

# The New Act on International Jurisdiction in Japan: Significance and Remaining Problems

*Dai Yokomizo* \*

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## I. INTRODUCTION

This paper focuses on Japan's newly enacted rules on international judicial jurisdiction, which is one of the pillars of the recent reforms of Japanese private international law.

Japanese private international law belongs to the continental legal system. The first enacted choice-of-law rules, *Hōrei*,<sup>1</sup> were drafted in the light of the second Gebhard draft of 1887 of the German Civil Code and other dominating scholarly opinions of those days.<sup>2</sup> The first amendment of the *Hōrei* took place in 1989 and was mainly focused on matters concerning marriage and parent-child relationships.<sup>3</sup> The subsequent

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1 Act No. 10 of 1898. The English translation of the *Hōrei*, as amended, is found in: A. EHRENZWEIG / S. IKEHARA / N. JENSEN, *American-Japanese Private International Law* (1964) 115; *The Japanese Annual of International Law [JAIL]* 7 (1963) 20; J. Basedow / H. Baum / Y. Nishitani (eds.), *Japanese and European Private International Law in Comparative Perspective* (Mohr Siebeck, 2008) 421.

2 See generally M. DOGAUCHI, *Historical Development of Japanese Private International Law*, in: Basedow/Baum/Nishitani, *supra* note (1) 27, 35.

3 With regard to this amendment, see JUNKO TORII, *Revision of Private International Law in Japan*, in: *JAIL* 33 (1990) 56; Dogauchi, *supra* note (2) 41-43.

amendment of *Hōrei* was in 2006 and concerned civil and commercial matters. As the result of the 2006 reform, a new Act on General Rules for Application of Laws was adopted and came into force on 1 January 2007.<sup>4</sup> With regard to the recognition and enforcement of foreign judgments, foreign final judgments can be recognized and enforced pursuant to Art. 118 of the Code of Civil Procedure and Art. 24 of the Code of Civil Enforcement. These provisions were also modelled on the basis of German law and were later amended slightly.<sup>5</sup>

While Japanese law has certain provisions regarding the choice of law as well as the recognition and enforcement of foreign judgments, it had been thought that there was no specific provision prescribing international jurisdiction in Japan.<sup>6</sup> This situation changed with the adoption of the new ‘Act for the Partial Amendment of the Code of Civil Procedure and the Civil Provisional Remedies Act’ [hereafter referred to as ‘the Act’],<sup>7</sup> which came into force on 1 April 2012. This subsequent statute is considered to be the first legislation regarding international jurisdiction in civil and commercial matters in Japan.<sup>8</sup>

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- 4 Act No. 78 of 2006 (*Hō no tekiyō ni kansuru tsūsoku-hō*). English text is available at [www.soc.nii.ac.jp/pilaj/text/tsusokuho\\_e.htm](http://www.soc.nii.ac.jp/pilaj/text/tsusokuho_e.htm) (last visited on 3 July 2012). It is also found in: Basedow/Baum/Nishitani, *supra* note (1) 405-19, as well as in: JAIL 50 (2007) 87-98. See generally K. TAKAHASHI, A Major Reform of Japanese Private International Law, in: *Journal of Private International Law*, Vol. 2, No. 2 (2006) 311; Y. OKUDA, Reform of Japan’s Private International Law: Act on the General Rules of the Application of Laws, in: *Yearbook of Private International Law* 8 (2006) 145; DOGAUCHI, *supra* note (2) 51-57.
- 5 Art. 118 of the Code of Civil Procedure:  
 ‘A final and binding judgment rendered by a foreign court shall be effective only where it meets all of the following requirements:  
 (i) The jurisdiction of the foreign court is recognized under laws or regulations or conventions or treaties.  
 (ii) The defeated defendant has received a service (excluding a service by publication or any other service similar thereto) of a summons or order necessary for the commencement of the suit, or has appeared without receiving such service.  
 (iii) The content of the judgment and the court proceedings are not contrary to public policy in Japan.  
 (iv) Reciprocity exists.’  
 Art. 24(2) of the Civil Execution Act:  
 ‘An execution judgment shall be made without investigating whether or not the judicial decision is appropriate.’
- 6 However, the Great Court of Cassation considered that provisions on territorial jurisdiction also apply when determining international jurisdiction of Japanese courts. See M. DOGAUCHI, New Japanese Rules on International Jurisdiction: General Observation, in: *The Japanese Yearbook of International Law* [JYIL] 54 (2011) 260, 262-64.
- 7 *Minji soshō-hō oyobi minji hozen-hō no ichibu o kaisei suru hōritsu*, Act No. 36 of May 2, 2011.
- 8 The English translation is found in: JYIL 54 (2011) 723, *Kokusai shihō nenpō* [Japanese Yearbook of Private International Law] 12 (2010) 228-41 and *Kokusai shihō nenpō* 13 (2011) 47-60. With regard to this new Act, see generally M. DOGAUCHI, Forthcoming Rules on International Jurisdiction, in: *Kokusai shihō nenpō* 12 (2010) 212; *id.*, *supra* note (6);

As will be described later, the background of this legislation is quite specific. There had been strong divergence of academic opinion between predictability and case-by-case justice regarding the interpretation of the guidelines developed in case law. This disagreement was also obvious in the discussions during the legislative process. Due to this controversy of opinions, the new legislation had only limited significance.

The following sections of this paper will describe, first, the background of the new legislation (II), and, second, the legislative process of the Act (III). Then, after the overview of the Act is summarized (IV), its significance and problems will be examined (V).

