Japan's Newly Enacted Rules on International Jurisdiction: with a Reflection on Some Issues of Interpretation

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1. Introduction

On 28 April 2011, the Japanese National Diet (Parliament) passed a government-sponsored bill for enacting the bases of international jurisdiction of the Japanese courts. The new Act ("Act for the Partial Amendment of the Code of Civil Procedure and the Civil Interim Relief Act" – hereinafter referred to as "the Act") is scheduled to enter into force on 1 April 2012. It contains provisions on the international jurisdiction of the Japanese courts in civil and commercial matters,[(1)] which will be incorporated into the existing Code of Civil Procedure and Civil Interim Relief Act. The rules of international jurisdiction, which have hitherto been inferred from judicial precedents, will for the first time be prescribed by legislation. This article sets forth the present author's English translation and

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annotations of the key provisions from the Act. It will examine some of the issues of interpretation which may arise under Article 3-9, the backbone provision of the Act, and finally provide an overall evaluation of the new Rules.

2. Translation[2] and annotations of the key provisions

a. The provisions to be incorporated into the Code of Civil Procedure

Translation (Once the Act comes into effect, the following provisions will be incorporated into the Code of Civil Procedure.)	**Annotation**
Article 3-2 (Jurisdiction Based on, *inter alia*, the Domicile of the Defendant) (1) The courts shall have jurisdiction over an action against a natural person: – when he/she is domiciled in Japan; – if he/she has no domicile or if his/her domicile is unknown, when he/she is resident in Japan; or – if he/she has no residence or if his/her residence is unknown, when he/she has ever been domiciled in Japan prior to filing the action (except where he/she was domiciled abroad after he/she was last domiciled in Japan).	• The expression "the courts" as used throughout this Act refers to the courts of Japan as a whole unless the context indicates otherwise. • The word "domicile" as used throughout this Act is a concept which has a meaning less technical than the same term used for the conflict-of-laws rules of the common law tradition. It is a translation of the Japanese word "*jyûsho*," which is defined by Article 22 of the Civil Code as the principal place of living. • The word "residence (*kyosho*)" denotes the place of living over a period of time which has less permanence than domicile. There is no rule fixing the minimum length of the period, but mere presence, such as a holiday stay, is not sufficient to establish residence. • The phrases "if he/she has no domicile or if his/her domicile is unknown" and "if he/she has no residence or if his/her residence is unknown" must be read with the addition of the words "anywhere in the world." If, for example, the defendant has no domicile in Japan but is domiciled in country X, the Japanese courts do not have jurisdiction under this provision even if the defendant is resident in Japan.
(2) Notwithstanding the provision of the preceding paragraph, the courts shall have jurisdiction over an action against an ambassador, minister, or	Though not expressly stated, it would make sense to understand this provision as providing jurisdiction only with respect to the types of

any other Japanese national in a foreign country who enjoys immunity from the jurisdiction of that country.	actions for which the diplomatic personnel enjoys immunity in the foreign country.
(3) The courts shall have jurisdiction over an action against a legal person or any other association or foundation: – when its principal office is located in Japan; or – if it has no office or if the location of its office is unknown, when its representative or any other principal person in charge of its business is domiciled in Japan.	• The expression "any other association or foundation" refers to an entity without legal personality. • The word "office (*jimusho matawa eigyôsho*)" covers both an office engaged in profit-making activities and an office engaged in non-profit-making activities. • The word "business" as used throughout this translation covers both profit-making activities and non-profit-making activities. • The expression "if it has no office or if the location of its office is unknown" must be read with the addition of the words "anywhere in the world."
Article 3-3 (Jurisdiction over Actions Relating to, *inter alia*, Contractual Obligations) The actions set out in each sub-paragraph below may be filed with the courts of Japan in the circumstances described in each of them. (i) An action for the enforcement of a contractual obligation, an action arising from *negotiorum gestio* (management of another's affairs without mandate) performed in connection with a contractual obligation, an action relating to unjust enrichment arising in connection with a contractual obligation, an action seeking damages for the breach of a contractual obligation, or any other action relating to a contractual obligation: – when the place of performance of the obligation as specified in the contract is located in Japan or when the place of performance of the obligation is located in Japan according to the governing law chosen in the contract.	The "governing law chosen in the contract" denotes the governing law of the contract as chosen in the contract.
(ii) An action seeking payment of a bill of exchange, promissory note or check: – when the place of payment of the bill, note or check is located in Japan.	

(iii) An action relating to a property right: – when the object of the claim is located in Japan; or – if the action is for the payment of money, when the defendant's asset capable of being seized is located in Japan (except where the value of the asset is extremely low).	• The "property right (*zaisanken*)" is a broad concept covering rights of monetary value generally, whether they are real rights or personal rights. • The "object of the claim" and the "asset capable of being seized" cover both tangible and intangible assets. Amongst intangible assets, a debt is deemed to be located where the debtor is domiciled under Article 144(2) of the Civil Execution Act. Intellectual property rights are considered to be located where they are registered or otherwise have been created. • The condition mentioned in the parentheses concerns the absolute value of the asset as opposed to the value relative to amount of the claim.
(iv) An action which is against a person having an office and relates to the activities carried out in that office – when the office is located in Japan.	• The word "office (*jimusho matawa eigyôsho*)" covers both an office engaged in profit-making activities and an office engaged in non-profit-making activities. • The "person" can be either a natural person or an entity (association or foundation) whether incorporated or unincorporated.
(v) An action against a person engaged in business in Japan (including a foreign company (as defined by Article 2(2) of the Companies Act (Act No. 86 of 2005)) which continuously carries out transactions in Japan): – when the action relates to the business in Japan.	• The word "business" covers both profit-making activities and non-profit-making activities. • Article 2 of the Companies Act provides in the relevant part: In this Act, the words listed in each paragraph below shall have the meaning as defined in each of them. 1. A company means a *kabushiki-gaisha* (stock company), *gômei-gaisha* (incorporated general partnership), *gôshi-gaisha* (incorporated limited partnership), or *gôdô-gaisha* (limited liability company). 2. A foreign company means a legal person or any other entity established under a foreign law which is of the same type as, or similar to, a company. • This provision is a novel to the Act in that

