

Lecture 7

Recognition and Enforcement of Foreign Court Decisions in Korea

- Focused on the 2014 Revision of Korean Civil Procedure Code and Collective Redress -

2013 Hanyang/ Kobe symposium



Korean Statutory Law 2014 / The Brussels I Regulation Recast 2015

☞ Bench mark of Korean International Jurisdiction Legislation

- Brussels I Regulation on *jurisdiction, recognition and enforcement of judgments in civil and commercial matters* (entered into force in 2002)

- Brussels II Regulation on *jurisdiction, recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility*

- The review of Brussels I Regulation has now been completed and a new, revised version was adopted in December 2012 (« the Brussels I Regulation recast 2015 »); enter into force in January 2015.

☞ Korean Civil Procedure Codes for Recognition and Enforcement of Foreign Court Decisions are newly revised on May 20 2014 (at the same date entered into force)

- Irrelevant to Brussels I Recast

- Increasing FTAs (US, EU, ASEAN etc. 45 countries), negotiation process (12 countries including China), negotiation preparation (15 countries including Vietnam, Korea+China+Japan etc.) as of June 2012

- TPP join problem (ISD issue)

Brussels I Recast related with Indirect jurisdiction

Main changes

☞ Abolition of exequatur

- With some procedural safeguards
- Exception: defamation & collective redress
- 3 remedies: in the Member State of Origin if not properly informed; exceptionally in Member State of Enforcement if other procedural defects infringing right to a fair trial; at stage of enforcement if irreconcilability with another judgment

☞ Better functioning in the international legal order

- Creation of subsidiary ground of Jurisdiction - *forum patrimonii* & *forum necessitatis*
- Flexible *lis pendens* rule

Revised Korean Rules for indirect jurisdiction

Passive and minor revisions besides ineffective

☞ Reflection of majority opinions and precedents

- Broaden the Concept of Judgment(Art. 217 para. 1 KCPC/ Art. 26, 27 KCEC)
- Specify the Concept of Reciprocity(Art. 217 para. 1 sub para. 4 KCPC)
- Stress the Court's own duty on examination of satisfaction of prerequisites for recognition and enforcement of foreign judgment(Art. 217 para. 2 KCPC)

☞ Reflection of business field demands(be afraid of increasing foreign judgments especially American punitive damage and class action judgments) (Art. 217-2 KCPC)

Recognition and Enforcement of Foreign Judgments -Indirect Jurisdiction-

Recognition

Old version before May 20. 2014

KCPC Art. 217 (Effect of Foreign Judgment) A final and conclusive judgment by a foreign court shall be acknowledged to be valid, only upon the entire fulfillment of the following requirements:

1. That an international jurisdiction of such foreign court is recognized in the principles of an international jurisdiction pursuant to the Acts and subordinate statutes of the Republic of Korea, or to the treaties;
2. That a defeated defendant received, pursuant to a lawful method, a service of a summons or a document equivalent thereto, and a notice of date or an order, with a time leeway sufficient to defend (excluding the case pursuant to a service by public notice or similar service), or that he responded to the lawsuit even without being served;
3. That such judgment does not violate public policy of the Republic of Korea; and
4. That there exists a mutual guarantee.

Revised version after May 20. 2014

KCPC Art. 217 ① (Recognition of Foreign Decision) A final and conclusive judgment by a foreign court or decisions which are equivalent in effect shall be recognized only upon the entire fulfillment of the following requirements:

(1, 2 the same with old version)

3. In view of the contents of final and conclusive decisions and process, recognition of such court decisions do not violate the public policy of the Republic of Korea; and

4. That there exists a mutual guarantee or recognition requirements for conclusive and final decisions are more or less equal to each other between Korea and foreign country, and the requirements imposed by a foreign country are no major practical differences with ours.

② the court should investigate ex officio whether conditions of paragraph (1) is satisfied or not

2014 new provision and collision with public policy requirement

KCPC Art. 217-2(Recognition of decisions for damages)

- ① The court should not recognize the whole or parts of foreign conclusive and final decisions if foreign decisions for damages violate Korean laws or basic orders of international treaties which Korea had already signed
- ② The court should consider whether procedural costs such as lawyers fee are included or not in decisions for monetary amount of damages which a foreign court accepted when the court deliberate requirements of paragraph (1) are satisfied or not.

