



Title	Japanese Court Jurisdiction in Transnational Litigation
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Citation	Osaka University Law Review. 1984, 31, p. 21-37
Version Type	VoR
URL	https://hdl.handle.net/11094/5398
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JAPANESE COURT JURISDICTION IN TRANSNATIONAL LITIGATION

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INTRODUCTION

In this country which has adopted a code law system, if there is one area where judges do make law under the strong influence of scholastic opinion, it is the area of international adjudicatory jurisdiction. Since Japan has "no statutes expressly prescribing international adjudicatory jurisdiction, no treaties to be obeyed and no well-defined rules of international law which are generally recognized,"¹ it has been of great practical as well as theoretical importance to determine when a court can entertain a case which has a foreign element.

The Japanese Supreme Court has long been silent about the problem of where to seek guidance for the jurisdictional determination, and other than a rather exceptional area of *mibun-hō* (family law and status),² there have not been many cases decided in the lower courts. In the long awaited case of 1981, the Court finally addressed itself to this problem.³ Judging from the amount of comment it generated, it must be a crucial case. Yet it left several important questions unresolved and there is still doubt as to the scope of the holding.

After recounting the decision, this article examines, in two phases, the Court's doctrine vis-à-vis prevailing academic opinions. Against this theoretical background, some of the bases for international adjudicatory jurisdiction are discussed in order to highlight the limits of the current approaches taken by courts and writers. It is suggested that future jurisdictional rules or theories must have such flexibility as to take account of various factors which make international cases different from purely local ones.

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1. *Gotō v. Malaysian Airline System Berhad*, Supreme Court Judgement, October 16, 1981, 35 Minshū 1224, English Translation, 26 JAP. ANN. INT'L. LAW 122 (1983).

2. See Egawa, *International Divorce Jurisdiction*, 5 JAP. ANN INT'L LAW 1 (1961); See also Miura, *Judicial Jurisdiction in Japanese Conflict of Laws: Status*, 21 AM. U. L. REV. 522 (1972).

3. Note 1 *supra*.

I. THE MALAYSIAN AIRLINES CASE

On December 4, 1977, a plane operated by appellant Malaysian Airline System Berhad ("Malaysian Airlines") crashed in Johore Bahrn in Malaysia during a domestic flight from Penang to Kuala Lumpur. Subsequently the wife and two children of one of the deceased passengers brought a suit against Malaysian Airlines in the Nagoya District Court in Japan, seeking compensation for damages caused by the appellant's breach of the air transport contract which had been made in Malaysia between the deceased and the appellant company. The deceased Tomio Gotō was a Japanese national and so were the appellees, his heirs. The appellant airline was a Malaysian corporation incorporated under the law of the Federation of Malaysia and had its head office there. It had appointed a representative in Japan and had established a place of business in Tokyo.

The Nagoya District Court dismissed the case stating that where the place of contracting, place of performance, and the site of crash were all located in Malaysia, a Malaysian rather than a Japanese court had adjudicatory jurisdiction.⁴ The court found that the fact the plaintiffs' place of residence and the defendant's place of business were in Japan did not amount to the special circumstances which would otherwise overturn the finding in favor of the forum of the defendant's domicile.⁵

On appeal the Nagoya High Court reversed and remanded to the district court.⁶ The defendants appealed. The Supreme Court dismissed the appeal and held that Malaysian Airlines should be reasonably subject to the jurisdiction of Japan, even though it was a foreign corporation with its head office abroad.

The opinion of the Court can be seen to comprise of four sets of propositions. First, the Court spoke in terms of international law and set out a general principle:

Generally speaking, adjudicatory jurisdiction shall be exercised as an effect of national sovereignty and the scope of adjudicatory jurisdiction shall in principle be tantamount to that of national sovereignty.

4. Gotō v. Malaysian Airline System Berhad, Nagoya District Court, Unreported, March 15, 1979, English Translation, 25 JAP. ANN. INT'L LAW 167 (1982).

5. See text accompanying notes 44-55 *infra*.

6. Gotō v. Malaysian Airline System Berhad, Nagoya High Court Judgement, November 12, 1979, 402 Hanrei Taimuzu 102.

Therefore, if a defendant is a foreign corporation with its head office abroad, it is generally beyond the adjudicatory jurisdiction of Japan, unless it voluntarily submitted itself to the jurisdiction.⁷

The second set of propositions began with two exceptions the last of which is relevant to our present case:

If a case is concerned with the land of Japan or if a defendant has a legal connection with Japan, he can be exceptionally subject to the adjudicatory jurisdiction of Japan, whatever his nationality is and whether he is.⁸

How can one ascertain the limits of such exceptions? According to the Court, this is the problem of international adjudicatory jurisdiction. The third set of propositions referred to this question.

