanese courts at least appear to presume that in very limited instances multiple countries may concurrently exercise jurisdiction over a single case. The idea of *forum non conveniens* in the United States, however, stands on the premise that multiple fora may have jurisdiction over one case as a matter of course.<sup>168</sup> Even in Japan, in the context of domestic litigation, it is understood that multiple fora may have jurisdiction over a single case and, if the forum chosen by the plaintiff is inconvenient, an adjustment is made by transferring

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166. *Forum non conveniens* permits a court to "decline to exercise its jurisdiction, even though the court has jurisdiction and venue, when it appears that the convenience of the parties and the court and the interests of justice indicate that the action should be tried in another forum." *Baumgart v. Fairchild Aircraft Corp.*, 981 F.2d 824, 828 (5th Cir. 1993) (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 250 (1981)).

167. See Ronald A. Brand, *Comparative Forum Non Conveniens and the Hague Convention on Jurisdiction and Judgments*, 37 TEX. INT'L L.J. 467, 487 (2002).

168. See, e.g., *Gulf Oil Corp v. Gilbert*, 330 U.S. 501, 506-07 (1947) (stating "[in] all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process").

the case to a more convenient court.<sup>169</sup> Japanese courts, however, appear to presuppose that in international litigation multiple courts may not have jurisdiction concurrently, or that if they may have it, then they may only have it in extreme cases.<sup>170</sup> Such a supposition might lead courts unreasonably to bar Japanese plaintiffs from efficiently obtaining remedies in their own forum. Such an unreasonable conclusion was dramatically illustrated in *Mukōda*.<sup>171</sup> In *Mukōda*, the Japanese plaintiffs were precluded from obtaining efficient remedy in a Japanese court for the reason of inconvenience of the forum, although any inconvenience that did exist was not so serious, as was argued above.<sup>172</sup>

Of course, there are positive aspects of the rigid Japanese approach. If the court supposes only one forum for each international case, litigants are precluded from “forum shopping.” The litigant should choose one “correct” forum in advance. If the “correct” forum is outside of Japan, the litigant should first obtain a foreign judgment and then consider taking a step toward recognition and enforcement of the judgment in Japan. In recognition and enforcement proceedings, Japanese courts can grant jurisdiction of the foreign court and recognize and enforce the foreign judgment in Japan only when the litigant has chosen the one “correct” forum.<sup>173</sup>

Such an inflexible treatment is theoretically plausible but practically impossible. As is explained above,<sup>174</sup> it is very difficult to

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169. A court may transfer the case to another court in order to avoid considerable delay of the suit or for the sake of fairness to the parties, in consideration of (a) the parties' residence and the witnesses who might be examined; (b) the location of the objects that might be inspected; or (c) any other circumstance. CCP art. 17. This provision permits a court to transfer the case to a court at another venue in consideration of factors relating to the effectiveness of adjudication. This provision is applied to domestic cases only. There is no explicit provision in Japan's CCP that permits a court to deny hearing the case when there is a more convenient *foreign* forum for an international case.

170. See, e.g., *Family K.K. v. Miyahara*, 51 MINSHŪ 4055 (Sup. Ct., Nov. 11, 1997); *Mukōda v. Boeing Co.*, 1196 HANREI JIHŌ 87, 604 HANREI TAIMUZU 138 (Tokyo Dist. Ct., June 20, 1986).

171. *Mukōda*, 1196 HANREI JIHŌ at 87, 604 HANREI TAIMUZU at 138; see also *supra* Part III.C.2.

172. *Mukōda*, 1196 HANREI JIHŌ at 87, 604 HANREI TAIMUZU at 138.

