On the Hague Draft Convention on jurisdiction and foreign judgment from the viewpoints of the European jurisdiction system and the position of Japan (summary)

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1. Functionally, two different aspects as international judicial instrument can be found in the project of the Hague Convention on jurisdiction and foreign judgment. One of them can be characterized as an attempt to build up "world wide judgment nets", as Prof. Kessedjian once said, which amount to a complete system for judgment recognition, while the other aims to arrange the standard model for the rules of international jurisdiction, including for "black list jurisdiction" to be internationally prohibited as excessive jurisdiction.

In the early stages of drafting, namely until the 1999 Preliminary Draft Convention, most concerns were focused on the problems of drafting jurisdiction rules that would be proper for use as the international standard model, rather than on the features of a multinational judgment recognition system. Adopting the "mix-convention system", it was expected that the special drafting committee could reach an agreement about a proper model for jurisdiction rules-overcoming the differences in the jurisdiction system between the U.S. and Europe. But later, after the publishing the 1999 Draft Convention, it became apparent that it would be very difficult to reach agreement on the jurisdiction rules to be used as the standard model for general use. Once the committee had given up trying to create jurisdiction rules with such a wide scope for general use, the nature and the meaning of drafting the jurisdiction rules seemed changed.

Alternative counter provisions to almost all originally drafted jurisdiction rules in the 1999 Draft Convention were proposed by the U.S. delegation. All of these proposed alternative provisions had been drafted using U.S. concepts of jurisdiction systems and, if adopted, would create U.S. style jurisdiction rules. Consequently, confrontations have arisen between the U.S. and Europe regarding their respective proposals, and it seems unlikely that they can be resolved by making compromises in each pair of competing alternative proposals and conflating them into one jurisdiction rule. Logically, the only possible solutions to this im-

passe would seem to be to choose one of the proposed jurisdiction systems as a whole or to find a third system of new rules, yet today, it has become clear that to reach any one of these possible solutions is virtually impossible. Instead, the only feasible way to reach agreement seems to be to limit the scope of the jurisdiction rules to only those areas in which the results of the application of both proposed rules would be coincident. This means reducing the jurisdiction rules to only the cases in which both the U.S. and European systems could find the same results, and, therefore, giving up on the creation of an international standard model of jurisdiction rules with wide scope for general use. Under these circumstances, the meaning of the drafting work is changed, as above-mentioned, and the jurisdiction rules in the convention will remain functionally only as a part of the judgment recognition system.

2. As the instrument to stabilize the recognition and enforcement of judgments between member states, from the viewpoint of the multinational convention, the most important function of the body of jurisdiction rules is that it presents clear criteria. If the required conditions for jurisdiction in each rule are not clear, the interpretation of the same rules by the judgment rendering court and the recognizing court may become different, in which case, the convention would cease to fulfill its *raison d'etre*. U.S. jurisdiction rules, however, generally present criteria that are not perfectly clear, so their style would seem incongruous with the needs of the convention.

One unique feature of U.S. jurisdiction rules can be found in the flexibility of their application. Collectively, they may be characterized as an "open system". Under the U.S. system of rules, the required conditions in each rule are formulated in abstract expressions, for example "regular commercial activities", and are not ordinarily defined with any concrete activity. When the judge applies this type of rule then, he must always make an evaluation as to whether the concrete facts recognized from the evidence put forth in the proceedings satisfy the requested standard of the conditions. Here the judge must determine, for example, what sorts of activities on the part of the defendant could satisfy the provisional requirements, how many times and during what span of time said activities must be executed before they can be called"regular", and in which cases the defendant in the foreign country can be said to have "acted in the forum

state". Similarly, there are no concrete criteria for such interpretations in the proposed U.S. alternative provisions.

In contrast to this, the European model of rules requires the provision of concrete facts to establish jurisdiction, for example, place of the performance, place of the torts, or place of the branch. Under this system, the judges who apply the rules are not usually requested to make evaluations in abstract ways, but simply to make determinations as to whether the facts recognized in the procedure meet the concrete requirements in the provisions, or not. There is not so wide an area for evaluation by the judge as there is under U.S. style rules.

3. A s examples showing the difficulty of making compromises between the very different U.S. and European jurisdiction systems, let us examine three jurisdiction rules from the 2002 Draft Convention. They are articles on the jurisdiction of the contract (art.6), the tort (art.10), and the branch (art.9).