With regard to the limits of such exceptions, we have no statutes prescribing international adjudicatory jurisdiction, no treaties to be obeyed and no well-defined rules of international law which are generally recognized. Under these circumstances, it is reasonable to decide on international adjudicatory jurisdiction in accordance with the principles of justice and reason (*jōri*), which would require fairness between the parties and fair and speedy administration of justice.⁹

"*Jōri*" is a traditional Japanese concept which means principles of justice and reason or principle of natural reason, and may be employed by courts in the absence of proper statutes or customs.¹⁰ Yet it is as vague as or perhaps more vague than the American counterpart "traditional notions of fair play and substantial justice."¹¹ The Court thus went on to substantiate the idea of *jōri* in the last set of propositions by utilizing the territorial competence provisions in the Code of Civil Procedure.¹²

7. Note 1 *supra*.

8. *Ibid.*

9. *Ibid.*

10. See H. TANAKA, JAPANESE LEGAL SYSTEM 175-77.

11. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

12. *Mingei Soshōhō* (Law No. 29, 1890, as amended).

It should accord with these principles of justice and reason to subject a defendant to the jurisdiction of Japan if Japan has one of such contacts with the case as are set out in the Code of Civil Procedure as territorial competence. For example, when the defendant's residence (Article 2), the office or place of business of a juridical person or any other association (Article 4), the place of performance (Article 5), the location of the defendant's property (Article 8) or the place of tort (Article 15), etc., are in Japan.¹³

Applying the above principles to the facts of the case, the opinion concluded that the appellant-defendant foreign corporation should be reasonably subject to the jurisdiction of Japan where it had appointed a representative in Japan and had established a place of business in Tokyo.

II. ADJUDICATORY JURISDICTION AND INTERNATIONAL LAW

Adjudicatory jurisdiction of a state is an aspect of its sovereignty, and foreign sovereigns and certain of their representatives are immune from suit.¹⁴ There are also bilateral and multilateral treaties which limit adjudicatory jurisdiction of a state.¹⁵

Within this general framework of international law, each state determines whether or not its courts should exercise jurisdiction over a case which has a certain foreign element. This is the problem of international adjudicatory jurisdiction. In so far as the determination of international adjudicatory jurisdiction is still dependent on each state, it is theoretically plausible to treat the problem solely from a national point of view. Under this "nationalism approach", there is no practical and theoretical significance in discussing international adjudicatory jurisdiction and a court can be confident to take any case brought before it regardless of the case's international character and irrespective of interests which other states might have in adjudicating it.¹⁶ Even if one does not take this extreme view, international adjudicatory jurisdiction, at the

13. Note 1 *supra*.

14. In re Matsuyama, Great Court of Judicature Decree, Dec. 28, 1928, 7 Minshū 1128.

15. See, e.g., Agreement under Article VI of the Treaty of Mutual Co-operation and Security Between Japan and the United States of America, regarding Facilities and Areas and the Status of United States Armed Forces in Japan, 1960, 373 U.N.T.S. 207; Vienna Convention on Diplomatic Relations, adopted April 18, 1961, 500 U.N.T.S. 95.

16. See, e.g., French Civil Code, arts. 14 & 15.

present state of international law, is a matter of self-limitation on the part of a given forum state. Therefore, if we are to achieve a decent and workable international order, we should establish decent and workable domestic rules for international adjudicatory jurisdiction.

In the absence of statutory rules which directly regulate the problem of international adjudicatory jurisdiction, Japanese scholars and courts have constructed several theories to deal with it. Any of these theories can usually be seen to consist of two phases of discussions, the first phase of discussions being devoted to the nature of the subject itself and the second phase to the actual determination of international adjudicatory jurisdiction.

The problems which arise in the first phase are primarily explanatory. One view that was predominant some decades ago seemed to believe that international adjudicatory jurisdiction can generally be explained in terms of territorial and personal principles of sovereignty.¹⁷ This view is criticized on the ground that the concepts of territorial and personal sovereignty do not offer satisfactory explanation for various situations presented by international transactions. For convenience, we shall call this type of view the "sovereignty approach." The approach takes the position, as we shall see later, that since there are no rules in both international and municipal laws to delimit adjudicatory jurisdiction, the sum of territorial competences of Japanese courts is nothing but the extent of adjudicatory jurisdiction of Japan.¹⁸ Here, as in the nationalism approach, the concept of international adjudicatory jurisdiction finds no meaningful place.