173. To recognize and enforce foreign judgments in Japan, the Japanese court must have *indirect* jurisdiction. See *supra* note 83 for the definition of the *indirect* jurisdiction. The requirements to grant *indirect* jurisdiction had been considered to be the same as those for *direct* jurisdiction (mirror image theory; *Spiegelbildtheorie*). Hiroshige Takata, *Article 200*, in 4 CHŪSHAKU MINJI SOSHŌ-HŌ 354, 370 (Masahiro Suzuki & Yoshimitsu Aoyama eds., 1997). But in a recent case the Japanese Supreme Court held that these rules are not necessarily the same, although they substantially overlap. *Kishinchand Naraindas Sadhwani v. Gobindram Naraindas Sadhwani*, 52 MINSHŪ 853, 860 (Sup. Ct., Apr. 28, 1998). See Yoshinori Kawabe, *Annotated Case No. 19*, in 1 HEISEI 10 NENDO SAIKŌ SAIBANSHO HANREI KAISETSU [ANNOTATION ON SUPREME COURT DECISIONS OF THE 1998 TERM] 450, 473-75 (2001).

174. See *supra* Part IV.A.1.

predict the outcome of jurisdictional decisions in advance under the current Japanese jurisdictional system. Litigants who mistakenly did not choose the “correct” forum have to file another lawsuit in the hope of selecting the right forum the second time. In addition, there is no guarantee a foreign forum that the Japanese system deems to be “correct” will adjudicate the case because the jurisdictional system of Japan differs from those of foreign countries.

Forum shopping can be phased out by the gradual harmonization of jurisdictional systems and choice-of-law rules. Because the harmonization of these two matters has not been accomplished yet, we have no choice in Japan but to have a “loose” jurisdictional system—i.e., a system in which the litigant may have multiple fora in most cases. A litigant’s unreasonable preclusion from a convenient forum would be more detrimental than the risk of forum shopping.

Commentators have pointed out that the adjustment of multiple fora in jurisdictional decisions is inevitable in international cases because no transfer system exists for cases in which the current forum is inconvenient.<sup>175</sup> Decisions of the Japanese Supreme Court presupposed such necessity for adjustment.<sup>176</sup> A certain adjustment is necessary if the degree of inconvenience at the current forum is extreme. But the current Japanese practice has gone far beyond that. The factor of “convenience” does not require a single forum in *every* international case. For example, the Court in *Family* precluded the Japanese plaintiff from obtaining a remedy at the Japanese court, ruling that the adjudication of the case in Japan would be too inconvenient.<sup>177</sup> But the inconvenience of adjudication at a Japanese court would not have been serious enough in *Family* to justify the rejection of jurisdiction by simply pointing to the term “exceptional circumstances”—a term unarticulated in the CCP.<sup>178</sup> The Court also should have considered the high costs associated with the uncertainty that would result with respect to jurisdictional decisions in future cases. If any of the CCP venue grounds existed in both Japan and Germany, other than in very exceptional cases, both countries should have jurisdiction.

One might argue that the U.S. decisions concerning the reasonableness of jurisdiction under the concept of the “traditional notion of fair play and substantial justice” (reasonableness analysis) are similar to decisions concerning *forum non conveniens* as well,<sup>179</sup>

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175. *E.g.*, Dōgauchi, *supra* note 70, at 102; *see supra* note 169.

176. Takahashi, *supra* note 10, at 1335.

177. *Family K.K. v. Miyahara*, 51 MINSHŪ 4055, 4059 (Sup. Ct., Nov. 11, 1997).

178. *See supra* Part III.D.

179. *See* RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 4.8, at 173 (4th ed. 2001) (“[T]he portion of the [*Asahi*] opinion joined in by eight of the Justices raises to the level of due process concepts usually associated with the discretionary dismissal doctrine of *forum non conveniens*.”).

and that the frameworks of jurisdictional decisions in the United States and Japan are not very different in that both frameworks consider factors similar to *forum non conveniens*. But introduction of factors similar to *forum non conveniens* into jurisdictional decisions has introduced fewer problems in the United States than in Japan, because the U.S. Supreme Court dictates that the reasonableness analysis can only be used to counter the effect of the existence of minimum contacts in exceptional cases, as is explained above.<sup>180</sup>

### 3. The Different Roles of Judges in Civil and Common Law Countries

The third problem of the flexible Japanese approach is that it is not consistent with the traditional role of judges in civil law countries, in that the Japanese approach has given much discretion to judges to determine jurisdictional issues. Japanese courts traditionally have not been expected to create law to the same extent as courts are expected to do in common law countries. This is especially true in an area of procedural law in which consistent application of statutory provisions and predictability of results are highly desired.