3-1. The provision originally proposed for the jurisdiction of the contract is as follows,

A plaintiff may bring an action in contract in the courts of a State in which-

a) in matters relating to the supply of goods, the goods were supplied in whole or in part;

b) in matters relating to the provision of services, the services were provided in whole or in part;

This originally proposed provision is drafted with the typical European style and very much like the provision in the Brussels Convention (now reformed as the EU Regulation and called Brussels I Regulation). But this Hague Convention provision has an even narrower scope than the Brussels' equivalent (art.5(1)). Under this provision, jurisdiction is provided for contractual disputes arising only from contracts supplying goods or services, and only when said goods or services have already been delivered in whole or in part. Contrary to this, the equivalent provision of Brussels I is applicable for all kinds of contractual disputes and also when a performance should have been done but has, in fact, not yet been done. There were many discussions for a long time on the problem of determining the place where an obligation "should have been performed" under the Brussels Convention. The original provision proposed for the Hague Convention seems to avoid such inherent vagueness and reduces its scope of application to maintain the

clarity of the provisional requirements.

The proposed alternative provision drafted with U.S. style is as follows.

1. [Subject to the provisions of Articles 7 and 8,] a plaintiff may bring an action in contract in the courts of the State-

a) in which the defendant has conducted frequent [and] [or] significant activity; [or

b) into which the defendant has directed frequent [and] [or] significant activity;] provided that the claim is based on a contract directly related to that activity [and the overall connection of the defendant to that State makes it reasonable that the defendant be subject to suit in that State]

Variant 1

2. For the purposes of the preceding paragraph, 'activity' means one or more of the following

a) [regular and substantial]promotion of the commercial or professional ventures of the defendant for the conclusion of contracts of this kind;

b) the defendant's regular or extended presence for the purpose of negotiating contracts of this kind, provided that the contract in question was performed at least in part in that State. [Performance in this sub-paragraph refers [only] to non-monetary performance, except in case of loans or of contracts for the purchase and sale of currency];

c) the performance of a contract by supplying goods or services, as a whole or to a significant part.

Variant 2

2. For the purpose of the preceding paragraph, 'activity' includes, *inter alia*, the promotion, negotiation, and performance of a contract.

[3. The preceding paragraphs do not apply to situations where the defendant has taken reasonable steps to avoid entering into or performing an obligation in that State.]

This alternative, contrary to the European proposal, has a wide scope of application. It does not limit the jurisdiction only to the place of performance but admits generally the place of the defendant's activities related to the contract including promotion or negotiation for the contract.

The easy way to compromise both proposals seems probably to draft the new

provision only with a scope in which both proposed provisions can have the same result at their application. This means to adopt principally the original proposal of the European style, because the alternative proposal with the U.S. style can very likely cover the jurisdiction of the courts of the place of the performance. Nevertheless, like the European proposal, the alternative U.S. proposed provision contains the performance of the contract's obligations by the defendant as one instance of a jurisdiction causing activity. Thus, there would seem to be a coincident area in which both provisions, more or less, can exist.

However, once one has considered the development and the concept of jurisdiction in person in the U.S. legal system, it becomes clear that jurisdiction based only on the fact that the place of performance stands in the forum state could hardly be acceptable under U.S. jurisdiction law. The U.S. Supreme Court said in an often-cited judgment,

> The Court long ago rejected the notion that personal jurisdiction might turn on "mechanical" tests, [...] or on "conceptualistic ... theories of the place of contracting or of performance" [...]. Instead, we have emphasized the need for a "highly realistic" approach that recognizes that a "contract" is "ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction." (Burger King Corp. v. Rudzewics, 471 U.S. 462 (1985) at 479).

Therefore, to draft a compromise provision in such a way as to make it acceptable under the U.S. system, one might request that there be included, in addition to the mere performance of the contract obligation, some activities of the defendant relating to the contract. The problem, however, is that such activities would be inherently ill-defined, for, as suggested above, the term "activity" is abstract and therefore inherently impossible to define concretely, without an exhaustive list of specific concrete activities, which is obviously impractical. In other words, by including the notion of "activity" the rule would necessarily become unclear. This, in turn, would likely lead to differences of interpretation among the courts of the convention member states, which would disturb the provision's function as part of the international recognition system.

Unfortunately, it seems too difficult to compromise both proposed provisions

in such a way as to make a single provision that is acceptable to both the U.S. and European systems while at the same time keeping the clarity of the requirements for jurisdiction which is requested as a fundamental element of the judgment recognition system. There would appear to be no option now except to abandon the jurisdiction of contracts in the convention.

3-2. The proposed provision for jurisdiction in the case of torts (Art.10) is as follows.