	no equivalent rule can be found in the existing law. It allows an action to be filed in Japan even if, unlike the preceding sub-paragraph, the defendant has no office of its own in Japan but conducts business through third-party entities such as agencies and subsidiaries. It also allows an action to be filed in Japan if the defendant is engaged in business in Japan from a foreign country by means of internet or other modes of communication. It was considered necessary to extend jurisdiction to cover such situations because nowadays business can be conducted easily by advanced means of communications without physical presence. • There are cases where it is not certain whether the defendant is deemed to be "engaged in business in Japan," such as where a defendant who hase no fixed place of business in Japan accepts a number of unsolicited orders from Japan through its non-Japanese language website. Any excess of jurisdiction is likely to be alleviated by dismissal of proceedings under Article 3-9. • On a literal reading, this sub-paragraph fully covers the preceding sub-paragraph (iv), making the latter redundant. Whether and how the courts will distinguish the two sub-paragraphs from each other remains to be seen.
(vi) An action based on a maritime-lien claim and any other claim secured by a ship: – when the ship is located in Japan.	The "maritime-lien claim" is a claim which arises in connection with a ship and for which a statutory lien is created on the ship (Article 842 of the Japanese Commercial Code). This provision more generally covers claims which are secured by a ship (including a claim secured by a mortgage over a ship).
(vii) An Action relating to a company or any other association or foundation which is one of the types specified below: a) an action by a company or other association against its present or former member, an action by a member against a present or	• The "association" and "foundation" can be either incorporated or unincorporated and can be either profit-making or non profit-making. • The "company" is a profit-making association which is incorporated. • The word "office (*jimusho matawa eigyôsho*)"

former member, or an action by a former member against a present member, each of which is based on his/her status as a member; b) an action by an association or foundation against its present or former officer based on his/her status as an officer; c) an action by a company against its present or former incorporator or inspector, based on his/her status as an incorporator or inspector; d) an action by a creditor of a company or other association against its present or former member, based on his/her status as a member; – if the association or foundation is a legal person, when it was incorporated under Japanese law; and – if it is not a legal person, when its principal office is located in Japan.	covers both an office engaged in profit-making activities and an office engaged in non-profit-making activities.
(viii) An action relating to a tort: – when the tort occurred in Japan (except where the result of a harmful act committed abroad has occurred in Japan and the occurrence of that result in Japan would have been normally unforeseeable).	In cases where the place of a harmful act and the place of the result of the act differ, it is sufficient if either the act or the result took place in Japan except for the case mentioned in the parentheses.
(ix) An action seeking damages arising from a collision of ships or any other accident at sea: – when the first place at which the damaged ship arrived is located in Japan.	Where a collision takes place on the territorial waters of Japan, the Japanese courts have jurisdiction under sub-paragraph (viii).
(x) An action relating to salvage: – when the salvage was performed in Japan or where the first place at which the salvaged ship arrived is located in Japan.	
(xi) An action relating to immovable property: – when the immovable is located in Japan.	An action relating to the ownership of immovable property falls under this sub-paragraph. The jurisdiction is not exclusive. It should be noted, however, that jurisdiction over an action relating to the registration of immovable is exclusive under Article 3-5(2) (See below).

(xii) An action relating to an inheritance right or a hereditary reserve or an action relating to a testamentary gift or any other act taking effect upon death: – when the deceased was domiciled in Japan at the time of the commencement of succession; – if the deceased had no domicile or if his/her domicile is unknown, when he/she was resident in Japan at the time of the commencement of succession; or – if the deceased had no residence or if his/her residence is unknown, when he/she had ever been domiciled in Japan prior to the commencement of succession (except where he/she was domiciled abroad after he/she was last domiciled in Japan).	• A hereditary reserve is a share of the deceased's estate which is reserved for certain members of the successors regardless of the deceased's will. • This provision mirrors that of Article 3-2(1) except that it substitutes the deceased for the defendant and the commencement of succession for the filing of an action.
(xiii) An action relating to an inherited obligation or any other burden on the inherited property which does not fall under the preceding sub-paragraph: – in the circumstances described in the preceding sub-paragraph.	
Article 3-4 (Jurisdiction over Actions Relating to Consumer Contracts and Employment Relations) (1) An action brought by a consumer (*viz.* a natural person (except where he/she becomes party to a contract in the exercise of, or for the purpose of, business activities)) against a business operator (*viz.* a natural person who becomes party to a contract in the exercise of, or for the purpose of, business activities, or a legal person, or any other association or foundation) with respect to a contract (excluding an employment contract) concluded between them (hereafter a "consumer contract") may be filed with the courts of Japan if the domicile of the consumer at the time of filing the action or at the time of the conclusion of the contract is located in Japan.	• In the pre-existing law, there are no special rules for consumer contracts or for employment relations. The provisions of this article are therefore a novel. • The rationale for this provision is the protection of consumers and employees as weaker parties. • The word "business" covers both profit-making activities and non-profit-making activities. • The words "preceding article" in Paragraph (3) refer to Article 3-3. • The jurisdiction under Paragraphs (1) and (2) are available concurrently with the other heads of jurisdiction such as those laid down in Article 3-3.