It is true that Japanese judges occasionally establish new law. This can occur when the proper interpretation of a statutory provision is unclear or gaps exist between statutory provisions and the reality of society. It is also true that Japan's Supreme Court develops law, especially in the area of substantive law. For example, the Supreme Court created a new type of security interest that relevant statutes did not yet recognize.<sup>181</sup> Further, several influential scholars have pointed out that the role of judges in civil law countries, including Japan, has become more active in creating law than in the past and has gradually become similar to the role of judges in common law countries.<sup>182</sup>

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180. See *supra* Part IV.A.1.

181. This new type of security interest is called *kari tōki tanpo* [provisional registration security] and was codified in the *Kari Tōki Tanpo Keiyaku ni Kansuru Hōritsu* [Law Regarding Provisional Registration Security Contract], Law No. 78 of 1978, following the Supreme Court decision of *Mikami v. Kobayashi*, 28 MINSHŪ 1473 (Sup. Ct., Oct. 23, 1974) (holding that the registration of the real estate to the effect that ownership of the real estate would pass to the lender if the borrower defaulted is not a registration of a real "transfer" but only that of "security" of the real estate, and therefore in such case the difference between the value of the real estate and the borrower's debt must be returned to the borrower). See TAKASHI UCHIDA, MINPŌ III [CIVIL LAW III] 539 (2d ed. 2004) (court decisions virtually created this new type of security interest).

182. See, e.g., Nobuyoshi Ashibe, *Shihō ni Okeru Kenryoku-sei* [The Nature of Power in the Judiciary], in 6 IWANAMI KŌZA KIHON HŌGAKU: KENRYOKU [IWANAMI LECTURERS ON BASIC LEGAL STUDIES: POWERS] 219, 224-28 (Nobuyoshi Ashibe et al. eds., 1983) (on file with author).



Still, Japanese practitioners consider that such creative phenomena of judicial activities are exceptional—especially in the area of procedural law—and that the role of judges in Japan is still passive and fundamentally different from that in common law countries. In the area of procedural law, the majority of Japanese practitioners, and even judges themselves, appear to expect Japanese judges to *apply* faithfully law enacted by legislators rather than *create* law themselves. Legal scholars have occasionally proposed departing from mechanical application of traditional legal principles and introducing ad hoc determinations. For example, scholars have proposed expansion of standing (*tōjisha tekikaku*)<sup>183</sup> and the scope of the issue preclusion (*sōten-kō*)<sup>184</sup> even though the CCP did not explicitly provide such proposed expansions. Courts have rejected such flexible treatments in the absence of explicit provisions in the CCP regarding these matters.<sup>185</sup> It appears that courts are concerned that ad hoc determination of procedural matters would introduce instability into proceedings. Dynamic evolution of law is simply not as prevalent in Japan as it is in common law countries.

Determination of jurisdiction occasionally requires making difficult policy determinations, and therefore legislators, not judges, should first address such policy determinations—and judges should respect those legislators' determinations. For example, in cross-border product liability cases, courts often have to make difficult choices between two competing interests—protecting consumers and protecting international trade and business interests. Jurisdictional rules of the European Union include many provisions intended to avoid complications that courts might otherwise face when making highly difficult policy determinations in the areas of consumer and