## II. BACKGROUND

As for international jurisdiction in civil and commercial matters, there have been two conflicting views regarding the following question: From what viewpoint should rules on international jurisdiction be established? On the one hand, according to a nationalistic view, international jurisdiction of Japanese courts should be presumed to exist when the conditions of the case establish internal territorial jurisdiction (or local venue) as provided in the Code of Civil Procedure (the defendant's domicile, the place where the obligation is to be performed, the place where the tort occurred, the place where the property is located, etc.). This approach is known as the 'reverse presumption theory'.<sup>9</sup> On the other hand, proponents of the universalistic view have been emphasizing the need to establish rules on international jurisdiction from the viewpoint of the appropriate allocation of judicial functions to national courts in international society (the 'allocating jurisdiction theory').<sup>10</sup>

In the judgment of 16 October 1981 (the *Malaysian Airlines System* case),<sup>11</sup> the Supreme Court established some guidelines regarding international jurisdiction, on the one hand respecting the allocating jurisdiction theory by holding that 'the determination of international jurisdiction should be made in accordance with the principle of justice and reason which requires that fairness be maintained as between the parties, and a proper and prompt trial be secured'. On the other hand, the Supreme Court adopted the reverse presumption theory by holding that a defendant should be subject to the jurisdiction of

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K. TAKAHASHI, Japan's Enacted Rules on International Jurisdiction: with a Reflection on Some Issues of Interpretation, in: *Kokusai shihō nenpō* 13 (2011) 146.

9 H. KANEKO, *Minji soshō-hō taikai zotei-ban* [Civil Procedure Law, Revised Version] (Sakai Shoten, 1966) 59; H. EGAWA, *Kokusai shihō ni okeru saiban kankatsu-ken* (3) [Jurisdiction in Private International Law (3)], in: *Hōgaku Kyōkai Zasshi* [Journal of the Jurisprudence Association The University of Tokyo], Vol. 60, No. 3 (1942) 369, 373 *et seq.*

10 S. IKEHARA, *Kokusai saiban kankatsu-ken* [International Jurisdiction], in: C. Suzuki / A. Mikazuki (eds.), *Shin-jitsumu minji soshō kōza* [New Practice of Civil Procedure], Vol. 7 (Nihon Hyōron-sha, 1982) 3, 15 *et seq.*

11 *Minshū* [Supreme Court of Civil Reports], Vol. 50, No. 7, p. 1451. English translation is found in: *JAIL* 26 (1983) 122.

Japan when the conditions of the case establish internal territorial jurisdiction (or local venue) as provided in the Code of Civil Procedure.<sup>12</sup>

The Court's judgment in the *Malaysian Airlines System* case was subject to much discussion among academics as well as practitioners. Some pointed out that the Supreme Court's approach may pose a danger of inflexibility in determining international jurisdiction of Japanese courts.<sup>13</sup> The Supreme Court's approach was generally followed by Japanese lower instance courts. Yet the subsequent practice in lower courts added one additional condition: Japanese courts shall assert international jurisdiction, unless exceptional circumstances are found or if a trial in a Japanese court would contradict the promotion of fairness between the parties, and the equitable and prompt administration of justice would not be served (exceptional circumstances condition).<sup>14</sup> This new condition added by the lower courts was largely supported by academics, who argued that this new condition would prevent Japanese courts from exercising the exorbitant international jurisdiction and that it would bring room for exceptional consideration in a concrete case under the clear guidelines given by the Supreme Court.<sup>15</sup>

However, a divergence among academic opinions gradually became clear, especially with regard to the question of striking the balance between legal certainty and case-by-case justice in the application of the exceptional circumstances condition in a concrete case. On the one hand, advocates of the view attaching more importance to legal certainty considered this condition as a safeguard to respond to exceptional cases and claimed a restricted interpretation of this condition.<sup>16</sup> On the other hand, the view attaching more importance to case-by-case justice regarded it as providing room to implement a balancing test in each concrete case and claimed to consider a variety of elements regarding fairness between the parties and the equitable and prompt administration of justice.<sup>17</sup> The lower court cases took the latter's position in considering a variety of elements in

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12 With regard to this judgment, see DOGAUCHI, *supra* note (6) 265.

13 See, for example, M. DOGAUCHI, Case Note, in: Hanrei Hyōron [Case Review], No. 310, p. 41, 43.

14 See, for example, Tokyo District Court, Preliminary Judgment, 27 September 1982, in: Hanrei Jihō [Judicial Reports], No. 1075, 137; Tokyo District Court, Preliminary Judgment, 27 March 1984, in: Hanrei Jihō, No. 1113, 26. With regard to inferior court cases, see generally K. YAMAMOTO, Case Note, in: Minshō-hō Zasshi [The Journal of Civil and Commercial Law], Vol. 119, No. 2 (1998) 268, 271 *et seq.*

15 M. DOGAUCHI, *Rippō-ron toshite no kokusai saiban kankatsu* [International Judicial Jurisdiction de lege ferenda], in: Kokusai-hō Gaikō Zasshi [The Journal of International Law and Diplomacy], Vol. 91, No. 2 (1992) 121 *et seq.*; S. NAKANO, Case Note, in: Hōgaku Kyōshitsu [Lecture for the Future], No. 213 (1998) 125.

16 DOGAUCHI, *supra* note (13) 43 *et seq.*

17 K. ISHIGURO, *Kokusai shihō no kaishaku-ronteki kōzo* [Interpretive Structure of Private International Law] (Yuhikaku, 1980) 272; *id.*, *Gendai kokusai shihō [Jō]* [Contemporary Private International Law (1)] (Tōdai Shuppankai, 1987) 322.

applying the exceptional circumstances condition,<sup>18</sup> and accordingly they were criticized by the former view for their ‘excessive pursuit of concrete justice on a case-by-case bases’.<sup>19</sup>

Under these circumstances, in the Judgment of 11 November 1997 (the *Family Company* case),<sup>20</sup> the Supreme Court straightforwardly adopted the framework suggested by the lower instance court cases, namely the reference to the conditions of the case establishing internal territorial jurisdiction (or local venue) plus the exceptional circumstances condition. Moreover, the Supreme Court took the position to attach more importance to case-by-case justice by broadly considering concrete circumstances in the determination of the existence of exceptional circumstances.<sup>21</sup> This judgment was strongly criticized for overweighting case-by-case justice.<sup>22</sup> Thus, academic opinion expected the legislative intervention to change the balance struck by the Supreme Court between legal certainty and case-by-case justice.

The legislation of rules on international jurisdiction was examined during the drafting process for the amendment of the Code of Civil Procedure in 1998. However, the introduction of provisions regarding international jurisdiction was abandoned, due to the opposition of views on a variety of issues. One of the reasons for this abandonment was the on-going project to establish a global uniform convention on international jurisdiction and recognition and enforcement of foreign judgments under the auspices of the Hague Conference of Private International Law.<sup>23</sup> However, the establishment of a comprehensive convention was abandoned because of opposition among member states, and the Hague Conference’s project ended with the adoption of the Convention on Choice of Court Agreements (June 30, 2005).