The Supreme Court, in setting out its first set of principles, relied on sovereignty.¹⁹ One commentator interpreted it as evidencing the Court's adoption of the sovereignty approach.²⁰ However in the third set of propositions the Court explicitly admitted that international adjudicatory jurisdiction is an exception to adjudicatory jurisdiction which is an aspect of sovereignty, and held that the boundaries of international adjudicatory jurisdiction should be delimited in accordance with the principles of justice and reason.²¹ Adjudicatory jurisdiction is an aspect of sovereignty, and the sovereignty approach can no doubt explain ordinary cases of purely local nature. But the territorial and personal principles emanating from the concept of sovereignty fail to provide

17. See H. KANEKO, *MINJI SOSHÖHÖ TAIKEI* 66-67 (1957).

18. See text accompanying notes 28-29 *infra*.

19. See text accompanying note 7 *supra*.

20. See Gotō, *Case Comment*, 768 *JURISUTO* 278, 279 (1982).

21. See text accompanying note 9 *supra*.

guidance to cope with borderline situations which may be more properly regulated by other principles.²² It would, therefore, be more appropriate to say that the Court recognized the limit of the sovereignty approach and turned to *jōri* to resolve the borderline cases which are increasing in number as more transactions are carried out across national borders. Perhaps the Court is to be commended for recognizing facts of life in the modern world, but its failure to expound the notions of *jōri* is not. The Court's position as to the nature of international adjudicatory jurisdiction may be called, the "exception approach."

There is one view which now has virtually unanimous support from scholars, especially those in the field of international private law. According to this modern view, the principles of *jōri* which are to fill the "legal vacuum," as it were, of international adjudicatory jurisdiction should derive from the basic values of international civil procedure.²³ The idea of international civil procedure is understood as "international cooperation among judicial organizations of the world to share judicial functions in civil and commercial matters which arise from international private transactions between private persons."²⁴ Under this view, the problem of international adjudicatory jurisdiction is to decide how to allocate judicial functions to judicial organizations of various states. Thus the determination of international adjudicatory jurisdiction can logically be compared to that of domestic territorial competence whose purpose is also to allocate judicial competence territorially. If so, the same requirements of fair, just and efficient administration of justice must be fulfilled in both processes.²⁵ We may call it the "international allocation approach." It is true that this approach must be pursued in the process of framing "hard-and-fast rules" of international adjudicatory jurisdiction.²⁶ It is certainly tempting to imagine that a national court could behave as if it were an international tribunal in allocating international adjudicatory competence to a forum of another state. Yet it is practically difficult for a court or even for the proponent of the approach to ascertain the extent of jurisdiction only relying on the basic values of international civil procedure. Thus most adherents of the international allocation approach also look to the domestic territorial compe-

22. See Sawaki, *Adjudicatory Jurisdiction Revisited*, 9 KOKUSAI SHŌJI HŌMU 611 (1981).

23. See Ikehara, *International Adjudicatory Jurisdiction*, 7 SHIN JITSUMU MINJISOSHŌ KŌZA 3 (1982).

24. *Id.* at 16.

25. See *id.* at 16-19.

26. See Reese, *General Course on Private International Law*, 1976 RECUEIL DES COURS 1, 33 (1977).

tence provisions for practical guidelines.²⁷

III. TERRITORIAL COMPETENCE AND INTERNATIONAL ADJUDICATORY JURISDICTION

It would no doubt be desirable if adjudicatory jurisdiction of various states could be regulated by international law. But at present it is not very appealing to link the sovereignty approach with the view that the sum total of domestic territorial competences amounts to the adjudicatory jurisdiction of Japan.²⁸ Under this view, if a Japanese court has territorial competence over a particular case in accordance with the Code of Civil Procedure (CCP), Japan has jurisdiction to adjudicate the case, regardless of its nature.²⁹

On the other hand, Japan has no jurisdiction to adjudicate a case with a foreign element if no bases of territorial competence under the CCP are located in Japan.³⁰ This approach, if applied without modification, leads to mechanical application of the domestic competence rules to international cases. When based on the CCP provisions, it may be called the "direct approach," whereas more generally it may be called the "single-factor-basis approach."³¹ The former name will serve our present purpose. The direct approach is vulnerable to the criticism that the application of the competence provisions irrespective of the case's international nature would give rise to some unreasonable results.³²

Unlike the direct approach, the Supreme Court interposed the notions of *jōri* or the principles of justice and reason before it looked to the CCP. However in the last set of propositions, the Court seemed to develop an argument which would in effect produce the same results as the direct approach.³³ The Court's language may be interpreted to mean that exercise of jurisdiction by a Japanese court is consistent with the principles of justice and reason in so far as it complies with a domestic competence rule.³⁴ As a matter of fact the opinion concluded that the defendant foreign corporation was subject to Japanese jurisdiction because it had a place of business in Japan, which is one of the

27. See text accompanying notes 35-36 *infra*.

28. See KANEKO, *supra* note 17, at 66.

29. *Ibid.*

30. *Ibid.*

31. See text accompanying notes 62-66 *infra*.

32. See Ikehara, *supra* note 23, at 17-18. See also text accompanying notes 57-58 *infra*.

33. See text accompanying note 13 *supra*.

34. Takeshita, *Case Analysis*, 637 KINYŪ SHŌJI HANREI 49 (1982). See also Gotō, *supra* note 20 at 279.

bases for territorial competence. Thus we are faced with two questions as to the scope of the holding. First, did the Court adopt a direct approach? Second, should the rationale of *Malaysian Airlines* be limited to the facts of the case or could it be generally applied to the situation where a foreign corporation has a place of business in Japan?