Many Korean academics doubt :

- ☞ What is this new provision for?
- ☞ What is it different from public policy requirement?

Enforcement

KCEC Article 26 (Enforcement by Foreign Judgment) (1) A compulsory execution based upon **the judgment** of a foreign court may be conducted only if a court of the Republic of Korea has made a declaration of its legality by means of a judgment of execution.

(2) A lawsuit seeking a judgment of execution shall be under the jurisdiction of the district court located at the debtor's general forum, and if there exists no general forum, it shall be under the jurisdiction of the court having jurisdiction over a lawsuit against the debtor under the provisions of Art. 11 KCPC

Article 27 (Enforcement Judgment)

(1) A judgment of execution shall be made without making any examination as to whether **the judgment** is right or wrong.

(2) A lawsuit seeking a judgment of execution shall be dismissed if it falls under any of the following subparagraphs:

1. When it has not been proved that the judgment of a foreign court has become final and conclusive; and
2. When the foreign judgment fails to fulfill the conditions under Art. 217 KCPC.

KCEC Article 26 (Enforcement by Foreign Decisions)

(1) An enforcement based upon the **decision** of a foreign court may be conducted only if a court of the ROK has made a declaration of its legality by means of enforcement judgment.

(2) A lawsuit seeking an enforcement judgment shall be under the jurisdiction of the district court located at the debtor's general forum, and if there exists no general forum, it shall be under the jurisdiction of the court having jurisdiction over a lawsuit against the debtor under the provisions of Art. 11 KCPC.

Article 27 (Enforcement Judgment)

(1) An enforcement judgment shall be made without making any examination as to whether **the decision** is right or wrong.

(2) A lawsuit seeking an enforcement shall be dismissed if it falls under any of the following subparagraphs :

1. When it has not been proved that the decision of a foreign court has become final and conclusive; and
2. When the foreign decision fails to fulfill the conditions under art. 217 KCPC

Recognition and Enforcement of Foreign Decision in Korea

Principles

1. Automatic recognition of foreign court decisions with *res judicata effect*(Art. 217 KCPC)
2. Exequatur process for enforcement of foreign court decisions in Korea(Art. 26 KCEC)
3. Prohibition of "*Révision au fond*" (Art. 27 para. 1 KCEC)

Basic Rules for Recognition & Enforcement of Foreign Court Decisions

Recognition Prerequisites (Art. 217 & 217-2 KCPC)

Court Decisions(including judgment/ court order/ disposition) with *res adjudicata effect*: Art. 217 para. 1

Mirror Image Principle : Art. 217 para. 1 sub para. 1

Opportunity for defense (Defects in service of process) : Art. 217 para. 1 sub para. 2

Public Policy : Art. 217 para. 1 sub para. 3

Reciprocity : Art. 217 para. 1 sub para. 4

Art. 217 -2 KCPC function as a defense against judgments with class action and punitive damage etc.?

☞ Art. 217-2 intended function is against punitive damage and class action judgments

☞ FTA with US, EU already and with China in the near future? / Trans –Pacific Partnership ?

☞ increasing fear for American opt-out class action, punitive damage judgment and anti suit injunction etc. because securities class action has been used even in restricted area and triple damage system also became effective in these days in Korea(Korea is not far from American unique devices).

Collective Redress in Korea

☞ Collective Redress in Korea

- Securities Class Action Code from 2005 (opt-out method)
- Consumers Rights Code : Consumer Association Action in consumer related case (Verbands Klage)
- Internet-Mobile Joint Action(now most popular device among Korean)

☞ Demanding opt-out class action in Korea and EU countries especially from consumer/ environment fields (vs. business association and institution)

- This means mandatory or compulsory recognition of American opt out class action judgment or settlement protocol?
- Social demand for CA and PD but worry about American judgment and settlement with CA and PD

☞ Enforceability of US Class Action/ US Class Arbitration in Korea

- US court opinion for civil litigation (In re Vivendi Case in the US Federal Court)
- US court opinion for class-wide arbitration (Green tree case etc.)