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18 See, for example, Tokyo District Court, Preliminary Judgment, 27 March 1984, in: Hanrei Jihō, No. 1113, 26; Tokyo District Court, Preliminary Judgment, 15 February 1984, in: Hanrei Jihō, No. 1135, 70.

19 DOGAUCHI, *supra* note (15) 123.

20 Minshū, Vol. 51, No. 10, 4055. English translation is found in: JAIL 41 (1998) 117.

21 See D. YOKOMIZO, Case Note, in: Hōgaku Kyōkai Zasshi, Vol. 117, No. 9 (2000) 1356, 1361.

22 Y. EBISAWA, Case Note, in: Jurisuto [Jurist] No. 1135 (1998) 290; M. DOGAUCHI, Case Note, in: Jurisuto, No. 1133 (1998) 214; NAKANO, *supra* note (15) 125; E. ADACHI, Case Note, in: NBL [New Business Law], No. 662 (1999) 71; R. YAMADA, *Shōgai jiken ni kansuru saikin no saikō-sai hanketsu ni tsuki omou* [Reflections on Recent Supreme Court Judgments Concerning International Civil Cases]. But, as the view supporting the Supreme Court, YAMAMOTO, *supra* note (14) 281 *et seq.*; M. TAKESHITA / M. MURAKAMI, Case Note, in: Hanrei Taimuzu [The Law Times Report], No. 979 (1998) 23.

23 KOKUSAI SAIBAN KANKATSU KENKYŪ-KAI [Working Group on International Judicial Jurisdiction], *Kokusai saiban kankatsu kenkyū-kai hōkoku-sho* (1) [Report of Working Group on International Judicial Jurisdiction (1)], in: NBL, No. 883 (2008) 37.

### III. LEGISLATIVE PROCESS

#### 1. *Legislative Process of the Act*<sup>24</sup>

In November 2005, a working group called *Kokusai Saiban Kankatsu Kenkyū-kai* [Working Group on International Judicial Jurisdiction] was formed for the establishment of domestic rules on international jurisdiction at the Commercial Law Center,<sup>25</sup> based on the research entrustment from the Ministry of Justice. It was formed with the concern that ‘the case law rules are not sufficiently clear and it cannot be said that the predictability is high enough only with the case law’.<sup>26</sup> After twenty-two meetings, it produced a report on ideas for rules of international jurisdiction in April 2008.<sup>27</sup>

Then, in September 2008, the Ministry of Justice consulted with the Legislative Council regarding the rules of international judicial jurisdiction to be enacted.<sup>28</sup> Based on this consultation, the General Assembly of the Legislative Council established a special division named the Division on International Jurisdiction. This division held ten meetings after October 2008 and published its preliminary draft rules for public comment in July 2009, with various alternative proposals and comments explaining the intent of the drafters.<sup>29</sup> After considering comments from the courts, the bar associations, law professors and other interested parties, the Division held six additional sessions and submitted its final draft of the rules to the General Assembly of the Legislative Council in January 2010.<sup>30</sup> The final draft was adopted and submitted to the Minister of Justice in February 2010. Then, the Bill for Partial Amendment of the Code of Civil Procedure and the Civil Provisional Remedies Act, which was based on the final draft, was submitted to the Parliament by the Government in March 2010. However, because of political turbulence, by April 2011 it had still not been adopted. It was finally adopted by the House of Councilors (on 20 April 2011) as well as by the House of Representatives (on 28 April 2011), and was promulgated on 2 May 2011. It came into force on 1 April 2012.

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24 See generally DOGAUCHI, *supra* note (6) 268-269.

25 The Commercial Law Center is a non-governmental, non-profit entity that, in general, concerns itself with commercial law; DOGAUCHI, *supra* note (6) 268.

26 KOKUSAI SAIBAN KANKATSU KENKYŪ-KAI, *supra* note (23) 37.

27 KOKUSAI SAIBAN KANKATSU KENKYŪ-KAI, *Kokusai saiban kankatsu kenkyū-kai hōkoku-sho (1) to (6)*, in: NBL, No. 883, 37; No. 884, 64; No. 885, 64; No. 886, 81; No. 887, 115; No. 888, 73 (2008).

28 Consultation, No. 86 of 3 September 2008.

29 *Kokusai saiban kankatsu hōsei ni kansuru chūkan shian* [Draft Proposals on the Rules of International Judicial Jurisdiction], available at [moj.go.jp/shingi1/shingi\\_090710-1.html](http://moj.go.jp/shingi1/shingi_090710-1.html) (last visited on 7 July 2012).

30 Meeting documents and reports including the final draft are available at [moj.go.jp/shingi1/shingi\\_kokusaihousei\\_index.html](http://moj.go.jp/shingi1/shingi_kokusaihousei_index.html) (last visited on 7 July 2012).

## 2. *Features*

This legislative process has several features. First of all, it can be pointed out that the Working Group on International Judicial Jurisdiction played a great role in the legislative process. As mentioned above, this group was a non-official group, although it was formed based on the research entrustment from the Ministry of Justice. However, it was significantly influential in this legislation process because the report it produced became a starting point for discussion at the meetings of the Division on International Jurisdiction. The Working Group constituted of eight law professors (six professors of civil procedure law, two professors of private international law), two judges and one lawyer. Almost all members of this group participated in the meetings of the Division.

Second, as for the Division on International Jurisdiction, two features can be pointed out as probably common features in the Japanese legislative process: strong initiative of the Secretariat and no clear process in decision-making. It is evident that the Secretariat, which was constituted of only four staff workers at the Department of Justice, took a strong initiative during the legislative process by deciding on the framework of the process, such as members of the Division, the scope of the legislation<sup>31</sup> and the period of the legislative process.<sup>32</sup> Also, it took the initiative by submitting drafting proposals at each meeting, which were the object of the discussion.