Perhaps the ultimate answers should wait until the Court or lower courts elaborate on these points. In the meantime the questions need to be explored as a matter of theory. The last question will be discussed in the next section. As to the first question, it is plausible to conclude that the rationale of the Court would not amount to mechanical application of the CCP provisions because those provisions are seen to function as *jōri principles*, not as statutory rules.

Even when there is one of the bases for territorial competence in Japan, it is only *prima facie* accord with the principles of *jōri* to conclude that Japan has jurisdiction to adjudicate. If a court finds exercise of jurisdiction over a particular case inconsistent with the principles of justice and reason, it may not "apply" a competence rule. If understood in this way, the Supreme Court approach may be categorized as a kind of "indirect approach." This observation is supported by a more practical reason. Under the direct approach, a district court can and must take the case with a foreign element if it finds any basis for territorial competence in Japan. Since the doctrine of *forum non conveniens* is unavailable in Japan, the court could not dismiss the case even when it would be more appropriately tried in some other state. This result is certainly contrary to the principles of justice and reason.

The international allocation approach is linked with the view that international allocation of adjudicatory jurisdiction should be regulated by the same principles of *jōri* as intranational allocation for territorial competence, namely the principles of fair, just and efficient administration of justice.³⁵ Hence this view concludes that international allocation of jurisdiction is determined by essentially the same rules as intranational allocation of competence. However it calls attention to the need for international considerations when one infers jurisdictional rules from territorial competence provisions.³⁶ In evaluating a particular assertion of jurisdiction, both this method and the Court's approach seek a guideline from the CCP under the principles of justice and reason. A most noticeable difference may be that the former calls for international considerations in the process of evaluation. Another difference is that the former

35. See Ikehara, *supra* note 23, at 16.

36. See *id.* at 19.

infers jurisdictional rules from the CCP provisions whereas the latter presumes, from the existence of territorial competence, that a Japanese court has jurisdiction to adjudicate. However, it is uncertain whether there is a practical difference between them. At least in theory, it should be noted that while the "inferential method" is more flexible and may be more appropriate for creating internationally acceptable rules of jurisdiction, the Court's "presumptive method" seems more stable and predictable. At any rate, both methods may be categorized under the name of indirect approach since they seek jurisdictional rules from the CCP by way of *jōri*.

The international allocation approach is also adopted by those writers who employ the balancing of interests approach in the jurisdictional determination. Some of them reject either form of the indirect approach, which more or less resort to the CCP provisions.³⁷ The proponents of the balancing approach stress the differences between international allocation of jurisdiction and intranational allocation of territorial competence.³⁸ They propose to make a jurisdictional decision by considering and comparing various factors such as the burden on the defendant to defend in a distant forum, the burden on the plaintiff to have the forum of his choice denied and the forum state's interests in adjudicating the dispute.³⁹

A commentator who follows the inferential method criticizes the balancing approach on the ground that it would make prediction of jurisdictional decisions uncertain and unstable, and would thus discourage the parties from pursuing their interests, and fetter the development of international transactions.⁴⁰ But are the two approaches mutually exclusive? Perhaps what is needed is a change in emphasis. The balancing approach is certainly vulnerable to the above criticism if applied by and in itself. But it can be integrated into the indirect approach with success.⁴¹ The indirect approach bears an undesirable aspect,

37. See, e.g., Kosugi & Tatsuno *Jurisdictional Requirement in Recognition of Foreign Judgments*, KOKUSAI SHIHŌ NO SŌTEN 162, 162-63 (1980). The Nagoya District Court in *Malaysian Airlines* adopted the same position and held, "... international jurisdiction and domestic competence have distinct contents. This court thinks that the provisions for domestic competence cannot apply by analogy to international jurisdiction." See note 4 and accompanying text *supra*.

38. See Kosugi & Tatsuno, *supra* note 37 at 163.

39. The pure balancing approach was also adopted by a district court in *Yamazaki v. Takenaka Kōmuten Ltd.* See text accompanying note 64 *infra*.