(2) An action brought by an individual employee against his/her employer with respect to a civil dispute between them over the existence of their employment contract and other matters of employment relations (hereafter "civil dispute over individual employment relations") may be filed with the courts of Japan if the place of supply of labor under the employment contract (or, if no such place is specified, the office which hired the employee) is located in Japan. (3) The preceding article shall have no application to an action brought by a business operator against a consumer with respect to a consumer contract or to an action brought by an employer against its employee with respect to a civil dispute over individual employment relations.	
Article 3-5 (Exclusivity of Jurisdiction) (1) Actions provided in Chapter II (except those provided in Sections 4 and 6) of Part VII of the Companies Act, actions provided in Section 2 of Chapter VI of the Act on General Incorporated Associations and General Incorporated Foundations (Act No. 48 of 2006) and analogous actions relating to associations or foundations incorporated under other Japanese legislation shall be subject to the exclusive jurisdiction of the Japanese courts.	• Actions provided in Chapter II (except those provided in Sections 4 and 6) of Part VII of the Companies Act are actions concerning the organization of a company (Section 1), actions for pursuing the liability of officers of a stock company (*viz. kabushiki-gaisha*) (Section 2), actions seeking dismissal of officers of a stock company (*viz. kabushiki-gaisha*) (Section 3), actions seeking the removal of members of a membership company (*viz. gômei-gaisha* (incorporated general partnership) or *gôshi-gaisha* (incorporated limited partnership) or *gôdô-gaisha* (limited liability company)) (Section 5), and actions seeking the rescission of redemption of bonds by a bond-issuing company. • The general incorporated associations and general incorporated foundations are non-profit-making associations and foundations. • Actions provided in Section 2 of Chapter VI of the Act on General Incorporated Associations and General Incorporated Foundations are actions concerning the organization (Subsection 1), actions for pursuing the liability of officers (Subsection 2), and actions seeking dismissal of officers (Subsection 3).

(2) An action with respect to registration shall be subject to the exclusive jurisdiction of the Japanese courts if the place of registration is located in Japan.	
(3) An action with respect to the existence and effect of an intellectual property right (*viz.* the right as defined by Article 2(2) of the Basic Act of Intellectual Property (Act No. 122 of 2002)) which comes into existence by registration shall be subject to the exclusive jurisdiction of the Japanese courts if the registration was effected in Japan.	• Article 2(2) of the Basic Act of Intellectual Property provides: The term "intellectual property right" as used in this Act shall mean a patent right, a utility model right, a breeder's right, a design right, a copyright, a trademark right, any other statutory right in intellectual property, and a right to legally protected interest in intellectual property. • Intellectual property rights which come into existence by registration include patent rights, trademark rights and breeder's rights. • This paragraph does not cover an action for damages for infringement of an intellectual property. The other heads of jurisdiction, such as the jurisdiction based on the defendant's domicile (Article 3-2(1)) and the jurisdiction for an action relating to a tort (Article 3-3 (viii)), are available for such an action.
Article 3-6 (Jurisdiction over Joint Claims) Where two or more claims are made jointly in a single action and the courts of Japan have jurisdiction over one of them only, the action may be filed with the courts of Japan only if that particular claim over which the jurisdiction exists has a close connection with the other claims. However, with respect to an action brought by, or against, two or more persons, the foregoing applies only in the cases described in the first sentence of Article 38.	• The first sentence covers both an action involving multiple claims by a single plaintiff against a single defendant and a multi-party action. Only the latter is treated by the second sentence. • Article 38 sets out conditions of a multi-party action as follows: Two or more persons may sue or be sued as joint parties where the rights or obligations which constitute the subject matter of the action are common to all of them or are based on the same legal and factual grounds. The same shall apply where the rights or obligations which constitute the subject matter of the action are of the same type and are based on the same type of legal and factual grounds.

	• A joint and several obligation is an example of "obligations which ... are common to all of [the parties]" (Article 38) and an obligation of joint tortfeasors is an example of "obligations which ... are based on the same legal and factual grounds" (Article 38).
Article 3-7 (Jurisdiction Agreement) (1) The parties may decide by agreement the country in which they may file an action. (2) The agreement provided in the preceding paragraph shall have no effect unless it is in writing and is concerned with an action arising from specific legal relationships. (3) For the purpose of the preceding paragraph, an agreement is deemed to be in writing if it is recorded in an electromagnetic record (*viz.* a record made in an electronic form, a magnetic form, or any other form unrecognizable to human perception, which is used for information processing by computers). (4) An agreement to file an action exclusively with the courts of a particular foreign country may not be invoked if those courts are legally or factually unable to exercise jurisdiction. (5) The agreement provided in Paragraph (1) having as its object a future dispute arising in connection with a consumer contract shall have effect only in the circumstances set forth below: (i) where it is an agreement which allows an action to be filed in the country where the consumer was domiciled at the time of the conclusion of the contract (If the agreement purports to allow an action to be filed exclusively in that country, it shall be without prejudice to the right to file in other countries except in the cases provided in the following sub-paragraph.); or (ii) where the consumer filed an action in the country specified by the agreement or where the consumer invoked the agreement in response to an action brought by the business operator in Japan or in a foreign country.	The rules of jurisdiction incorporated by the Act are generally applicable to the cases and petitions filed on or after the date of entering into force of the Act. By way of exception, Article 3-7 has no application to jurisdiction by agreement concluded prior to entering into force of the Act (Article 2 of the Supplementary Provisions of the Act).