☞ Detour Redress through American Class Action

- Some Korean could have joined in Class Action in Canada as sub-class for foreign victims (Airia Brands Inc v. Air Canada case Ontario Superior court of Justice, Judgment Oct. 26, 2011 ---not realized)
- Canadian plaintiffs counsel recruited positively victims as for class member in Korea, Japan. (but not realized for two reasons/ Air cargo owner is weaker party and there is no likelihood of recognition for Canadian class action)

In re Vivendi case(242 F.R.D. 76 (S.D.N.Y. 2007))

Recognition Likelihood Analysis :US & Canadian court trend

- ☞ Morrison case[130 S. Ct 2869 (2010)] US Supreme Court is a significant securities litigation decision with important implications for the extraterritorial effect of American law but it did not address an increasingly pressing question that affects all transnational class actions: When, if ever, should foreign citizens be included as members of American class actions?
- ☞ In re Vivendi case plaintiffs moved to certify class, in § 10(b) securities fraud case against French corporation.
- ☞ The question is not a new one. Judge Henry J. Friendly first raised it thirty-five years ago in *Bersch v. Drexel Firestone, Inc*
- ☞ Conclusion : When foreign citizens hail from a country that is unlikely to recognize an American class judgment or settlement, courts should exclude them from an American class action.
- class action was superior method of litigation management for French, English and Dutch shareholders, but not superior method of litigation management for German and Austrian shareholders.

Recognition and enforcement of American Punitive Damage judgment

☞ Demanding Punitive damage system in Korea

- unsuccessful and incomplete official control over global mega company such as Samsung and LG etc.
- from public enforcement to private enforcement
- Towards pure punitive damage?

☞ triple damage clause appears in Korean Code

Art. 35 para. 2 ENFORCEMENT DECREE OF THE FAIR TRANSACTIONS IN SUBCONTRACTING Code

If any person suffers damages since a principal contractor abuses the acquired technical data in violation of Article 12-3 (3), the principal contractor shall be liable to compensate for such damages to the extent not exceeding **three times the damages sustained by the person**: Provided, That this shall not apply where the principal contractor proves that he/she has no intention of or has not been negligent in causing such damages.

- ☞ Triple damage clause in Korean code means mandatory or compulsory recognition of American judgment with punitive damage decision?

Not Punitive Damage case but diminish the amount of American judgment

Seoul Eastern District Court Decision 93kahap19069 delivered on Feb. 10. 1995

- 1) The Default judgment in the amount of US \$ 500,000 for damages was rendered in Minnesota state court for plaintiff (Korean woman who was raped by Korean defendant)
- 2) Seoul Eastern District Court concluded that this judgment did not include punitive damages either in the procedures or the text itself of the judgment, but it ruled that the compensatory portion noticeably exceeding the amount that would be acceptable in Korea should not be executed because recognizing the portion would violate the public policy of Korea.
- 3) and "... as punitive damages have the nature of criminal penalty, they are not accepted in Korea's current civil law system which permits only compensatory damages for tort and therefore they may violate substantive public order of Korea ..."

the District Court allowed only US \$ 250,000 to be executed for the victim.

--this case went up to Korean Supreme Court 96Da47517 Decision Delivered on Sep. 9. 1997 (But lawyers did not raise any argument about punitive damage)

Provisional and protective Remedies

☞ Provisional and Protective Measures

- Revised Art. 217 KCPC (from judgment to all decisions)
- This means Provisional and Protective Measures also could be recognized in Korean Court?
- Opinions are split among academics

☞ ECJ decision : provisional measures out of ex parte procedure should be excluded (Case 125/ 79 Denilauler v. Couchet Frères)

☞ opinion

- Revised Art. 217 KCPC do not aim at improvement of Provisional and Protective Measures
- Provisional and Protective Measures with inter parte process should be recognized and enforced
- Provisional and Protective Measures with ex parte process could be recognized and enforced in exceptional and urgent circumstances¹⁶

Conclusion

- ☞ Acute Demanding Private Enforcement Devices in Korea
- ☞ American opt-out or modified opt-out class action and triple damage system (specifically restricted amount) could be introduced to wide area in Korean society.
- ☞ US class action judgment or settlement and pure punitive damage judgment (without any ceiling amount) which contain excessive amount for damage claim than we could expect usually in Korea could not be recognized or enforced according to public policy requirement.
- ☞ New KCPC 217-2 could not be helpful for function of public policy clause

Thank you for Listening!!