40. See Yamada, *Case Comment*, 88 MINSHO ZASSI 100, 111-12 (1983) (the balancing of interests should be embodied in a particular rule of jurisdiction). See also Watanabe, *Case Comment*, 715 JURISTO 110, 111 (1980) (comment on *Yamazaki v. Takenaka Kōmuten*, *supra* note 64).

41. One such attempt was made by Hiratsuka, *Case Comment*, 770 JURISTO 139, 141

to the pure balancing-approach advocate, when it appears to focus solely on the CCP provisions.⁴² The inferential method is not very clear about how one can "infer" reasonable rules of jurisdiction from the territorial competence provisions. The balancing approach may make the process of inferring more concrete and easier to understand by articulating relevant factors to be weighed. Particularly, the international considerations it calls for will require inquiry into "private interest factors" pertaining to the convenience of the litigants and "public interest factors" pertaining to the convenience of the forum, which are much amplified in the international arena.⁴³ And surely the presumptive method needs a balancing process where international considerations are duly given, in so far as it refers to the principles of justice and reason.

IV. THE DEFENDANT'S FORUM?

Japanese courts follow the general principle *actor sequitur forum rei*—plaintiff must sue at defendant's domicile. This principle was laid down by Article 1 and paragraph 1 of Article 2 of the Code of Civil Procedure. A Japanese court sitting at the defendant's domicile can exercise jurisdiction over any action against him since it is his "general forum."

The general forum of a corporation is ordinarily determined, as Article 4, paragraph 1 provides, "by the location of its principal place of business, by the domicile of the principal person in charge of its affairs." However, paragraph 3 provides:

with regard to a foreign corporation, the provisions of paragraph 1 shall apply to the office, place of business or person in charge of the affairs of such concern in Japan.

Relying on this rule, the *Malaysian Airlines* Court sustained the jurisdiction of Japan. Is this result justified? Most commentators who disagree with the Court's conclusion turn to Article 9 rather than Article 4 to create a rule for

(1982). The factors he proposes to consider are the interests of the plaintiff, interests of the defendant, convenience of collecting evidence, foreseeability of the forum, and enforceability of the judgement. He found that balancing of these factors in the *Malaysian Airlines* did not override the general rule that a foreign corporation with a place of business in Japan should be sued only in connection with the operation of that place of business.

42. See Kosugi & Tatsuno, *supra* note 37 at 162-63.

43. *Gulf Oil Corporation v. Gilbert*, 330 U.S. 501, 508-9 (1947). See *Piper Aircraft Co. v. Reyno*, — U.S. —, 102 S.Ct. 252 (1981).

international adjudicatory jurisdiction.⁴⁴ They propose a rule to the effect that a suit against a foreign corporation maintaining an office or place of business in Japan may, only in so far as it concerns the affairs of such an office or place of business, be brought before a Japanese court.⁴⁵ Since the victim made the air transport contract in Malaysia for a domestic flight which ended in a crash there, the suit could not be said to concern the affairs of the defendant's place of business in Tokyo.

Opinions of the commentators who support the result vary. One commentator suggests that in a suit based on an air carrier's liabilities ensuing from an air accident, the forum of the plaintiff's domicile should have jurisdiction so far as the defendant air carrier does business internationally and has a place of business in the forum state.⁴⁶ Another commentator considers the fact that the defendant was doing business in Japan as controlling.⁴⁷ Despite the emphasis being different it is noteworthy that many of them seem to rely on a balancing approach in the final justification of the Court's ruling.⁴⁸ Perhaps the most undesirable consequence of taking any approach focusing on the territorial bases of the CCP, with or without the buffer of *jōri*, would be that they often stop short of articulating the compelling reasons for their jurisdictional determination. Though not articulated in the Court's ruling, it would be unrealistic to suppose that the fact that the plaintiffs were the bereaved family of the victim and the defendant, an international airline doing continuous and substantial business in Japan, did not influence the Court's decision.⁴⁹ The result of *Malaysian Airlines* could and should have been justified by a number of factors in addition to the defendant's place of business.

We must now turn to the question which was raised previously. Should the *Malaysian Airlines* rationale be limited to the facts of the case or should it be seen to extend to any situation where the defendant foreign corporation has

44. See, e. g., Ikehara *supra* note 23 at 25.

45. See *id.* at 25.

46. See Osuga, *Case Comment*, 729 JURISTO 143, 144 (1980).

47. See Matsuoka, *Jurisdictional Problems in International Transactions* 124 HANDAI HŌGAKU 1, 6-7 (1982).

48. See, e. g., Gotō *supra* note 17 at 280; Aoyama, *Case Comment*, 76 BESSATSU JURISTO 20, 21 (1982); Takeshita, *supra* note 34 at 53-55; Matsuoka, *supra* note 47 at 7; Ohara, *Case Comment*, 296 HANREI HYŌRON 201, 204 (1983). After weighing a few factors, their balancing seemed to point toward the protection of the plaintiffs. Some of the commentators refer to Article 28 of the Warsaw Convention of 1929 amended by the 1971 Protocol of Guatemala City as an indication of the recent trend toward the protection of the plaintiff in the field of international air transportation. See, e. g., Osuga *supra* note 46 at 144.