(6) The agreement provided in Paragraph (1) having as its object a civil dispute over individual employment relations shall have effect only in the circumstances set forth below: (i) where it is an agreement which was concluded when the employment contract was terminated and stipulates that an action may be brought in the country in which the labor was being supplied at the time of the conclusion of the agreement (If the agreement purports to allow an action to be filed exclusively in that country, it shall be without prejudice to the right to file in other countries except in the cases provided in the following subparagraph.); or (ii) where the employee filed an action in the country specified by the agreement or where the employee invoked the agreement in response to an action brought by the employer in Japan or in a foreign country.	
Article 3-8 (Jurisdiction by Submission) The courts shall have jurisdiction when the defendant, without objecting to the jurisdiction, made an oral argument on the merits or made a statement in preparatory proceedings.	
Article 3-9 (Dismissal of Proceedings under Special Circumstances) Even where the Japanese courts have jurisdiction over an action (except where the action has been brought on the basis of an exclusive jurisdiction agreement in favor of the Japanese courts), the court may dismiss the whole or part of the proceedings if, taking into account the nature of the case, the burden of the defendant to answer the claim, the location of evidence and any other factors, the court finds that there are special circumstances in which hearing and determining the case in Japan would impair fairness between the parties or hinder the proper and efficient conduct of the hearing.	• The "dismissal" within the meaning of this provision is not a dismissal on the merits but a dismissal without prejudice. • No particular provision was made to deal specifically with international parallel litigation (concurrent proceedings) since no consensus emerged as to how best to deal with such situations. Nothing prevents this provision from being applied where concurrent proceedings are pending in foreign countries but it remains to be seen how exactly the courts will appraise such situations to determine whether there are "special circumstances."
Article 3-10 (Exclusion of Application in the	• This provision is poorly drafted. What is

Case of Exclusive Jurisdiction) The provisions contained in Article 3-2 to Article 3-4 and those contained in Article 3-6 to the preceding Article shall have no application where, with respect to the action in question, the exclusive jurisdiction of the Japanese courts is prescribed by legislation.	meant is that the Japanese courts shall have no jurisdiction under the provisions mentioned therein in cases where legislation concerning exclusive jurisdiction (which in the Act corresponds to the provisions in Article 3-5) points to the courts of a foreign country. • This provision also signifies, by including Article 3-9 within the provisions mentioned, that where a Japanese court has exclusive jurisdiction under Article 3-5, it has no power to dismiss proceedings under Article 3-9. • The inclusion of Article 3-7 within the provisions mentioned signifies that exclusive jurisdiction prescribed by law overrides an exclusive jurisdiction agreement. This happens in two situations. Firstly, an exclusive jurisdiction agreement in favor of the Japanese courts has no effect if the legislation concerning exclusive jurisdiction points to the courts of a foreign country. Secondly, an exclusive jurisdiction agreement in favor of the courts of a foreign country has no effect if the legislation concerning exclusive jurisdiction points to the courts of Japan or a third country.
Article 3-11 (Examination of Evidence *ex officio*) The courts may examine evidence on its own motion in matters relating to the jurisdiction of the Japanese courts.	
Article 3-12 (Point in Time by Reference to which Jurisdiction shall be Determined) The jurisdiction of the Japanese courts shall be determined as of the time when the action is filed.	• Internal jurisdiction is also determined as of the time when the action is filed (Article 15 of Code of Civil Procedure). • Once the courts have acquired jurisdiction, it is not affected by events supervening in the course of hearings. • The jurisdiction by submission (Article 3-8) may not be acquired until the defendant makes an oral argument on the merits.
Article 145 (Action for Interlocutory Declaration)	• Article 145(1) of the Code of Civil Procedure provides:

(3) The parties may not seek a declaratory judgment under Paragraph (1) where the Japanese courts have no jurisdiction over the claim for declaration because of the provisions on exclusive jurisdiction.	Where the decision sought in an action is predicated on the existence or non-existence of certain legal relationships which are disputed in the course of proceedings, the parties may by enlarging their claims seek an interlocutory judgment for declaration confirming the relationships. However, the foregoing shall not apply where the claim for declaration is subject to the exclusive jurisdiction of another court (except where that jurisdiction is based on an agreement between the parties pursuant to Article 11). • Under the Japanese law of civil procedure, only the main text of a judgment has the binding force of *res judicata*. The interlocutory judgment for declaration provided by Paragraph (1) is sought when a party to an action wishes to obtain binding force with respect to a preliminary issue. The party claiming such a declaration can be either the plaintiff or the defendant. Thus, for example, the defendant to an action for delivery of goods may, while resisting the demand for delivery, seek an interlocutory judgment for declaration that he/she has the ownership of the goods, so that the latter issue be settled finally and conclusively. • The exclusive jurisdiction mentioned in Paragraph (1) concerns domestic venue within the territory of Japan while the exclusive jurisdiction mentioned in Paragraph (3) concerns international jurisdiction.
Article 146 (Counterclaim) (3) Where the Japanese courts have no jurisdiction over a claim brought by the defendant as a counterclaim pursuant to Paragraph (1), only if the claim has a close connection with the plaintiff's claim or with the defence thereto, may the defendant bring the claim. However, the foregoing shall not apply where the Japanese courts do not have jurisdiction over the counterclaim because of the provisions concerning exclusive juris-	Paragraph (1) provides: Only for the purpose of making a claim connected to the plaintiff's claim or the defence thereto, may the defendant file a counterclaim with the court hearing the plaintiff's claim until the oral argument is concluded. However, the foregoing shall not apply in the following cases: – where the claim brought as the counterclaim is subject to the exclusive jurisdiction

diction.	of another court (except where that jurisdiction is based on an agreement between the parties pursuant to the provision of Article 11). – where the filing of a counterclaim would significantly delay the proceedings.
Article 312 (Grounds for Appeal to the Final Appellate Court) (2) Appeal to the final appellate court may also be made in the cases set out in the sub-paragraphs below.... ... (ii-ii) where a provision concerning the exclusive jurisdiction of the Japanese courts has been violated.	With respect to the violation of other heads of jurisdiction, no appeal may be made to the final appellate court (usually the Supreme Court: "*saikô saibansho*") as of right, but leave for appeal may be sought from the final appellate court which then has discretion to decide whether to grant the petition (Article 318).

