

Lecture 9

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The Reformation of International Civil jurisdiction in Korea

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Two techniques of regulating international jurisdiction

- System of “rule-like” rules: specific-connecting-factor-based approach (e.g., place of performance, place of tort)
- System of an abstract standard (e.g., minimum contacts, reasonableness, substantial connection) that relies solely on all-things-considered balancing
- Each may be based on either (i) the idea of international allocation of jurisdiction or (ii) nationalist view (e.g., territorialism)

Specific-connecting-factor-based approach

- General jurisdiction: defendant's domicile
- Cause-of-action-specific special jurisdiction:
 - contract -> place of performance
 - tort -> place of tort
- Jurisdiction over related claims
- Jurisdiction by agreement
- Jurisdiction by appearance
- Exclusive jurisdiction

Moderation of specific-connecting-factor-based approach

- A system of rules may be made flexible by adding an additional (second-stage) review of "balance of interests," "substantial connection," "minimum contacts," etc.
- place-of-tort rule + further articulation of its limits (e.g., regarding place of preparation, place of secondary harm)
- place-of-tort rule + Due Process analysis (minimum contacts and reasonableness)
- place of tort + forum conveniens (ad hoc interest-balancing)

Single stage, all-things-considered balancing approach

- Minimum contacts test defined as a pure all-things-considered interest-balancing
- Restatement (Third) of Foreign Relations Law of the United States (1987), s. 421: “reasonableness”
- One reading of Korean Private International Law, Article 2: “substantial connection” (para. 1)

Separate or integrated legislation for international jurisdiction?

- A system of rules based on specific connecting factors may consist of:
 - (i) two separate regimes for international jurisdiction and internal jurisdiction (venue) (e.g., Austria, Japan, England)
 - or
 - (ii) an integrated legislation that applies to both international and internal jurisdiction. (e.g., Germany, pre-2012 Japan)

“international” jurisdiction vs. “internal” (or territorial or regional) jurisdiction (or venue)

- Different dimension
- Criteria may be the same, or only require slight differentiation.
- Legislative technique:
 - (1) two separate sets of provisions, although the criteria often overlap, or
 - (2) a single set of provisions having “double functionality”
 - > How to secure a room for differentiation?
With an explicit statutory language in a general clause? Or leave it to the courts?

Double functionality

- German Civil Procedure Code of 1877
 - (1) provided for criteria that make sense to both international jurisdiction and venue,
 - (2) with a clear legislative intent of double functionality.
- However, the two aspects were doubtful in
 - (1) Japanese Civil Procedure Code of 1890 and Civil Procedure Act of 2003, and
 - (2) Korean Civil Procedure Code of 1960 and Civil Procedure Act of 2002

Modified reverse inference doctrine ("special circumstances" doctrine)

- Reverse inference from venue rules "unless there are **special circumstances** that demand the opposite conclusion"
 - (1) tentative reliance on venue rules as if they were international jurisdiction rules,
 - (2) modifiable in the final all-things-considered test.
- Problems with predictability:
 - courts neglect to sort out those rules that deserve double functionality and those that do not.
 - courts not willing to clarify the exact criteria but only to give the final answer in a concrete case.

Peculiarity of Korean practice of the modified reverse inference doctrine before Article 2 (2001)

- Abstract formula: reverse inference from venue rules, "unless there are special circumstances that demand the opposite conclusion"
- Practice:
 - (1) "unless ..." language is given no practical meaning
 - (2) courts tend to be careful in referring to venue rules
 - > Relatively closer to German doctrine/practice?
 - > Was it so urgent to discard this practice?

Article 2 of Korean PIL of 2001

- (1) The courts shall have international jurisdiction if the parties or the case in dispute has a **substantial connection** with the Republic of Korea. In determining whether or not a substantial connection exists, the courts shall follow the **reasonable** principles that conform to the idea of **allocation of international jurisdiction**.
- (2) The courts shall determine whether they have international jurisdiction by reference to the **internal law provisions** on jurisdiction, having full regard to the **special characteristics of international jurisdiction** in light of the purport of paragraph (1).

