

International jurisdiction by agreements, appearance, counterclaim, and joinder of claims (summary)

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1. Introduction

This paper introduces the issues of future legislation concerning international jurisdiction based on agreement, general appearance, counterclaim and joint claims by taking into consideration judicial precedents and the evolution of theories following the promulgation of the new Code of Civil Procedure in 1996. Each of the aforementioned grounds for jurisdiction is based on the provisions on territorial jurisdiction of the Code of Civil Procedure. Based on the standpoint of the precedents of the courts of Japan which analogizes international jurisdiction with the provisions on territorial jurisdiction, this text examines the extent to which the provisions for territorial jurisdiction, which provide for these grounds for jurisdiction, are applicable as rules for international jurisdiction.

2. Agreed jurisdiction

In the legislation process of the new Code of Civil Procedure which was promulgated in 1996, initially, there were plans to include provisions of the Code of International Civil Procedure. However, there were no significant discussions on internationally agreed jurisdiction. The requirement shown in the Supreme Court judgment on 28 November 1975 should be the starting point of discussions for future legislation.

3. Jurisdiction by appearance

Few objections are made against applying Article 12 of the Code of Civil Procedure to international jurisdiction. If a case is brought to a court in Japan and the defendant presents an oral argument on the merits without filing a defense of lack of jurisdiction, Japan shall have international jurisdiction over such case. This applies even to cases in which a foreign court is acknowledged to have agreed exclusive jurisdiction, and it is not swayed by whether or not grounds for jurisdiction other than appearance are justified in Japan.

Due to revisions to the provisions concerning transfer of suits (Article 17 of the Code of Civil Procedure), the provisions of territorial jurisdiction in the new Code of Civil Procedure allow more flexibility for locational adjustments concerning jurisdiction. However, regarding international jurisdiction, under which such transfer is inconceivable, caution is required in establishing jurisdiction.

4. Counterclaim

(1) Meaning of jurisdiction based on counterclaim

Article 146 of the Code of Civil Procedure allows for jurisdiction based on counterclaim. In interpreting the domestic Code of Civil Procedure, there were views that the significance of the counterclaim was to ensure equality of arms or equity between parties. However, Article 238 of the old Code of Civil Procedure (amended in 1926) requires a certain connection between the principle suit and the counterclaim, based on German law (Article 33 of the German Code of Civil Procedure). This requirement has also carried over to Article 146 of the current Code of Civil Procedure. From this requirement, it is clear that the significance of the counterclaim lies in resolving related cases at once (judicial economy) and avoiding contradictory decisions, rather than the advantages of equity between parties. In regards to international jurisdiction, as long as the advantages of judicial economy and the avoidance of contradictory decisions are held reasonable, there is good reason to allow jurisdiction based on counterclaims by giving dual functionality to Article 146 of the Code of Civil Procedure.

5. Jurisdiction over joint claims

Whether or not the provisions of Article 7 of the Code of Civil Procedure are applicable to international jurisdiction is a classic argument. In past precedent and theory, jurisdiction over joint claims has always been cited as a typical example of a forum in which dual functionality is not permitted. Despite such negative views in theory, in practice, recent Supreme Court cases has allowed for such dual functionality subject to certain requirements.

(1) Objective joint claims

The problem arising from claims lacking jurisdictional grounds being joined and tried also applies to cases of domestic jurisdiction. Transfer of suit has been

thought to resolve this problem; however, in international jurisdiction cases, transfer between courts across national borders is not anticipated, and the disadvantages of the defendant must be taken into consideration within the domestic jurisdictional regulations.

(2) Subjective joint claims

Unlike objective joint claims, the problem concerning disadvantages of joint defendants who should normally be tried in courts without jurisdiction was recognized early on not only for international jurisdiction but for regulations on territorial jurisdiction as well. The issue was also discussed in the legislation process of the new Code of Civil Procedure and, eventually, it was decided that only in cases of joint suits referred to in the first sentence of Article 38 of the Code of Civil Procedure shall jurisdiction over joint claims prescribed in Article 7 of the Code of Civil Procedure be applied.

Whether or not jurisdiction over joint claims, which has undergone the above refinement in terms of requirements, may also be applied to international jurisdiction must be further examined.

6. Conclusion

Of the forums raised in this paper, the diversion of jurisdiction over joint claims to international jurisdiction cases (dual functionality) was often times viewed negatively in theory and in some areas of practice. However, as a result of the aforementioned Supreme Court judgment of 1998 (the "Sadhvani case") and the Supreme Court judgment of 2001 (the "Ultraman case") which allowed international jurisdiction under certain requirements (close connection), it seems that the tendency to acknowledge the dual functionality of jurisdiction on both subjective and objective joint claims has become stronger in Japan. However, in comparison to legislation in other countries and the Brussels Regulation, it has been made clear that caution is still called for in considering the jurisdictional merits for cases of objective joint claims (including set-off defense). Further, even if legislation measures which essentially grant dual functionality to these forums are taken in the future, it is impossible to sufficiently stipulate in detail requirements therefor such as the extent of appearance concerning jurisdiction by appearance, the relation between the principle claim and the counterclaim in ju-

jurisdiction based on counterclaims and the close connection between multiple claims in jurisdiction over subjective joint claims, in the provisions of the law. Disputes over the interpretation of these abstract requirements, whose purpose is to narrow down the grounds for jurisdiction, cannot be avoided. Therefore, as far as these forums are concerned, there are no significant advantages in enacting legislation.