b. The provision to be incorporated into the Civil Interim Relief Act

Translation (Once the Act comes into effect, the following provision will be incorporated into the Civil Interim Relief Act.)	**Annotation**
Article 11 (Jurisdiction to Grant an Order of Interim Relief) A petition for an order of interim relief may be made only where an action on the merits may be filed with the courts of Japan or where the asset to be provisionally seized or the object of the dispute is located in Japan.	• Interim relief can be either the provisional seizure of assets (*saisie conservatoire*) or the provisional disposition to preserve the status quo. • The words "object of the dispute (*keisôbutsu*)" has the connotation of a tangible property. But it has been suggested that it could be interpreted as covering also the subject matter of the dispute such as employment relations. Whether this interpretation will be upheld by the courts remains to be seen. • No provision equivalent to Article 3-9 is to be incorporated into the Civil Interim Relief Act. However, Article 7 of the latter provides for the *mutatis mutandis* application of the provisions of the Code of Civil Procedure to the interim relief procedure. It is not clear whether Article 3-9, too, will become applicable

	through this route. If it does, it would serve as a useful ground for dismissing a petition in such cases as where an order of provisional seizure is sought in support of Japanese proceedings but the respondent has no asset on which to execute the order in Japan.

3. Some issues of interpretation under Article 3-9

It is expected that the new provisions will give rise to a number of issues of interpretation. The less controversial issues have been dealt with in the annotations of the preceding chapter. What follows will consider three (potentially) controversial issues under Article 3-9. Article 3-9 is singled out for analysis here because, being applicable in conjunction with all but a few heads of jurisdiction, it is a provision underpinning the whole operation of the Act.

a. What factors are eligible to be taken into account?

Since Article 3-9 involves a fact-sensitive assessment, if it is given a broad scope of operation, it will become difficult to predict with reasonable certainty whether the court will dismiss proceedings in any particular case. In the interest of preserving certainty, it may be argued that only the factors which are inconsistent with the underlying premise of the head of jurisdiction invoked should be taken into account as "special circumstances." While this argument may on the surface look incontestable, it cannot be supported for the following two reasons.

Firstly, ascertaining whether any factor is inconsistent with the underlying premise of a particular head of jurisdiction is easier said than done. Suppose, for example, that an action is brought in Japan with respect to the ownership of immovable property situated in a foreign country. It has been seen above that under the Act, jurisdiction over an action relating to immovable property does not fall within the realm of exclusive jurisdiction (See Article 3-5 as well as the annotation to Article 3-3(xi)). Consequently, if the defendant makes oral arguments on the merits without contesting jurisdiction, the court has jurisdiction under Article 3-8 (jurisdiction by submission). Likewise, if the defendant is domiciled in Japan, the court has jurisdiction under Article 3-2 (jurisdiction based on the domicile of the defendant). Now, it is conceivable that the legislature intended, by excluding

jurisdiction over immovable property from the realm of exclusive jurisdiction, to allow an action in respect of immovable property situated abroad to be brought in Japan provided that neither parties objects, in which case the presence of the immovable property abroad which is the object of the suit would not be inconsistent with the underlying premise of Article 3-8. On the other hand, it is not inconceivable that the legislature had no conviction that such an action should be allowed to be filed in Japan where the defendant has objection to be sued in Japan, in which case the presence of the immovable property abroad which is the object of the suit might be inconsistent with the underlying premise of Article 3-2. No amount of scrutiny of legislative materials shed a clear light on the correctness of these suppositions.

Secondly, even if a particular factor is by itself not inconsistent with the underlying premise of a particular head of jurisdiction, if it is combined with other factors, they may jointly constitute "special circumstances." For example, under Article 3-3(iii), the Japanese courts have jurisdiction over an action for the payment of money if the defendant's asset capable of being seized is located in Japan. This head of jurisdiction is prone to produce exorbitant jurisdiction. Conscious of that danger, the legislature has expressly made an exception where the value of the asset is extremely low. As annotated above, this exception concerns the absolute value rather than the value relative to the amount of the claim. Prior to the enactment, it had been suggested by some commentators that exceptions should also be made in the cases where the defendant's asset situated in Japan had a smaller value than the amount of the claim or where the presence of the asset in Japan was transient or fortuitous. The legislature did not adopt these exceptions in Article 3-3(iii). It may therefore be inferred that neither the low value of the asset relative to the amount of the claim nor the transience or fortuity of the presence of the asset is, if taken alone, inconsistent with the underlying premise of Article 3-3(iii). Even so, however, that should not mean that those factors cannot be taken into account under Article 3-9. This is because if combined together or with other factors, they may jointly constitute, quoting from Article 3-9, "special circumstances in which hearing and determining the case in Japan would impair fairness between the parties or hinder the proper and efficient conduct of the hearing."

For those reasons, a rigid categorization of factors between those which are consistent and those which are inconsistent with the underlying premise of each head of jurisdiction should be eschewed. Such an approach would, contrary to what it seeks to achieve,

increase legal uncertainty. No factors should be ruled out from the equation of Article 3-9 if they might affect the finding whether "hearing and determining the case in Japan would impair fairness between the parties or hinder the proper and efficient conduct of the hearing." Weighing up all such factors, the court should arrive at a holistic view whether there are "special circumstances." Only a case-by-case analysis is possible under Article 3-9 and the consequential uncertainty must be accepted as being inherent in that provision.

b. Application to international parallel litigation

The Act has made no particular provision to deal specifically with international parallel litigation since no consensus emerged as to how best to deal with such situations.(3) However, nothing prevents Article 3-9 from being applied to the situation where parallel proceedings are pending in foreign countries. The concurrence of proceedings may lead the Japanese court to dismiss its proceedings by finding that there are "special circumstances in which hearing and determining the case in Japan would impair fairness between the parties or hinder the proper and efficient conduct of the hearing."