183. MAKOTO ITŌ, MINJI SOSHŌ NO TŌJISHA [PARTIES OF CIVIL LITIGATION] 112 (1978) (on file with author).

184. Kōji Shindō, *Jōkentsuki Kyūfu Hanketsu to Sono Kōka* [Conditional Coercive Judgment and its Effects], 10 MINJI SOSHŌ ZASSHI 1 (1963), reprinted in KŌJI SHINDŌ, SOSHŌBUTSU TO SŌTEN-KŌ · JŌ [SUBJECT MATTERS AND ISSUE PRECLUSION EFFECTS I] 183 (1988); Kōji Shindō, *Kihanryoku to Soshōbutsu* [Res Judicata and Subject Matters], 80-3 HŌGAKU KYŌKAI ZASSHI 295 (1963), reprinted in KŌJI SHINDŌ, SOSHŌBUTSU TO SŌTEN-KŌ · JŌ [SUBJECT MATTERS AND ISSUE PRECLUSION EFFECTS I] 145 (1988).

185. See *Itō v. Kyūshū Denryoku K.K.*, 1181 HANREI JIHŌ 77, 586 HANREI TAIMUZU 64 (Sup. Ct., Dec. 20, 1985) (rejecting adoption of the view proposed by Professor Itō regarding the expansion of standing and denying standing of the plaintiffs); *Watano v. Kanetani*, 1014 HANREI JIHŌ 69, 450 HANREI TAIMUZU 88 (Sup. Ct., July 3, 1981); *Kaneko v. Takahashi*, 724 HANREI JIHŌ 33 (Sup. Ct., Oct. 4, 1973); *Matsumoto v. Tamadan*, 569 HANREI JIHŌ 48, 239 HANREI TAIMUZU 143 (Sup. Ct., June 24, 1969) (rejecting adoption of a view proposed by Professor Shindō regarding expansion of the scope of issue preclusion and denying issue preclusion as to the reasoning in the preceding judgment).

laborer protection.<sup>186</sup> This exemplifies the fact that European Union countries, most of which are civil law countries, recognize that judges might not be able to decide properly jurisdictional matters that involve policy determinations without guidance from detailed provisions. In Japan, such detailed provisions as those of the European Union do not exist. This does not mean, however, that Japanese judges may disregard the current provisions in the CCP. Courts must first pay close attention to the literal meaning of the provisions of statutes. If a court finds that the meaning of any provision is not clear or does not clearly apply to the matter at hand, then the court should look into the legislators' intentions.<sup>187</sup> The Court in *Family*, however, improperly encouraged lower courts to ignore legislative policy decisions as codified in the CCP by circumventing application of relevant venue provisions.<sup>188</sup>

This does not mean that judges may not create law in civil law countries. The explanation above intends to point out objective phenomena in Japan, which is a civil law country. Judges in civil law countries should be allowed to create law when appropriate. But recent Japanese decisions regarding jurisdictional issues have gone astray by disregarding the legislators' clear mandates in the CCP.<sup>189</sup>

As discussed above, from this perspective, courts should rely on the "exceptional circumstances" sparingly.<sup>190</sup>

### B. *The Potential of the Japanese Jurisdictional Framework*

As shown above, the Japanese framework for deciding international jurisdiction combines the Continental European *rule*-based approach and the U.S. *standard*-based approach. The Japanese approach is similar to the Continental European approach in that courts are supposed to apply rules codified in a statute when determining jurisdictional issues. It is also similar to the U.S. approach in that courts may exercise discretion in evaluating relevant factors in the determination of "exceptional circumstances." Notwithstanding the problems with the current Japanese approach explained above, if the doctrine of "exceptional circumstances" is strictly applied only in extreme cases, this framework may well accommodate two opposing demands—preserving predictability and achieving fairness in litigation in each case. This Japanese

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186. For example, arts. 8-13 (insurance contracts), arts. 15-17 (consumer contracts) and arts. 18-21 (employment contracts) of Council Regulation 44/2001, 2001 O.J. (L 12) 1, 5-7.