49. See Shiozaki, *A Comment on the Malaysian Airlines Case*, 10 KOKUSAI SHŌJI HŌMU 14, 22 (1982).

a place of business in Japan? In other words, is a Court justified in concluding that Japan has jurisdiction over the corporation simply because the Court finds a single factor, that is, its place of business in Japan? When a foreign corporation has an office or place of business in Japan, it is usually the case that it is doing continuous and substantial business there.⁵⁰ If so, it does not seem to be inconsistent with the principles of justice and reason to require the corporate defendant to defend any kind of suit there. After *Malaysian Airlines*, there was one case which apparently based its decision on the defendant's place of business.⁵¹ This case is notable for two reasons. First, it indicates a direction in which the indirect approach may be developed. Second, it tested the reach of the *Malaysian Airlines* in a different fact pattern.

In *Tokyo Marine & Fire Insurance K. K. v. K. L. M. Royal Dutch Airlines*,⁵² the Japanese underwriter, standing in the consignee's place by way of subrogation, brought an action for damages, alleging breach of air transportation contract or tort, before the Tokyo District Court. The district court restated the basic principles of civil procedure set forth in *Malaysian Airlines* and reformulated the Supreme Court's presumptive method. It stated that if one of the CCP bases for territorial competence is located in Japan, it would accord with the notions of *jōri* to sustain the jurisdiction of Japan "provided that there are no special circumstances that would produce unreasonable results as to frustrate the abovementioned basic values of civil procedure."⁵³

The advantage of this reformulation is that it compels a court to explain and justify why a single basis of domestic territorial competence may be used as a basis for international adjudicatory jurisdiction. In fact the district court reasoned:

... it was the obvious fact that the defendant was an international air carrier doing business all over the world. With its international business network and with the place of business in Japan, we do not think it was impossible or considerably difficult for the defendant to conduct necessary defense activities here. Furthermore, the destination of the transpor-

50. Article 479 of the Commercial Code (*Shōhō*, Law No. 48, 1899) provides that any foreign corporation intending to do business continuously in Japan shall register its office and a representative in Japan. However a foreign "corporation" can be sued even without the registration. See Article 46 of the CCP.

51. *Tokyo Marine & Fire Insurance K. K. v. K. L. M. Royal Dutch Airlines*, Tokyo District Court Interlocutory Judgment, September 27, 1982, 1075 Hanrei Jihō 137.

52. *Ibid.*

53. *Ibid.*

tation contract between Shenker [the contracting carrier] and the defendant ... was an airport in Japan. The inconvenience incurred by the defendant is the cost it should bear for the benefits it receives from his world-wide activities. Of course it is the obvious fact, too, that the plaintiff is a large insurance company. Yet we do not believe that asserting Japanese court jurisdiction in the instant case would be inconsistent with fairness to parties only on account of this fact.

In light of the abovementioned ability of the parties, collecting of evidence is not so difficult as to obstruct a fair and speedy trial.⁵⁴

Thus the district court justified its exercise of jurisdiction over the Dutch corporation. In the process of examining whether or not there are any "special circumstances" to overturn the general pattern, it is to be expected that the principles of justice and reason will be given content, not mere lip service. A development of practice in this direction will ensure, to a certain degree, a fair and just determination of jurisdiction which gives due regard to the international character of the case.

The *K. L. M.* case demonstrated that the place of business rule of jurisdiction is applicable to non-air-crash cases. Such factors as the relative economic postures of the litigants, the situs of evidentiary sources, or the destination of a transportation contract may not be controlling by and in themselves, but requiring a foreign corporation to defend a suit in his "general forum" is surely justified if those factors point towards trial in that forum. At any event, to the extent that the place of business rule (and hence the office or the person in charge)⁵⁵ is applicable to a transnational case, the principle *actor sequitur forum rei* is substantially modified in favor of the plaintiff.