As is well known, under the Brussels I Regulation, a strict rule giving priority to the earlier proceedings is adopted in the intra-EU context.(4) That rule is predicated on the assumption that the quality of justice does not differ greatly between different Member States. The contrary assumption that the parallel foreign proceedings may not be as fair and efficient as the domestic proceedings must be the basis upon which to devise the Japanese approach since it should be capable of dealing with parallel proceedings to be brought in any country of the world. It follows that while the EU's rule seeks to eliminate parallel proceedings for the sake of promoting mutual recognition of judgments, the central aim of the Japanese courts managing parallel proceedings should be the proper administration of justice. For that purpose, the order of seizure of proceedings may well be unimportant since the court seized later may be the more appropriate forum.

To ensure the proper administration of justice in parallel litigation, it is necessary to thoroughly evaluate the situation by weighing up a wide range of factors. Thus, if the foreign proceedings have almost reached the stage of producing a judgment, it may be appropriate to treat them as a significant factor. If, on the other hand, the foreign proceedings have not passed beyond the initiation phase, it may be unnecessary to attach them as much weight. The burden on the defendant may be significant where both the Japanese and the foreign proceedings are brought by the same plaintiff against the same defendant

whereas it may not have to be treated as so significant where the plaintiff to foreign proceedings is the defendant to Japanese proceedings. Article 3-9 enables the courts to take all such factors into consideration with sufficient flexibility.

Another advantage of Article 3-9 is that it is capable of dealing with parallel proceedings which are not identical but involve related causes of action between the same or related parties. Suppose, for example, that X brings proceedings abroad against a company Y in contract and its director Z in tort and then brings proceedings in Japan against the company Y in contract on the same cause of action. The two sets of proceedings are not identical but related. Since the identity of the proceedings is not a prerequisite under Article 3-9, the Japanese court may dismiss its proceedings if it finds that there are "special circumstances." Suppose also the reverse example where X brings proceedings abroad against Y in contract and then brings proceedings in Japan against Y in contract and Z in tort. As Article 3-9 allows partial dismissal of proceedings, the Japanese courts may, if they see fit, dismiss the part of its proceedings which overlap with the proceedings abroad, *i.e.* the proceedings against Y.

As seen above, the flexibility and versatility of Article 3-9 make it both fit and sufficient to deal with international parallel litigation. Though it is not applicable in the cases where the Japanese courts have exclusive jurisdiction, it would not be inappropriate in view of the sanctity of exclusive jurisdiction that there be no possibility of dismissing Japanese proceedings in favor of foreign proceedings in such situations.

Another approach for dealing with international parallel proceedings which has been strongly supported by some commentators is called the recognition prognosis approach. Under that approach, a Japanese court must dismiss its proceedings where the foreign proceedings are predicted to produce a judgment entitled to recognition in Japan. This approach, if at all workable, would save judicial resources and prevent conflicting judgments. It may be argued that since the Act has made no particular provision to deal specifically with international parallel litigation, the recognition prognosis approach has not been precluded. This argument cannot, however, be supported because, as has been just demonstrated, Article 3-9 is adequate to deal with international parallel litigation. Two additional reasons may be put forward.

Firstly, the recognition prognosis approach is based on the premise that if foreign proceedings are predicted to produce a judgment entitled to recognition in Japan, the foreign proceedings should be treated as equivalent to Japanese proceedings. This premise is,

it is submitted, incorrect. Foreign proceedings are, even if they are between the same parties on the same cause of action, qualitatively different from Japanese proceedings: the procedure and the language used in the proceedings are different; the law applicable to the substance of the case may be different; the efficiency of proceedings may be different; the burden on the defendant to travel to the fora to take part in the proceedings may be different; and the integrity of the court may be different. The recognition prognosis approach turns a blind eye to all those highly important factors.

Secondly, and most significantly, the recognition prognosis approach is unworkable since it is extremely difficult, if not impossible, to predict whether foreign proceedings will produce a judgment entitled to recognition in Japan. There are two specific difficulties involved. Firstly, it is difficult to predict whether foreign proceedings will produce a judgment at all since it is possible that the foreign court will dismiss the proceedings without prejudice, or the plaintiff will voluntarily withdraw its claim, or the parties will settle the case. Secondly, it is difficult to predict whether the ensuing foreign judgment, assuming that one will be produced, is entitled to recognition in Japan. For a foreign judgment to be recognized in Japan, it must meet all the requirements set out in Article 118 of the Code of Civil Procedure. Item 3 of that provision requires that neither the foreign judgment nor the foreign procedure be contrary to the *ordre public* of Japan, a requirement which can only be tested after the foreign proceedings have completely run their course to produce a judgment.[5] In one case,[6] the court adopted the recognition prognosis approach and refused to dismiss its proceedings by noting the difficulty of prediction. That judgment ironically exposed the weakness of the approach it took as it proved that the recognition prognosis approach would, because of the difficulty of prediction, only result in refusal to dismiss proceedings.

c. The legal ground for dismissing proceedings

The provision of Article 3-9 largely follows the principle established by the pre-existing case law[7] which allows the courts to decline jurisdiction if there are "exceptional circumstances (*tokudan no jijô*)" which are defined in essentially the same terms as the "special circumstances" of Article 3-9. However, on a literal reading, it deviates from the latter with respect to the legal ground for dismissing proceedings. Under the pre-existing case law, a court may dismiss proceedings because the "exceptional circumstances" deprive it of jurisdiction which it would otherwise have whereas under Article 3-9, a court may dismiss pro-

ceedings if there are "special circumstances" notwithstanding that it has jurisdiction. Thus, on the literal interpretation, Article 3-9 has created a new threshold requirement, distinguished from the requirement of international jurisdiction, which serves as a ground for dismissing proceedings.

If Article 3-9 had followed the case-law position with respect to the legal ground for dismissing proceedings, the courts would not be able to take into account the events occurring after the filing of an action because international jurisdiction must be determined as of the time when the action is filed (See Article 3-12 and its annotation). On the other hand, Article 3-9 on the literal reading would allow the court to dismiss proceedings by taking into account the events supervening in the course of oral hearings because the threshold requirements[8] must generally[9] be satisfied at the time of the closure of oral hearings. Thus, if an important witness has moved to a foreign country after filing of the action, the court would be able to take it into account in determining whether there are "special circumstances." More importantly, where parallel proceedings are pending abroad, the Japanese courts would be able to decide whether to dismiss its proceedings by having regard to how the foreign proceedings will pan out in terms of the determination of jurisdiction as well as the efficiency and fairness of the proceedings. The literal interpretation of Article 3-9 will produce those practically beneficial effects.

