The Innovation in English Common Law of International Civil Jurisdiction (summary)

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English common law has established a new paradigm based on the theroy of *natural forum*, which regulates almost all the aspects of international civil jurisdiction problems. A line of closely related House of Lords cases in these three decades evolved the doctrine. The important cases dealt with in the paper are as follows:

Atlantic Star [1974] AC 436	(Collision of a Large ship and the barges in a port area)
MacShannon [1978] AC 795	(Personal injuries in a workplace)
Abidin Daver [1984] AC 396	(Collision between Large Ships)
Spiliada [1987] 1 AC 460	(Damages caused to the tank of a Ship by the cargo)
Airbus [1999] 1 AC 199	(Personal injuries caused by air crush)
Lubbe [2000] Llyd's Rep 139	(Personal injuries in work places by asbestos)

In Atlantic Star, the House abandoned the so-called Judicial chauvinism: a long lasted position of English common law since the judgment of *St Pierre* ([1936] 1 KB 382) which in someway had promoted the forum shopping of English courts. Through the arguments presented in *MacShannon* and *Abidin Daver*, the theory was developed under the strong influence of Scottish common law as to international civil jurisdiction. The real landmark decision was *Spiliada*, in which Lord Goff clearly articulated the theory of natural forum as follows:

a) A stay of proceeding will only be granted where the court is satisfied that there is some other available forum, which has competent jurisdiction and appropriate for the trial of the action.

b) In general, the burden of proof to persuade the court to exercise its discretion to grant a stay rests on the defendant. If the court is satisfied that

there is another available forum, which is *prima facie* the appropriate forum for the trial, the burden will then shift to the plaintiff to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in this country.

c) If the jurisdiction has been founded as of right which means based on the service of writ within England, rather than leave to serve the defendant out of jurisdiction being required, the burden on the defendant is not just to show that England is not the natural or appropriate forum, but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum for the trial. In this way, proper regard is paid to the fact.

d) The *natural forum* is 'that with which the action had the most real and substantial connection'. So the court first has to look connecting factors in this sense; and these will include not only factors affecting convenience or expense, but also other factors such as the law governing the transaction, and the places where the parties respectively reside or carry on business.

e) If the court concludes at the stage that there is no other available forum which is clearly more appropriate, it will ordinarily refuse a stay;

f) If the court concludes at the stage that there is some other forum which *prima facie* is clearly more appropriate for the trial, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted.

Now this position is predominant in almost all Anglo-Commonwealth countries. As Lord Goff explained in the later case of *Airbus*, the principle of *natural forum* is suitable for the jurisdictions scattered all over the globe which acts individually ; and there is no application to the areas where they have uriform international jurisdiction rules such as Brussels=Lugano Conventions areas. For the *natural forum* theory to function, each separate jurisdiction has to adopt the principle voluntary and seeks to adjust its jurisdiction according to the response of other jurisdictions.

In England, for example, jurisdiction is founded on the presence of the defendant within the jurisdiction, and, in certain specified circumstances, on a power

to serve the defendant with process outside the jurisdiction. However, the potential excesses of this jurisdictions are generally adjusted by the principle of *forum non conveniens* : a self-denying ordinance under which the court will stay the proceedings in favour of another clearly more appropriate forum. The theory of natural forum in *Spiliada* is the completion of the doctrine of *forum non conveniens* originated in Scottish common law.

What are the main features of International Civil Litigation? In these litigations, the parties have to figure out their actions among more or less independent legal systems. The cooperative structure and relationship between the legal systems surrounding a dispute defer considerably, depending on their identities and combinations.

Therefore, we have to have clear awareness of existing background of judicial cooperation for considering the problem of international civil jurisdiction. The background matrix of judicial cooperation heavily affects the regulation of international civil jurisdiction generally. Brussels=Lugarno Model [a tightly woven structure of judicial cooperation]is the extreme one, in which the parties can enjoy uniform jurisdiction rules and almost automatic enforcement of judgment everywhere within the area. Within this area, they seem to try to kill any discretionary response such as *forum non conveniens* also and this is at least partially justifiable. Still some necessity of discretion seems to persist. However, the situations are dramatically different in the areas other than this. English international jurisdictional law is now fully conscious of this fact. Therefore, besides admitting the importance of Brussels=Lugano regime, they have developed another different legal regime outside of it. Recently, USA is also becoming to be aware of the difference of the legal backgrounds between interstate litigations supported by Full Faith and Credit and other real international disputes. They are now trying to develop different regimes.

What is the ideal for the determination of international civil jurisdiction? It might not be so difficult to answer : the equilibrium between the parties of a dispute ; the appropriateness of the forum to treat the problem in the actual situation of litigations ; security for fair and proper proceeding under the legal system of the forum. In a civil litigation, the plaintiff always takes the first action and therefore selects the forum. However, which party becomes the plaintiff is often a matter

of accident. In an ordinary dispute, both parties have the possibility to become a plaintiff. It is difficult to strike an equitable and stable jurisdiction rules under the influence of these variable conditions. The rule based on defendant's domicile can narrowly be said to coincident with the *natural forum* of the dispute. However, strictly applied special jurisdiction rules based on substantive law concepts can often spoil the equilibrium of the parties. For adequately responding to these unstable conditions, a good jurisdiction rule should inevitably keep some room for flexible reflection.

Also, I suspect the efficiency of using substantive law concepts for defining each special jurisdictions rule. The cases elaborating the *natural forum* theory contain various and heterogeneous disputes from the viewpoint of substantive law. This fact suggest to us the possibility of making the rules of international civil jurisdiction without paying so much consideration to the substantive law character of each dispute or details of causes of action asserted by the plaintiff. Very large categories such as contract, torts or property, which are based on factual situation seem to be narrowly useable as a broad guideline. However, these are far from the only basis for indicating a *natural forum*. The complicated problems of the interpretation of the concepts defining special jurisdictions as to the application of Brussels=Lugano rules might suggest the fundamental flaw of regulatory structure that uses substantive law concepts.

Under the *natural forum* theory, they use totally different languages and grammar. They are building a completely independent regulatory scheme, which has almost no relation to which causes of action the party is asserting. The key words such as 'natural or appropriate forum', 'forum non conveniens', 'forum shopping', 'stay', 'anti-suit injunction', 'lis pendence' are used, instead of contract, tort or restitution.

Japanese case law of international civil jurisdiction seems to be taking the same direction as the doctrine of *forum non conveniens* by pushing in front the "special circumstances" considerations for confining its own jurisdiction. The special jurisdiction rules based on substantive law concepts have not been fully evolved despite the strong assertion of some academics. In my understanding, this is not the fault of Japanese judges. Rather, as judges in an isolated legal system surrounded by independent and heterogeneous legal systems in the world, they are

trying hard to respond properly to the variables of actual situations surrounding international civil litigations. Therefore, we have to appreciate the value of their efforts much more and warmly support them. For the purpose, the *natural forum* theory evolved by English common law will surely provide them with rich experiences and information for advancing their present position.