It is certain that it would have been much more difficult to draft rules on international jurisdiction without the strong initiative of the Secretariat. However, it is also true that, because of that, the decision-making process was sometimes not clear. For example, as will be pointed out later, the structure of members was one of the determinant factors in deciding on the direction of the legislation. However, there was no explanation as to the balance of numbers between law professors (ten) and practitioners<sup>33</sup> or between professors of civil procedure law (seven) and professors of private international law (three). Also, on the one hand, the Secretariat made it difficult to discuss the possibility of excluding some grounds provided for internal territorial jurisdiction from the grounds of international jurisdiction, by stating that this legislative process should be based on the existing grounds for domestic territorial jurisdiction;<sup>34</sup> yet, on the other hand, it proposed new rules such as those relating to an action against a person engaged in business

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31 International jurisdiction on family matters was excluded by the Secretariat from the scope of this legislative process, since research on family matters was still ongoing. The minutes of the 1<sup>st</sup> meeting of the Division on International Jurisdiction, p. 8 [Sato] (pdf version).

32 At the 1<sup>st</sup> meeting, the Secretariat proposed to submit the final draft in February 2010. The minutes of the 1<sup>st</sup> meeting, p. 2 [Sato].

33 Four judges, two lawyers, four governmental staffs. It should be noted that there is a strong relation between judges and governmental staffs including the Secretariat, since in most cases the latter are transferred temporarily from the judiciary.

34 With regard to the place of performance, see in particular the minutes of the 2<sup>nd</sup> meeting, pp. 25-33. Cf. H. TAKAHASHI ET AL., *Kokusai saiban kankatsu ni kansuru rippō no igi* [Significance of the Legislation Regarding International Jurisdiction], in: *Jurisuto*, No. 1386 (2009) 4, 7 [Takahashi].

in Japan and those to consumer contract and labour relationship, which finally constituted the Act. Furthermore, exclusive jurisdiction over proceedings *in rem* with respect to immovable property was not adopted in spite of claims from members<sup>35</sup> and the international trend; and with regard to an action on a property right, the possibility of introducing the nexus between the claim and the property in Japan as a condition restricting the scope of jurisdiction based on the defendant's property was omitted, without any explicit explanation. Thus, the strong initiative of the Secretariat was the key for the successful legislation (in the sense that the legislative process finally succeeded in introducing the first provisions on international jurisdiction in Japan), but it made the legislative process unclear as well.

#### IV. OVERVIEW OF THE ACT

##### 1. *General Framework*

Under the Act, it is to be determined, first, whether one of the grounds newly established in Art. 3-2 and the following provisions are met or not. Second, if they are met, it is to be examined whether there are special circumstances 'under which a trial and judicial decision by the court of Japan would undermine equity between the parties or disturb realization of a proper and prompt trial'. If there are special circumstances, the international jurisdiction of Japanese courts over the case should be declined.<sup>36</sup> This framework for deciding on Japanese international jurisdiction is the same as the framework the Supreme Court established in the *Family Company* case.<sup>37</sup> Nevertheless, the existence of special circumstances should not be examined when the Japanese courts have international jurisdiction on the ground of an exclusive choice-of-court agreement conferring jurisdiction upon Japanese court(s).<sup>38</sup> This decision resulted because more importance was attached to the viewpoint of private interests such as party autonomy and predictability than that of public interests such as realization of a proper and prompt trial.<sup>39</sup>

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35 See DOGAUCHI, *supra* note (6) 270, note 37.

36 Art. 3-9: 'Even where the courts of Japan have jurisdiction over an action (excluding cases where the action is riled on the ground of choice of court agreement designating the courts of Japan exclusively), the court may dismiss the whole or a part of such action when it finds special circumstances under which a trial and judicial decision by the courts of Japan would undermine equity between the parties or disturb realization of a proper and prompt trial, taking into consideration the nature of the case, the degree of the defendant's burden of submitting defense, the location of the evidence and any other circumstances.'

37 The minutes of the 5th meeting, p. 9 [Higure]. It was explained that the wording of Art. 3-9 which seems to allow the discretion of the court ('the court may dismiss the ... action') would not change the intent of the existing case law. The minutes of the 16<sup>th</sup> meeting, p. 6 [H. Yamamoto, Sato].

38 Art. 3-9.

39 This issue was discussed until the 16<sup>th</sup> meeting. See M. DOGAUCHI, *Nihon no atarashii kokusai saiban kankatsu rippō ni tsuite* [On the New Legislation on International Jurisdiction in Japan], in: *Kokusai Shihō Nenpō*, Vol. 12 (2010) 186, 203.



## 2. *New Rules*

### a) *Consumer Contracts and Labour Relationships*

As for the newly established rules, first, the rules on jurisdiction over actions relating to consumer contracts and labour relationships should be mentioned.<sup>40</sup> These provisions were introduced with an objective to protect the interests of consumers and employees.<sup>41</sup> With regard to a dispute between a consumer (an individual, excluding cases where he/she becomes a party to a contract as a business or for the purpose of business) and a business operator (a juridical person or other association or foundation, or an individual who becomes a party to a contract as a business or for the purpose of business), an action brought by a consumer against a business operator may be filed in a court of Japan, if the domicile of the consumer at the time of the filing or at the time of the conclusion of a consumer contract is located in Japan. On the other hand, with regard to an action brought by a business operator against a consumer, the rules on so-called special jurisdiction – such as jurisdiction on the ground of the place of performance of the obligations – would not be applied;<sup>42</sup> instead, Japanese courts would have international jurisdiction only if the domicile of the consumer is located in Japan. In addition, a choice-of-court agreement with respect to a dispute arising in the future<sup>43</sup> shall be effective only in cases where it is agreed that action can be filed to a court or courts of the state where the consumer had his/her domicile at the time of the conclusion of the consumer contract,<sup>44</sup> or in cases where a consumer files an action with a court of the state agreed in the agreement, or in cases where a business operator files an action in Japan or a foreign state and a consumer invokes the agreement in the proceedings in his/her favour.<sup>45</sup>

Moreover, an action brought by an individual employee against an employer in relation to an individual labour-related civil dispute (a civil dispute arising between them with respect to the existence or non-existence of a labour contract and other matters concerning labour relationships) may be filed with the courts of Japan, if the place of performance of his/her employment duties under the labour contract pertaining to the individual labour-related civil dispute (when such a place is not fixed, the place of the office at which the employee was employed) is located in Japan.<sup>46</sup> On the other hand, for an action brought by an employer against an employee, Japanese courts would have

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40 Arts. 3-4 and 3-7 (5)(6).