That interpretation is, however, contradicted by the legislative history. In Japan, for enacting or amending major pieces of legislation, bills are usually submitted by the government to the Diet. The preparation of bills may be preceded by deliberations at the Legislative Council of the Ministry of Justice. The Legislative Council establishes a working group for each consulted project consisting of ministerial officials and others such as practicing lawyers, academic experts and representatives of interest groups. At the 16th meeting of the working group on international jurisdiction, a question was raised whether the legislative proposal then on the table intended to depart from the position under the case-law with respect to the legal ground for dismissing proceedings. To this query, the Ministry of Justice official in charge of the proposal replied negatively. This episode may carry some weight because the proposal then on the table was the same in content as the final text of Article 3-9. However, it seems wrong to treat it as conclusive. The reply was made in a single sentence and the exchange took place in passing without exploring the implications of the question. The legislative proposal in question was not phrased in a proper legislative style. Moreover, the Legislative Council is not the legislature, the Diet being the sole law-

making organ (Article 41 of the Constitution). Though the statements made in the Council meetings are admissible as an aid to interpretation, it is impermissible to attribute them to the Diet as expressing the will of the legislature.[10] Since the Diet expresses its intent in the words of statutes it enacts, the legislative intent should be ascertained first and foremost by putting ordinary and natural meaning to the words used. Departure from the literal interpretation should only be permitted in exceptional cases as where the plain meaning is difficult to fathom or where it leads to an absurd result. It is instructive that in England, references to Parliamentary materials are permitted as an aid to statutory construction only where (a) the wording of legislation is ambiguous, obscure or leads to absurdity; (b) the material relied upon consists of statements by the minister or other promoter of the bill together if necessary with such other Parliamentary material as is necessary to understand such statements and their effect; and (c) the statements relied on are clear.[11] Admittedly, the Japanese legislation is not as conducive to literal interpretation as the English counterpart since it relies more on concise and comprehensive concepts.[12] But some restraint in the use of *travaux préparatoires* would be preferable also in the interpretation of Japanese legislation. Japanese lawyers have a tendency of indulging in an extensive perusal of preparatory materials in pursuit of teleological interpretation. However, the law is not made only for lawyers. Lay people should be able to put reasonable faith in the text of legislation. Today, literal interpretation has arguably become more important since, thanks to the internet, everyone – lawyer and non-lawyer alike - has easy access to the text of all legislation, whereas in the past much of it may have been tucked away in the lawyer's office. Though preparatory materials have also become more accessible,[13] lay people cannot be expected to work their way through the intricacies of preparatory works or even textbooks. The case for literal interpretation is particularly strong with statutes of an international dimension as foreign users can be even less expected to conduct research into legislative history. If a lawyer is hired to do the research, it will add to the costs of litigation. Furthermore, the preparatory materials will seldom prove conclusive. The parliamentary record is not as illuminating as one would hope since the debates are conducted by politicians who are usually not specialists in the subject matter of the bills. Better informed debates take place in the Legislative Council meetings but since they are based on earlier proposals, their relevance to the final text is often unclear. If reference to preparatory materials is reined in, it would also have the salutary effect of encouraging lawmakers to take greater care in choosing the right words for legislative texts.

Some might resist the literal interpretation of Article 3-9 by arguing that it would result in giving effect to a foreign judgment rendered in a situation where a Japanese court, placed in the foreign court's shoes, would dismiss proceedings under Article 3-9. This argument is based on the assumption that indirect jurisdiction (*i.e.* the jurisdictional requirement for the recognition and enforcement of foreign judgments) is a mirror image of direct jurisdiction (*i.e.* jurisdiction necessary for the Japanese court to hear a case). However, this argument seems misconceived. While the phrase "*kansetsu kankatsu*" (indirect jurisdiction) is widely used in literature, the actual expression used in Article 118 of the Code of Civil Procedure is "*saibanken*" (adjudicatory power). Its meaning is open to interpretation and does not have to be aligned with direct jurisdiction. It should rather be construed as equivalent to a mirror image of the combination of direct jurisdiction and the possibility of dismissal under Article 3-9. If Article 118 is so construed, the literal interpretation of Article 3-9 would not be an impediment to denying recognition to a foreign judgment rendered in a situation where a Japanese court, placed in the foreign court's shoes, would dismiss proceedings under Article 3-9.

For the foregoing reasons, the literal interpretation should be adopted with respect to the legal ground for dismissing proceedings under Article 3-9.

4. Overall evaluation of the new Rules

The newly enacted rules are by a large measure a statutory restatement of the existing law. Nevertheless, there are some novelties. Most notable examples are the provisions on jurisdiction over an action relating to business in Japan (Article 3-3(v)), jurisdiction over an action relating to consumer contracts and employment relations (Article 3-4), and jurisdiction agreement concerning consumer contracts and employment relations (Article 3-7 (5)(6)). The provision in Article 3-3(v) represents an effort to adapt to modern-day business reality and the provisions in Articles 3-4 and 3-7(5)(6) embrace the modern idea of establishing special rules for protecting weaker parties.

The Act, by codifying the rules which have hitherto had to be inferred from judicial precedents, will enhance the transparency of law. The Act will also improve the clarity of the law to the extent it has settled – in express terms – some outstanding issues. For example, with respect to jurisdiction based on the place of performance, while opinion has thus far been divided whether it is available where the place of performance is not stipulated by the contract and is ascertainable only by applying the governing law of the contract, the

Act has now sided with the affirmative opinion by an express term in Article 3-3(i). With respect to jurisdiction based on the location of the defendant's seizable assets, while opinion has thus far been divided over what should be the conditions under which it is available, the Act has now expressly stipulated the conditions in Article 3-3(iii).