187. See Fujita, "Kokusai Saiban Kankatsu Hōki" to Sono Hikakuho teki Kenkyū, *supra* note 10, at 11.

188. Family K.K. v. Miyahara, 51 MINSHŪ 4055 (Sup. Ct., Nov. 11, 1997).

189. *Id.*

190. See *supra* Part IV.A.1.

framework might preserve predictability by mechanical application of venue provisions. If the conclusion is too harsh for the litigants or inconvenient for the court, courts may decline jurisdiction under the doctrine of "exceptional circumstances," just as U.S. jurisdictional decisions do pursuant to reasonableness analysis. In Continental European countries, as typified in the German regime, courts are not given discretion in jurisdictional decisions. By limiting the scope of application of the "exceptional circumstances" doctrine, it might be easier for such countries to accept this scheme than to accept a purely ad hoc, *standard*-based approach like that of the United States.

Thus, this Japanese jurisdictional framework explained above has the potential to accommodate the conflicting considerations from two distinct legal regimes: Continental Europe and the United States.

## V. CONCLUSION

In the process of assessing the reasonableness of rules or standards used in decisions of jurisdictional issues, perspectives of comparative law are important. These perspectives are important because they provide us with the means to evaluate whether the exercise of jurisdiction is exorbitant or too restrictive. Professor Weintraub, in relation to the evaluation of the *Asahi* decision, noted that "[c]oncern to avoid offending friendly foreign nations is commendable, but is relevant only if a United States court is exercising jurisdiction that is 'exorbitant' under international standards."<sup>191</sup> Thus, one important way to evaluate whether a court's exercise of jurisdiction would be unreasonable is to assess the likely conclusion of the case from the perspective of international standards. These means have not been widely used.

The restrictive interpretation of the CCP provisions and the developments of the "exceptional circumstances" approach in Japan stemmed from scholars' recognition that some venue provisions in the CCP were too excessive and unreasonable to be applied in international cases.<sup>192</sup> But viewed in light of U.S. treatment, one might consider that such recognition is groundless and that the outcome in *Malaysian Airline* was not necessarily unreasonable. U.S. courts would find jurisdiction over defendants in similar cases based on the fact that the defendants had continuous and systematic contacts with the forum state through the activity of a local office, even when such offices were not related to the disputes.<sup>193</sup> Although

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191. WEINTRAUB, *supra* note 179, at 174.

192. See *supra* Part III.C.1.

193. See *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445 (1952); LOWENFELD, *supra* note 61, at 49; Linda J. Silberman, *Judicial Jurisdiction in the*

there would be no jurisdiction over the defendant in such a case under the jurisdictional regime of the European Union,<sup>194</sup> the exercise of jurisdiction seems to be generally fair and reasonable if a defendant has assumed the risk of litigation in the foreign country by establishing a stable base for business in that country unless other concerns such as inconvenience of adjudication would hamper the reasonableness of adjudication there.<sup>195</sup> The reasonableness of exerting jurisdiction should be evaluated from a comparative law perspective.<sup>196</sup>

Introducing a comparative law perspective is also useful for global harmonization of jurisdictional systems. So far, the differences between civil and common law countries have been emphasized in the discussion of this topic. As this Article has shown, however, the regime of a civil law country, Japan, has some commonalities with the U.S. jurisdictional system. A comparative law perspective suggests the possibility of harmonization between two distinct legal regimes, although this is not an easily achievable task.

Thus, the unique status of the Japanese jurisdictional system as a convergence of a *rule*-based approach and a *standard*-based approach might provide a new perspective for a discussion of global harmonization of jurisdictional systems.

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*Conflict of Laws Course: Adding a Comparative Dimension*, 28 VAND. J. TRANSNAT'L L. 389, 404 (1995).

194. See Council Regulation 44/2001, art. 5(5), 2001 O.J. (L 12) 1, 4; LOWENFELD, *supra* note 61, at 50.

195. *But see supra* note 24.

196. See Silberman, *supra* note 193, at 402 (emphasizing a comparative law perspective in the discussion of conflict of laws and judicial jurisdiction).

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