41 The Division document No. 11, p. 6 *et seq.*, 11 *et seq.*

42 Art. 3-4 (3).

43 With regard to choice-of-court agreements concluded after a dispute has arisen, general rules on choice-of-court agreements would be applied. DOGAUCHI, *supra* note (39) 197.

44 In this case, an agreement to the effect that such an action can be filed only with the court or courts of such a state shall be deemed not to disturb the filing of actions with the courts of other states. Art. 3-7 (5)(i).

45 Art. 3-7 (5).

46 Art. 3-4 (2).

international jurisdiction only if the domicile of the employee is located in Japan.<sup>47</sup> Besides, a choice-of-court agreement with respect to a dispute arising in the future shall be effective only in cases where it is agreed at the time of termination of a labour contract and it is agreed that an action can be filed with a court or courts of the state where the place of performance of his/her labour at that time is located,<sup>48</sup> or in cases where an employer files an action with a court of the state agreed in the agreement, or in cases where an employer files an action in Japan or a foreign state and an employee invokes the agreement in the proceedings in his/her favour.<sup>49</sup>

*b) Doing Business in Japan*

Second, according to the Act, ‘an action against a person engaged in business in Japan (including a foreign company (provided for in Article 2, item 2 of Companies Act, Act No. 86 of 2005) carrying out transactions continuously in Japan)’ may be filed with the court of Japan, in cases where the action is related to the business of the person in Japan.<sup>50</sup> This provision was introduced out of a concern that the provision with regard to an action against a person who has a business office or other office,<sup>51</sup> which is based on an existing provision on internal territorial jurisdiction (Art. 5 item 5), could not cover actions against a foreign company continuously carrying out transactions with no business office in Japan. Thus, the main focus of this provision is the continuity of transactions in Japan.<sup>52</sup> This provision would cover, for example, cases where a foreign company continuously carrying out transactions in Japan carried out business concerning those transactions with a Japanese company through the opening of a web site targeted to Japan, without intermediation of the office in Japan.<sup>53</sup>

*c) Exclusive Jurisdiction*

Finally, under the Act, three types of actions shall be subject to exclusive jurisdiction of the courts of Japan.<sup>54</sup> The first type is actions relating certain matters involving Japanese corporations or other corporate legal entities established in accordance with Japanese law.<sup>55</sup> The following reasons are mentioned for the introduction of exclusive jurisdiction

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47 Art. 3-4 (3), Art. 3-2.

48 In this case, an agreement to the effect that such an action can be filed only with the court or courts of such a state shall be deemed not to disturb the filing of actions with the courts of other states. Art. 3-7 (6)(i).

49 Art. 3-7 (6)(ii).

50 Art. 3-3 (v).

51 Art. 3-3 (iv).

52 *Kokusai saiban kankatsu hōsei ni kansuru chūkan shi’an no hōsoku setsumei* [Complementary Comments on Preliminary Draft Regarding the Legislation on International Jurisdiction] (July 2009) 16.

53 *Ibid.*

54 Art. 3-5.

55 Art. 3-5 (1).

over this type of actions: the necessity of dealing uniformly with legal relations with regard to corporations or other corporate legal entities, convenience for corporations or other corporate legal entities and shareholders to take part in the proceedings, convenience for collecting evidence and establishment of efficient trial and harmonious judgments in several similar actions.<sup>56</sup>

The second type is actions relating to a registration.<sup>57</sup> This provision is explained from the fact that the registration system has an inseparable relation with the system of publication, which is of a highly public nature. Also, it is justified by the other reasons, namely, that the court of the registration could realize a proper and prompt trial and that even if international jurisdiction of foreign courts is accepted, this would not serve the convenience of the parties.<sup>58</sup>

The third type is actions relating to the existence or non-existence or the validity of intellectual property rights, which become effective by registration for their establishment.<sup>59</sup> This provision is justified on the ground that intellectual property rights are often granted by administrative acts and that the courts of the state of registration are best suited to decide upon the existence or the validity of the registered intellectual property rights. In addition, even if a court of a state other than the state of registration invalidates rights such as patents, it would be necessary to take certain proceedings in the state of registration in order to invalidate the rights with *erga omnes* effects.<sup>60</sup> However, actions relating to the ownership of intellectual property rights are excluded from the scope of this provision, since they concern the subject of the rights and it can be considered that they would not so often require technical and expert judgments.<sup>61</sup> It should also be noted that this provision does not cover claims for injunction.<sup>62</sup>

### 3. *Modified Rules*

#### a) *Place of Performance of Obligation*<sup>63</sup>

Art. 5(1) provides that actions concerning property rights may be filed to the courts of Japan if the place of performance of the obligation is in Japan. When this provision was referred to in the context of international jurisdiction, some issues were controversial: for example, whether actions relating to claims for damages on the ground of the tort shall be included within 'actions on a property right'; or according to which law the

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56 Complementary Comments, *supra* note (52) 17f.

57 Art. 3-5 (2).

58 Complementary Comments, *supra* note (52) 25.

59 Art. 3-5 (3).

60 Complementary Comments, *supra* note (52) 36ff.

61 Complementary Comments, *supra* note (52) 36.

62 The minutes of the 4th meeting, p. 6 *et seq.* [Yokomizo, Sato]; DOGAUCHI, *supra* note (39) 201.

63 See generally A. SAITO, International Civil Jurisdiction Based on the Place of Performance of Obligation Relating to a Contract, in: JYIL 54 (2011) 295.