1. A plaintiff may bring an action in tort [or delict] in the courts of the State-

a) in which the act or omission that caused injury occurred, or

b) in which the injury arose, unless the defendant establishes that the person claimed to be responsible could not reasonably foresee that the act or omission could result in an injury of the same nature in that State.

[2. A plaintiff may bring an action in tort in the courts of the State in which the defendant has engaged in frequent or significant activity, or has directed such activity into that State, provided that the claim arises out of that activity and the overall connection of the defendant to that State makes it reasonable that the defendant be subject to suit in that State.]

[3. The preceding paragraphs do not apply to situations where the defendant has taken reasonable steps to avoid acting in or directing activity into that State.]

[4. A plaintiff may also bring an action in accordance with paragraph 1 when the act or omission, or the injury may occur.]

[5. If an action is brought in the courts of a State only on the basis that the injury arose or may occur there, those courts shall have jurisdiction only in respect of the injury that occurred or may occur in that State, unless the injured person has his or her habitual residence in that State.]

Here, the core problem relating to the differences between the U.S. and European jurisdiction system is whether subparagraph 2 should be adopted in addition to or replace subparagraph 1. Sub-para. 1 is typical of a provision in the traditional European style with jurisdiction being based on the place where the tortious act has been committed and the place where the injury has occurred. Sub-para. 2, on the other hand, is a provision drafted with the U.S. jurisdiction concept and so has an activity based form.

As to jurisdiction in the case of torts, the rules of the European style have

some closeness to those of the U.S. jurisdiction system. That is, under the European system, it is the defendant's damage-causing *activity* that constitutes the grounds for jurisdiction, so it can be said, in a sense, that the European system of jurisdiction in this case is, like the U.S. system, activity-based. Practically, differences become apparent when the place of tortious activity and the place of the damage caused by it belong to different countries (distant torts). While in such cases the European system will permit jurisdiction also to the place of damage (for example, the judgment of the European Court of Justice in the case of Bier/Mines de Potasse d'Alsace), under the U.S. system the mere fact that the damage arose in the forum state is principally not evaluated as enough contact to warrant jurisdiction. For example, in the PL case in which a foreign company produces guns and distributes its products in the U.S. market, and a U.S. citizen who bought one of the company's guns is injured in a gun accident caused by the gun's defect while hunting in the Canadian mountains, under the European rules, Canada, as the place of direct damage, may be permitted jurisdiction for the action brought by the U.S. citizen for damages, while the jurisdiction of the U.S. courts will be principally denied as the mere place of distribution of the products. But under the U.S. rules, the U.S. has enough contact with the defendant to sue the foreign gun maker before its courts, because the defendant has distributed its products regularly in the U.S. market and the action is directly related to its activities in the forum state.

On the other hand, so far as simple torts cases are concerned, when the place of the tortious act and the place of the damage are the same, the European and the U.S. jurisdiction rules find an acceptable common area of application.

3-3. The main part of the proposed provisions for the jurisdiction of branches (art.9) is as follows.

A plaintiff may bring an action in the courts of a State in which a branch, agency or any other establishment of the defendant is situated, [or where the defendant has carried on regular commercial activity by other means,] provided that the dispute relates directly to the activity of that branch, agency or other establishment [or to that regular commercial activity].

As to the jurisdiction of branches, the difference between the proposed European and U.S. rules is not great. As long as this jurisdiction can be permitted

only when the defendant is a foreign entity which carries out commercial activities in the forum state, and an action arises relating to its activities, there is no difference in both of the proposed rules. Here, the fundamental requirements for jurisdiction are common. The difference exists only in the matter of whether the part quoted with [] in the proposed provision should be added or not. It means that jurisdiction is affirmed under the U.S. rules with the mere fact of regular commercial activities of the defendant in the forum state, while under the European rules such activities must be done through the branch or other such physical establishment in the forum state. The European rules permit jurisdiction only when the foreign defendant has a branch or other such establishment in the forum state. These differences have arisen from differences of historical background and from substantive differences in the concept of jurisdiction under the U.S. rules and the European rules. From the viewpoint of clarity in the application of the rules, as already mentioned above, the European style of the provision should be adopted.