V. A PROSPECT FOR FUTURE DEVELOPMENT

When a foreign defendant has no "general forum" in Japan, adjudicatory jurisdiction may be based on the "special forum" provisions of the Code of Civil Procedure. Frequently utilized bases in transnational litigation are place of performance (Article 5), place of tort (Article 15), situs of attachable property (Article 8) and consent (Article 22).⁵⁶ There is still doubt as to what constitu-

54. *Ibid.*

55. See Article 4, paragraph 3 of the CCP the pertinent part of which was quoted earlier.

56. See generally Fujita, *Transnational Litigation—Conflict of Laws*, in 7 Z. KITAGAWA ed., *DOING BUSINESS IN JAPAN* ch. 5 (1981).

tes the place of performance, or place of tort. Suppose, for example, one takes the view that the former refers to the place of performance of the obligation to pay damages in breach of contract as well as the place of performing an originally contracted duty, it is highly difficult to determine the place of performance uniformly. The criticism has been made that if such ambiguous concepts as the place of performance or place of tort are to be applied in transnational litigation, a defendant might be forced to defend in an unforeseeable forum which has sometimes nothing to do with trial convenience.⁵⁷ Also questionable is the general applicability of Article 8 to a case where the defendant has no other connection with Japan than the presence of his property there. Many writers are willing to limit narrowly the Japanese rule of attachment jurisdiction to a case where the presence of the defendant's property is not temporary and its value is sufficient to satisfy the claim.⁵⁸

Generally speaking, Japanese judges have taken a cautious attitude in applying the CCP provisions to transnational cases.⁵⁹ Most of the cases where Japanese jurisdiction was sustained had some other affiliating circumstances than the statutory bases, on which jurisdiction could have otherwise been grounded, and various factors which could have justified the result.⁶⁰ No doubt the significance of the Supreme Court doctrine announced in *Malaysian Airlines* should ultimately be tested by lower courts in the context of the principles of justice and reason. However, despite the Supreme Court's fleeting reference to the CCP provisions, it might be reasonable to say that if past experience is any guide, Japanese courts will

57. See, e.g., Ikehara, *supra* note 23 at 26-27 & 31.

58. See *id.* at 29.

59. See, e.g., Loustalot v. Admiral Sales Co., Inc., Tokyo District Court Judgement, June 11, 1959, 10 Kaminshū 1204 (Article 5 not applicable; since the burden on the parties is considerably heavier and transfer is not available in the international setting, it is not reasonable to regard all the territorial competence provisions as the standard for jurisdictional determination); S.A. Rougemex v. Hoei Trading K. K., Tokyo District Court Judgement, May 2, 1972, 667 Hanrei Jihō 47, English Translation, 18 JAP. ANN. INT'L LAW 209 (1974) (enforcement of a French judgement denied; the place of performance provided in the CCP is not regarded as a sufficient connection to permit adjudicatory jurisdiction).

60. See, e.g., K. K. Yamashō v. Transasiatic Inc., Tokyo District Court Interlocutory Judgement, November 11, 1981, 460 Hanrei Taimuzu 118 (Article 5 plus place of contracting); Sōgo Kōeki K. K. v. A. D. Svendborg, Tokyo District Court Judgement, October 17, 1967, 18 Kaminshū 1002, English Translation, 11 JAP. ANN. INT'L LAW 136 (1967) (Articles 5 & 9); Yasutomi v. United Netherlands Navigation Co., Yokohama District Court Judgement, September 29, 1966, 17 Kaminshū 874, English Translation, 11 JAP. ANN. INT'L LAW 159 (1967) (Article 8, ship collision in Japanese waters, domicile of the injured plaintiff, location and registration of the victimized ship); Yabutani v. The Boeing Company, Tokyo District Court Interlocutory Judgement, July 24, 1974, 754 Hanrei Jihō 58, English Translation, 19 JAP. ANN. INT'L LAW 225 (1975) (Article 15, air accident in Japan, forum foreseeability, convenience of collecting evidence, protection of the plaintiffs).

not adopt the direct approach. In this respect, a version of the presumptive method reformulated in *K. L. M.* may be a correct restatement of what the law is and have utility as a rule of thumb for the immediate jurisdictional determination.⁶¹

A related, but often neglected problem is whether an affiliating circumstance which is not provided in the CCP is accepted as the basis for adjudicatory jurisdiction. Apparently most Japanese legal literature fails to explore this problem. This is probably due to the fact that its main concern has been to modify (usually to limit narrowly) the CCP provisions to avoid the unreasonable results of adopting the direct approach, which focuses solely on the CCP. It is the weak point of the indirect approach that they too, focus on the statutory bases for domestic competence. Nonetheless there is no reason why the question should be excluded from the theoretical horizon. The Supreme Court once recognized, though in an international divorce case, that the plaintiff's domicile could exceptionally be a basis for adjudicatory jurisdiction.⁶² The Court reasoned that the mechanical, rigid application of the defendant's domicile principle "will produce harsh results incompatible with the demands of justice and equity in international private relations and transactions."⁶³ Although this was an extraordinary case where the whereabouts of the defendant husband was not known, it is theoretically necessary to examine, as a general matter, what circumstances could justify the overturning of the traditional bias in favor of the defendant. Another illustration of the inadequacy of both approaches is presented by *Yamazaki v. Takenaka Kōmuten Ltd.*⁶⁴ The plaintiff was injured in a traffic accident in Thailand caused by one of the defendants, a Japanese national, who was driving the automobile at the time of the accident. The plaintiff filed the suit against the defendant still living in Thailand, and his employers, a Japanese company, which was the owner of the automobile, in a district court of Japan seeking damages based on torts. The court, after balancing such factors as the inconvenience to the defendants, the burden on the plaintiff and the convenience of gathering evidence, concluded that the inconvenience to the defendant employee was not so great as the plaintiff, who was in hospital in Japan, would suffer, and that litigation was more appropriately and efficiently conducted in Japan.