place of performance shall be determined.<sup>64</sup> Under the Act, this rule was amended with the consideration of the predictability for the parties. Namely, on the one hand, the scope of the rule regarding jurisdiction on the ground of the place of performance is limited to ‘an action which has as its object a claim for performance of an obligation under a contract’, or ‘an action which has as its object a claim in relation to an obligation under a contract, including a claim pertaining to management performed without mandate or unjust enrichment arising in relation to such obligation, and a claim for compensation for damages caused by the non-performance of such obligation’. On the other hand, with regard to the determination of the place of performance, the new rule indicates two cases: cases where the place of performance of the obligation provided for in the contract is located in Japan, or the place of performance of the obligation is determined to be located in Japan in accordance with the law chosen by the parties.<sup>65</sup> The former cases are justified by the argument that if the place of performance is provided for in the contract, it would correspond to the intent of the parties. The latter cases are justified by the predictability for the parties.<sup>66</sup>

b) *Jurisdiction Based on the Location of Property*<sup>67</sup>

Under the Act, although international jurisdiction based on the defendant’s seizable property located in Japan is maintained with regard to action concerning a property right, cases where the value of the property is extremely low are excluded.<sup>68</sup> Based on the idea that international jurisdiction based on seizable property might have effects of conferring the exorbitant jurisdiction, several possibilities for limiting this ground of jurisdiction were examined. As a result, the above-mentioned limitation was adopted from the idea that a typical case of exorbitant jurisdiction is a case where jurisdiction based on seizable property is affirmed on the ground of the existence of the property, the value of which is extremely low.<sup>69</sup> Whether the value of the property is extremely small or not shall be examined ‘absolutely’ – namely, regardless of the amount of claims.<sup>70</sup>

c) *Place of Tort*

As for jurisdiction based on the place of tort, the limitation is provided in the Act: the rule on an action relating to a tort excludes cases where a harmful act was committed in

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64 M. NAGATA, *Gimu rikōchi to kokusai saiban kankatsu* [Place of Performance of the Obligation and International Judicial Jurisdiction], in: *Handai Hōgaku* [Osaka University Law Review], Vol. 46, No. 2 (1996) 321.

65 Art. 3-3 (i).

66 Complementary Comments, *supra* note (52) 9.

67 See generally K. YAMAMOTO, *International Jurisdiction Based on the Location of Property*, in: *JYIL* 54 (2011) 311.

68 Art. 3-3 (iii).

69 The meeting document, No. 23, p. 7.

70 The minutes of the 13<sup>th</sup> meeting, p. 15 *et seq.* [Kojima].

a foreign state but where the occurrence of the effects of the said act in Japan was not normally foreseeable.<sup>71</sup> This limitation was added in order to strike a fair balance between the parties.<sup>72</sup>

d) *Choice-of-Court Agreement*<sup>73</sup>

As regards choice-of-courts agreements, the case law allowed such agreements designating a foreign court to be effective under the following conditions: 1) the case in question is not subject to the exclusive jurisdiction of Japan; 2) the foreign court designated by the choice-of-court agreement should have international jurisdiction under its own law; and 3) the agreement in question is not unreasonable and contrary to public policy of Japan.<sup>74</sup> It was held that the agreement should be made in such a manner that at least a court of the specific country is so manifestly designated in the document drafted by one of the parties that the existence and content of the agreement is evident.<sup>75</sup>

The Act clarifies some issues regarding the requirement of written agreement, and also provides that agreements made by means of an electromagnetic record are deemed to have been made in writing.<sup>76</sup> In addition, the rule under the Act extends the cases where an agreement to the effect that an action can be exclusively filed with a court or courts of a foreign state may not be invoked by referring to the situation where such court or courts are unable to exercise their jurisdiction in fact, which the Supreme Court had not mentioned. This situation was added from the viewpoint of the protection of the parties' right to access the trial.<sup>77</sup>

e) *Subjective Joinder*

Under the Act, subjective joinder would be allowed with respect to actions where the rights or obligations that are the purpose of the actions are common among several persons, or are based on the same factual and legal grounds.<sup>78</sup> This rule can be considered to have changed the attitude taken by lower instance courts in many cases: a subjective joinder was allowed only where there were special circumstances such that conducting a trial in the courts of Japan, in the light of specific facts, conforms to the prin-

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71 Art. 3-3 (viii).

72 The meeting document, No. 8, p. 16.

73 See generally S. NAKANO, Agreement on Jurisdiction, in: JYIL 54 (2011) 278.

74 Supreme Court, Judgment, 28 November 1975, Minshū, Vol. 29, p. 1554. English text can be found in: JAIL 20 (1976) 106.

75 *Ibid.*

76 Art. 3-7 (2)(3).

77 Complementary Comments, *supra* note (52) 29. The third condition referred to by the Supreme Court is not mentioned under the Act, but this is because it was considered unnecessary to mention this condition, on the presupposition that a choice-of-court agreement incompatible with Japan's public policy would be invalid. Complementary Comments, *supra* note (52) 30.

78 Art. 3-6.

principles of fairness between parties and the expectation of a proper and speedy trial, as a result of considering the extent of the disadvantage to a defendant who would be forced to respond to an action in a foreign country.<sup>79</sup>

## V. SIGNIFICANCE AND REMAINING PROBLEMS

### 1. *Significance*

The new legislation on international jurisdiction has made Japanese rules on international jurisdiction more clear and predictable. It does not mean, however, that the case law established by the Supreme Court was not clear. Nonetheless, the Supreme Court's practice appeared considerably complicated and difficult for foreign lawyers to confirm and understand correctly its unwritten rules.<sup>80</sup> It can be said that the Act has enhanced the convenience for foreign lawyers who usually have the difficulty of obtaining information on Japanese law.

In addition, among the newly introduced rules, rules with regard to actions concerning consumer contracts and labour relationships can be considered an epoch-making development because they have brought the viewpoint of the protection for weaker parties into international jurisdiction.<sup>81</sup> Furthermore, modified rules can be considered significant to a certain extent in that they made the scope and the interpretation of each rule more clear and reasonable.