The problem of whether general jurisdiction on doing business should be prohibited as blacklist jurisdiction (as the European draft of art.18, 2(e)) is also related to this type of jurisdiction. The distinction between general jurisdiction and specific jurisdiction is not clear here. In fact, the determination as to whether the jurisdiction of branches belongs to the category of general jurisdiction or specific jurisdiction is different in some textbooks, for example, in Born, "International Litigation before U.S. Courts 3rd. Ed.", pp.151-170 it qualifies as specific jurisdiction while in Silverman/Stein, "Civil Procedure Theory and Practice" (2001) p.101 it qualifies as a case of general jurisdiction. The differences between the jurisdiction of branches and general jurisdiction on doing business exist practically only in the determination of whether the action is related to the defendant's activities in the forum state and whether the activities are limited to a commercial nature.

Rule construction in which a slight difference related to that determination results in jurisdiction being "white" and permitted or jurisdiction being blacklisted and prohibited should be avoided. Such unstable rule construction destroys the credibility of the rules. So art.18(2)(e) should be deleted.

3-4. Summing up, as for jurisdiction over contracts, there is no common area between the two systems with which to draft the provision while at the same time

preserving the clarity of the required conditions. As for the jurisdiction over torts, only for simple injury cases in which the place of unlawful activities of the defendant and the place of the damage are coincident, can jurisdiction be admitted in the courts of the place where the defendant has done the tortious act. And, lastly, the jurisdiction of branches should be permitted only when the foreign defendant does his regular commercial activities through the branch or such physical establishments in the forum state. The general jurisdiction on doing business should remain as a grey area of jurisdiction and provision art. 18(2)(e) should be deleted.

3-5. The differences between European and U.S. jurisdiction rules can be attributed to differences in the fundamental concept and construction of jurisdiction in the two systems. For example, the principle of defendant's forum under the European system does not exist in the U.S. system. Under the European system, specific jurisdiction is characterised as the exception of this principle and is catalogued for the given types of disputes for which the courts outside of the defendant's forum have exceptional jurisdiction to adjudicate. Thus, these jurisdictions are drafted in a claim-based style. Under the U.S. system, the relationship between general and specific jurisdiction is not a principle-exception relation but more likely a basic-expansion relation of personal jurisdiction. The basic concept of jurisdiction in person is that there is judicial power over the defendant. The justifiability of the exercise of that power should be examined with the requirements of minimum contact, which should satisfy the due process requirements. Exceptionally, the defendant can assert the defence of forum non-conveniens only when another court could examine the case under better conditions.

The differences between the U.S. and the European system of this kind will become apparent, for example, when we posit the case in which the parties change their position as plaintiff and defendant. Under the European system the changes of the parties' position will principally not affect the special jurisdiction, while under the U.S. system, such changes should cause another determination on the jurisdiction. It is the defendant who stands in the position as a subject in the U.S. rules of jurisdiction in person, while under the European rules system, the subject in the rules is the case itself especially in the specific jurisdiction

rules.

The instrumental concept of activity-based jurisdiction versus claim-based jurisdiction reflects only a part of the differences between the two jurisdiction systems; probably there are also some technical differences for drafting the rules. To understand the whole nature of the differences of both jurisdiction systems correctly, it is perhaps not enough only to compare and analyse them in terms of the concepts of activity-based jurisdiction and claim-based jurisdiction.

4. Lastly, from the above analysis of the Hague Convention project and the difference between the European and the U.S. jurisdiction systems, the followings can be pointed out as suggestions for Japanese legal situations of international judicial jurisdiction.

4-1. The so-called special circumstances theory of Japanese case law should be re-considered. It limits the admitted exception of the principle of the defendant's forum once again from the defendants' interests. This seems a dogmatical failure in considering the defendant's interests. Under this construction, the defendant is protected in a double sense.

4-2. It was suggested to provide some rules on international jurisdiction in the Civil Procedure Code during its reform in 1997. But the legislation of the provision was postponed in expectation of the success of the Hague Convention project in worldwide standardization of the jurisdiction rules. Unfortunately, however, the Hague project will not be successful in this aspect, so we should know now the differences in the nature of the jurisdiction legislation in the international system and the domestic legal system. The legislation work on international jurisdiction in the domestic legal system should start if not immediately then very soon.

4-3. Considering the function of the jurisdiction rules in the international legal system, it is important also to take into consideration that the rules work as the criteria for foreign judgment recognition, so the clarity of the provisional requirements is an important factor in their legislation. For this reason, we should choose fundamentally the European style of jurisdiction rules. Jurisdiction in Korean Private International Law represents a good example of jurisdiction provisions formed under the U.S. concept of jurisdiction. But it is difficult to know the criteria for assigning jurisdiction in practical sense with this type of provision.

4-5. Thinking about the differences of jurisdiction legislation in the domestic and international legal systems, we should also consider the possibility to join the Lugarno-Convention.