Aspirations with Article 2 and its practical application

- Aspirations: venue provisions as a starting point + further judicial elaboration of precise rules
 - => a system of “rule-like” rules
 - moderated by an abstract higher standard
- Practical application - four divergent approaches
 - (1) pure all-things-considered test: tort, matrimonial cases
 - (2) clear definition of criteria: forum selection agreement, product liability, contract, jurisdiction by necessity
 - (3) “substantial connection” as an additional independent basis
 - (4) revitalization of the modified reverse inference doctrine in its genuine form

Supreme Court decision of 27 January 2005 (Kim/Hewlett Packard Co.)

- Facts: Mr. Kim registered a domain name “hpweb.com”. HP reclaimed it in a non-conclusive procedure. Mr. Kim sued HP seeking (1) its return and (2) a negative declaration of his infringement of HP’s U.S. trademarks.
- Seoul High Court (25 Sep. 2002): denied jurisdiction
 - Korea is neither (1) place of tort, or (2) place of performance of the obligation to return, or (3) location of relevant property.
 - (4) Nor has Korea a “substantial connection” with the dispute (Article 2 basis).
- Sup. Ct.: upheld jurisdiction
 - all-things-considered balancing test
 - no clear definition of the limits of tort jurisdiction in trademark infringement or unfair competition

Supreme Court decision of 26 May 2006, 2005 meu884

- Facts: U.S. citizen (domiciled in Missouri) and Korean woman (domiciled in Korea) got married and lived in Korea with an intention to reside there indefinitely. Husband sued wife for divorce before a Korean court.
- Held: upheld jurisdiction based on an all-things-considered balancing test, which included place of celebration of marriage, Missouri law of jurisdiction, “hidden renvoi” from Missouri law
- Why not a simple “defendant’s domicile”-based jurisdiction?

Is it a right way to proceed?

- Article 2 is too dominant.
 - Predictability harmed
 - Slow development of law
- Article 2 is powerless.
 - Some problems continue regardless of Article 2 (e.g., “reasonable connection” requirement to forum selection agreement)
- Confusing coexistence of diverse approaches

Ongoing legislative process

- Japan-Korea (or Korea-Japan) Principles of PIL on Intellectual Property Rights (2010)
- Comparative study of the Reform in Japan
- Commissioned report, Possible Options of Reforming PIL (2012-April 2014)
- Private International Law Reform Committee (June 2014 -)
- Public hearing in 2015?
- Scope: Proprietary matters / maritime matters / personal, family and succession matters

Expected structure of rules - General principles -

- Statement of purpose (“substantial connection”)
- Retention of “substantial connection”-based rule of jurisdiction?
- Jurisdiction by necessity
- Forum non conveniens
- Cf. Jurisdiction over related actions, Lis alibi pendens

Expected structure of rules - Specific rules -

- General jurisdiction
 - domicile or habitual residence
 - legal persons
 - activity-based general jurisdiction?
- Cause-of-action-specific jurisdiction
 - procedural definition of ‘place of performance’?
 - detailed provisions on tort?
 - separate provisions for special torts?

Expected structure of rules

- Specific rules -

- Location-of-property jurisdiction
 - requirement of “relevant” property?
 - abuse of right
- Jurisdiction over related actions
 - related action against the same defendant
 - related action against a different defendant
- Jurisdiction by agreement
 - abolition of ‘objective connection’ requirement?
 - relaxation of writing requirement?

Future Prospects

- Jurisdiction in personal, family and succession matters
- Bilateral or East-Asian convention on
 - recognition of foreign proceedings and judgment
 - international jurisdiction, and
 - applicable law
- Coordination through worldwide conventions
- Deepening mutual understanding

Thank you!



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