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79 Tokyo District Court, Preliminary Judgment, 8 May 1987, Hanrei Jihō, No. 1232, 40 = Hanrei Taimuzu, No. 637, 87; Tokyo District Court, Judgment, 28 July 1987, Hanrei Jihō, No. 1275, 77 = Hanrei Taimuzu No. 669, 219; Tokyo District Court, Judgment, 23 October 1990, Hanrei Jihō, No. 1398, 87; Tokyo District Court, Judgment, 29 January 1991, Hanrei Taimuzu, No. 764, 256; Tokyo District Court, Judgment, 25 April 1995, Hanrei Taimuzu, No. 898, 245; Tokyo High Court, Judgment, 25 December 1996, Ko-minshū, Vol. 49, No. 3, 109; Tokyo District Court, Judgment, 5 February 1997, Hanrei Taimuzu, No. 936, 242. As for the distinction between objective joinder and subjective joinder in Japan and the legal situation before the Act, see generally S. CHAEN / T. KONO / D. YOKOMIZO, *International Jurisdiction in Intellectual Property Cases: The Transparency Proposal*, in: J. Basedow/T. Kono/A. Metzger (eds.), *Intellectual Property in the Global Arena – Jurisdiction, Applicable Law, and the Recognition of Judgments in Europe, Japan and the US* (Mohr Siebeck, 2010) 110-111, 119-121.

80 Ex. D. FERNANDEZ ARROYO, *Compétence exclusive et compétence exorbitante dans les relations privées internationales*, in: *Recueil des cours de l'académie de droit international*, Tome 323 (2006), 9, p. 151, note 217, in which the exceptional circumstances condition was considered wrongly as a tool for extending the Japanese international jurisdiction. This misunderstanding is understandable, since the exceptional circumstances condition was dealt with differently with regard to subjective joinder under the case law.

81 However, as for the view which doubts the effectiveness of the provision relating to consumer contract due to the lack of the possibility of class actions in an opt-out manner, see DOGAUCHI, *supra* note (39) 198.

## 2. Problems

However, the Act also has several problems. Two fundamental issues will be mentioned in this paper.

### a) From the Viewpoint of the Legislative Objective

As has been mentioned earlier, the objective of this legislation consisted in ameliorating the situation under the framework established by the Supreme Court in the *Family Company* case, since it had lacked the clarity and decreased the predictability for parties. Thus, the targeted problem was not the clarity of each jurisdiction rule, but rather the too flexible application of the exceptional circumstances condition. In order to deal with this problem, it was necessary to limit the scope of rules on special jurisdiction considerably, or deny the exceptional circumstances condition. However, the Act did not greatly limit the scope of special jurisdictional rules. Moreover, the Act introduced Art. 3-9 concerning 'special circumstances' that actually resembles the Supreme Court judgment in the *Family Company* case, which has assured the direction indicated by the Supreme Court – namely, attaching more importance to case-by-case justice and flexible determination on international jurisdiction. Under the Act, it seems difficult to expect that the newly introduced special circumstances condition would be interpreted more restrictively and accordingly that the predictability would be enhanced for the parties.<sup>82</sup> It is difficult to consider that, with the newly introduced and slightly modified rules, the Act would bring a great influence over the practice of courts, which are oriented considerably towards case-by-case justice. Accordingly, from the viewpoint of the legislative objective, it must be concluded that this new legislation is insufficient.

### b) From the Viewpoint of the Coordination with Foreign Legal Orders

Second, since rules on international jurisdiction constitute a significant part of private international law, the main role of these rules consists in the coordination among different legal orders in international society.<sup>83</sup> Accordingly, the most important situations with regard to international jurisdiction are those where the exercise or non-exercise of international jurisdiction would greatly influence the other legal orders: positive conflict of international jurisdictions (*lis pendens*), negative conflict of international jurisdictions (*forum necessitatis*), exorbitant jurisdiction, exclusive jurisdiction and so on.

However, which issues among them does the Act deal with? As for the *forum necessitatis*, the introduction of the specific rule was abandoned.<sup>84</sup> With regard to inter-

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82 For a more optimistic view, see DOGAUCHI, *supra* note (39) 207.

83 Cf. P. MAYER, Le phénomène de la coordination des ordres juridiques étatiques en droit privé, in : Recueil des cours de l'académie de droit international, Tome 327 (2007), 9, p. 23.

84 At the stage of the Preliminary Draft, the rule relating to the *forum necessitatis* was still one of the issues to be examined. Complementary Comments, *supra* note (52) 55. However, since there had been no case regarding this issue in civil and commercial matters in Japan,

national concurrent litigation, a provision regarding the stay of the proceedings based on the theory of anticipated recognition<sup>85</sup> was proposed in the Preliminary Draft. However, it was strongly criticized with public comments by courts on the grounds of the ambiguity of conditions and the possibility of strategic abuse. As a result, the introduction of the provision was finally abandoned.<sup>86</sup> With regard to the exorbitant jurisdiction, it is certain that there is no provision which manifestly claims the exorbitant international jurisdiction of Japanese courts.<sup>87</sup> However, after the *Malaysian Airlines System* case, there was no lower instance court case that was strongly criticized on the ground of the exorbitant jurisdiction; thus it cannot be evaluated that the lack of exorbitant jurisdictional rule is a great achievement of the Act. Finally, what the Act has realized is only the introduction of a provision regarding exclusive jurisdiction.

Thus, it must be concluded that the Act does not respond sufficiently to important issues that rules on international jurisdiction should deal with.

## VI. CONCLUDING REMARKS

Thus, whereas the Act can be evaluated as having made each condition of international jurisdiction clearer and more reasonable, it must be considered insufficient in that it has not adequately achieved the objective of the legislation, and that it has not provided rules on such important issues as the coordination of parallel proceedings. What brought this insufficient result?

The answer to this question might be the strong initiative of the Secretariat. It continued to propose a provision with regard to the special circumstances condition in spite of critiques from professors of private international law. It is true that not a few members supported it during the meetings, but judges and lawyers supported it so that they would be able to continue their practice. Most professors of civil procedure law also supported it, since they were accustomed to the flexible interpretation of civil procedure law in domestic situations. Under the abovementioned structure of members, it would have been difficult to abandon the special circumstances condition.

The choice of members by the Secretariat might also be one of the main reasons for the insufficient introduction of rules regarding the coordination with other legal orders. In Japan, professors of civil procedure law rarely do research on international civil dis-

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and also since it would be difficult to assume the cases in civil and commercial matters where this issue would be at stake, it was finally decided not to draft a specific provision. The Meeting Document, No. 24, p. 11.

85 As for this theory, see M. DOGAUCHI, *Concurrent Litigations in Japan and the United States*, in: *JAIL* 37 (1994) 72, 89-92.