61. See text accompanying notes 53-54 *supra*.

62. *Chung v. Chung*, Supreme Court Judgement, March 25, 1964, 18 Minshū 486, English Translation, 5 JAP. ANN. INT'L LAW 175 (1961). See Egawa, *supra* note 2.

63. Note 62 *supra*.

64. Tokyo District Court Interlocutory Judgement, March 20, 1979, 925 Hanrei Jihō 78, English Translation, 24 JAP. ANN. INT'L LAW 127 (1981).

The district court did not make any attempt to refer to any of the territorial competence rules, and resolved the question by the pure balancing approach. No satisfactory explanation has yet been made by the commentators who agree with the result but seek to derive an appropriate jurisdictional rule by modifying the competence rules.⁶⁵ Furthermore the question has practical significance when we think of the possibility that future legislation may expand as well as limit the permissible basis for jurisdiction. Another possibility is that Japan may ratify a treaty which would demand a change in our jurisdictional practice in a particular field.⁶⁶

If legal scholars are to contribute to the development of jurisdictional law, to the establishment of reasonable and manageable rules for international adjudicatory jurisdiction, their task is to evaluate the existing as well as probable bases for jurisdiction. An attempt should also be made to provide a list of factors which would justify a particular exercise of jurisdiction in terms of the principles of justice and reason. It is in this process that the balancing approach should come into play and be integrated into the indirect approach in the contour drawn by the international allocation approach.⁶⁷

CONCLUSION

The rationale of *Malaysian Airlines* can at least be extended to a situation where a foreign corporation has an "office, place of business or person in charge of the affairs of such concerns in Japan."⁶⁸ The fact that a foreign corporation has, for example, a place of business in Japan, usually indicates that it is doing continuous and substantial business there. The same fact also suggests that the

65. Watanabe, *supra* note 40 views *Yamazaki v. Takenaka Kōmuten* as a case of multiple defendants. Article 21 of the CCP stipulates that where joinder of several defendants is proper and permissible, the plaintiff can sue all the co-defendants in the same court in accordance with the provisions of Articles 1 to 20. However most writers are reluctant to utilize Article 21 without qualification in the transnational setting.

66. See, e.g., Article 10 of the Hague Convention on the Recognition and Enforcement of Foreign Judgements in Civil and Commercial Matters.

67. *Yabutani v. The Boeing Co.*, *supra* note 60, is a notable example of this "integrated" approach. The Tokyo District Court evaluated the place of injury rule obtained from Article 15 of the CCP by a standard similar to the international allocation approach. It asked which state is the most appropriate forum to resolve the controversy from a view point of just, fair and efficient administration of justice. After stating that Japan cannot be a distant and unforeseeable forum for the airplane manufacturer, the court further justified the application of the place of injury rule to the instant case by balancing such factors as the convenience of collecting evidence, the interest of the plaintiff, and the interest of the defendant.

68. Code of Civil Procedure, art. 4, para. 3.

corporation has some other connections with Japan. Under these circumstances, it would not be contrary to the principles of justice and reason to require it to defend any types of action there. However the Court's laconic language should not be interpreted to mean that the mere existence of a place of business in Japan confers jurisdiction on a Japanese court. Neither should it be interpreted as the Court's acknowledgement of the direct approach. Unless modified, or justified by other factors, a single-factor-basis for domestic territorial competence can hardly be a reasonable basis for international adjudicatory jurisdiction. A better reformulation of the *Malaysian Airlines* rationale may be: A Japanese court may presume from the existence of territorial competence that it has jurisdiction to adjudicate a case with a foreign element, unless it finds some special circumstances which would bring about such an unreasonable result as to frustrate the principles of justice and reason.

Yet legal theorists may not content themselves with the rule of thumb. If they are to look beyond the horizon of the law as it is, their efforts should also be directed towards the establishment of reasonable and workable rules for international adjudicatory jurisdiction. Their immediate task is to examine existing as well as possible bases for jurisdiction, from the wider perspective of the international allocation approach. At the same time an attempt should be made to enumerate those factors which would make a particular exercise of jurisdiction consistent with the principles of justice and reason.