When analyzing the Act, care should be taken to read each head of jurisdiction in conjunction with Article 3-9. The legislator seemed cautious about restricting the bases of jurisdiction so that the cases which merit being heard in Japan would not be left out of the jurisdiction of the Japanese courts. As a result, there are provisions which could, depending on the facts of the case, lead to what may be seen as an exorbitant jurisdiction. For example, Article 3-3(iii) may lead to jurisdiction that is too broad if it is invoked in the cases where the presence of the defendant's asset in Japan is transient (such as where the defendant's ship is calling temporarily at a port in Japan). The danger of an exorbitant jurisdiction likewise exists where the jurisdiction under Article 3-6 is invoked in a multiparty action. However, any excess of jurisdiction may be alleviated by the dismissal of proceedings under Article 3-9 as the courts may come to the finding that there are special circumstances in which hearing and determining the case in Japan would impair fairness between the parties or hinder the proper and efficient conduct of the hearing. Another illustration can be drawn from the new rules to protect consumers. As the balance of those rules is strongly in favor of consumers, the application of those provisions will sometimes produce an outcome harsh for business operators. For example, if a consumer domiciled in Japan buys a souvenir in Hawaii and finds it defective, he/she may invoke jurisdiction under Article 3-4(1) to file an action in Japan to claim damages for breach of the sale contract against the Hawaiian seller who has no contact whatsoever with Japan. It is of no avail for the Hawaiian seller to insert an exclusive jurisdiction clause in favor of the Hawaiian courts since such an agreement has no effect under Article 3-7(5)(i). All it can do is expect the Japanese courts to dismiss the proceedings under Article 3-9.

While Article 3-9 will be useful to reach fair and appropriate results in individual cases, legal certainty and predictability will be undermined if it is given a broad scope of operation since it involves a case-by-case assessment of a wide range of factors. Legal certainty and predictability are particularly important for the rules of international jurisdiction so the parties do not have to waste too much time and money before starting to litigate on the merits. As noted in the preceding chapter, the provision of Article 3-9 largely follows the principle established by the pre-existing case law which allows the courts to de-

cline jurisdiction if they find that there are "exceptional circumstances (*tokudan no jijô*)" in which adjudicating the case in Japan would impair fairness between the parties and hinder the proper and efficient conduct of the hearing. The courts have often brought this principle into play even in cases where the facts do not display truly "exceptional circumstances." Commentators have been critical of this application because the excessive tendency to rely on this principle has made it difficult to predict with reasonable certainty whether the court will hear the case.

In drafting Article 3-9, the legislature has tried to limit its scope of operation by expressly leaving out the case where the jurisdiction is based on an exclusive jurisdiction agreement, conscious of the fact that such an agreement is likely to be concluded by parties desiring a high degree of legal certainty. In addition, efforts have been made to curb the need for dismissal on a fact-sensitive assessment under Article 3-9 by tightly delineating some of the heads of jurisdiction. Thus, for example, Article 3-2(3) makes it plain that the location of the defendant's non-principal office in Japan *per se* does not constitute a base of jurisdiction, a point contradicted by some previous court decisions. The jurisdiction for the place of tort, too, is limited by Article 3-3(viii) which requires the foreseeability of the result occurring in Japan if the harmful act is committed abroad. There are other examples that demonstrate the effort to curb the need to rely on Article 3-9. However, the assessment under Article 3-9 will prove to be decisive in a high proportion of cases.

Taken as a whole, the Act marks an important step forward as it will enhance the transparency and clarity of law while at the same time bringing the law in line with modern ideas and business reality. The progress is, however, marred by the failure to ensure a high degree of legal certainty and predictability. It will take many years before stable patterns of application emerge from the accumulation of judicial authorities.

(1) Matters of personal status are excluded from the scope.

(2) For another version of English translation, see Masato Dogauchi, "Forthcoming Rules on International Jurisdiction" 12 Kokusai Shihô Nenpô (Japanese Yearbook of Private International Law) 212 (2010).

(3) For an account on the demise of proposals, see Dogauchi, *supra* note 2 at p. 220.

(4) Article 27 of the Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (OJ 2001/L 12/1).

(5) The other requirements are capable of being tested prior to the actual delivery of a judg-

ment. They are indirect jurisdiction (Item 1 of Article 118), service of a claim form on the defendant (Item 2 of Article 118) and reciprocity (Item 4 of Article 118).

(6) Interlocutory judgment by the Tokyo District Court on 30 May 1989 (1348 Hanrei Jihô 91).

(7) The leading case is the judgment of the Supreme Court on 11 November 1997 (51-10 Minshû 4055).

(8) Other threshold requirements include internal and international jurisdiction, standing (*locus standi*) and legitimate interest to sue.

(9) Article 3-12 constitutes an exception with respect to the requirement of international jurisdiction. Article 15 of the Code of Civil Procedure constitutes another exception with respect to the requirement of internal jurisdiction.

(10) The same may be said of explanatory notes which are often published by the government officials in personal capacity after the bills have become law. An explanatory note was published also for the Act which this article is concerned (by Naoko Higurashi *et al.* 958 (2011.8.1) NBL 62). It steers largely clear of controversial issues.

(11) Pepper v. Hart [1993] 1 All ER 42 (House of Lords).

(12) Those are the features which characterize the legislation of civil law countries as opposed to the common law counterpart. The provisions of the Act, too, bear the hallmarks of the civilian legislative style.

(13) The minutes of the meetings of Parliamentary committees are available on the websites of both houses of the Diet. The minutes of the working groups of the Legislative Council of recent years are also available on the website of the Ministry of Justice.