86 See DOGAUCHI, *supra* note (39) 203f.

87 But see the minutes of the 16<sup>th</sup> meeting, p. 9 [Yokoyama], which expressed the opinion that some rules would bring about the exorbitant jurisdiction of Japanese courts.



putes; if they do, they have limited knowledge about the choice of law. With only three professors of private international law among its approximately thirty members, it would have been difficult to discuss the introduction of these rules.

The last question to be answered is why the Secretariat decided the structure of members as such. One explanation would be that it had a hidden objective other than the official one: for example, the true objective of this legislation might be the introduction of rules regarding the protection for weaker parties and doing business in Japan, not the enhancement of predictability. Regardless of whether it is true, it seems appropriate to create a system to limit and control activities of the Secretariat, in order to make the legislative process more significant.

#### SUMMARY

*This paper focuses on Japan's newly enacted rules on international judicial jurisdiction, which is one of the pillars of the recent reforms of Japanese private international law.*

*Japanese private international law belongs to the continental legal system. The first enacted choice-of-law rules, Hōrei, were drafted in the light of the second Gebhard draft of 1887 of the German Civil Code and other dominating scholarly opinions of those days. The first amendment of the Hōrei took place in 1989 and was mainly focused on matters concerning marriage and parent-child relationships. The subsequent amendment of Hōrei was in 2006 and concerned civil and commercial matters. As the result of the 2006 reform, a new Act on General Rules for Application of Laws was adopted and came into force on 1 January 2007.*

*With regard to the recognition and enforcement of foreign judgments, foreign final judgments can be recognized and enforced pursuant to Art. 118 of the Code of Civil Procedure and Art. 24 of the Code of Civil Enforcement. These provisions were also modeled on the basis of German law and were later amended slightly.*

*While Japanese law has certain provisions regarding the choice of law as well as the recognition and enforcement of foreign judgments, it had been thought that there was no specific provision prescribing international jurisdiction in Japan. This situation changed with the adoption of the new 'Act for the Partial Amendment of the Code of Civil Procedure and the Civil Provisional Remedies Act', which came into force on 1 April 2012. This subsequent statute is considered to be the first legislation regarding international jurisdiction in civil and commercial matters in Japan. The background of this legislation is quite specific. There had been strong academic opposition regarding the interpretation of the guidelines developed in case law between predictability and case-by-case justice. This opposition was also obvious in the discussions during the legislative process. Due to this controversy of opinions, the new legislation has only limited significance. This paper describes, first, the background of the new legislation, and, second,*

*the legislative process of the Act. Then, after the overview of the Act is summarized, its significance and problems are examined. Though the Act can be evaluated through how it has made each condition of international jurisdiction clearer and more reasonable, it must be considered insufficient because it has not adequately achieved the legislation's objective, nor has it provided rules on such important issues as the coordination of parallel proceedings.*

#### ZUSAMMENFASSUNG

*Der vorliegende Beitrag stellt Japans neu verabschiedete Vorschriften über die internationale Gerichtsbarkeit vor, welche eine der Säulen der jüngsten Reformen im japanischen internationalen Privatrecht darstellen:*

*Japans internationales Privatrecht lässt sich strukturell den kontinentaleuropäischen Rechten zuordnen. Die ersten kollisionsrechtlichen Vorschriften fanden sich im Hōrei (Rechtsanwendungsgesetz) und waren unter Einfluss des zweiten Gebhard-Entwurfs des deutschen BGB von 1887 und anderen herrschenden Auffassungen jener Zeit abgefasst worden. Die erste Novellierung des Hōrei erfolgte 1989 und konzentrierte sich vor allem auf die Regelung des internationalen Eherechts und das Eltern-Kind-Verhältnis. Die nächste Novelle erfolgte im Jahr 2006 mit dem Schwerpunkt auf Zivil- und Handelsangelegenheiten. Ergebnis der Reform von 2006 war ein neues „Gesetz über die allgemeinen Regeln betreffend die Anwendung von Gesetzen“, das am 1. Januar 2007 in Kraft getreten ist.*

*Ausländische rechtskräftige Entscheidungen können gemäß Art. 118 des Zivilprozessgesetzes und Art. 24 des Zivilvollstreckungsgesetzes anerkannt und durchgesetzt werden. Auch diese Regelungen waren nach deutschem Vorbild gestaltet und wurden später nur leicht überarbeitet.*

*Während das japanische Recht also über bestimmte Vorschriften in Bezug auf Rechtswahl sowie Anerkennung und Vollstreckung ausländischer Urteile verfügte, ging man allgemein davon aus, dass es keine spezifischen Vorschriften zur Regelung der internationalen Gerichtsbarkeit gebe. Dies hat sich mit der Verabschiedung des „Gesetzes zur teilweisen Änderung des Zivilprozessgesetzes und des Zivilsicherungsgesetzes“ geändert, das am 1. April 2012 in Kraft getreten ist. Es wird als das erste Gesetz zur internationalen Gerichtsbarkeit in Zivil- und Handelssachen in Japan angesehen.*

*Ausgehend von den Hintergründen des Gesetzgebungsverfahrens, wobei insbesondere auf den Streit in der Lehre zwischen Einzelfallgerechtigkeit und Rechtssicherheit eingegangen wird, gibt der Verfasser einen zusammenfassenden Überblick über das Gesetz. Dabei werden u.a. die neuen Vorschriften zur internationalen Zuständigkeit in Verbraucher- und Arbeitsachen, bezüglich der geschäftlichen Tätigkeit von Ausländern in Japan und zur ausschließlichen Zuständigkeit behandelt. Sodann thematisiert der*

*Beitrag die Bedeutung des Gesetzes und analysiert die verbleibenden rechtlichen Probleme aus gesetzgeberischer sowie internationaler Sicht: Obwohl das Gesetz unter dem Gesichtspunkt bewertet werden könne, dass es die einzelnen Voraussetzungen für die Annahme der internationalen Zuständigkeit transparenter und sachgerechter ausgestaltet habe, müsse es als unzureichend angesehen werden, da es weder den gesetzgeberischen Zweck ausreichend erfülle, noch Vorschriften über wichtige Probleme, wie etwa die Koordination paralleler Verfahren, bereitgestellt habe.*

*(Dt. Zusammenfass. durch d. Red.)*