

Introduction to Detailed Rules of International Adjudicatory Jurisdiction in the Republic of Korea: Proposed Amendments of the Private International Law Act

Kwang Hyun SUK (石光現)

Professor, School of Law, Seoul National University

I. Introduction¹

The current Private International Law Act of Korea (“KPILA”) includes three articles on international jurisdiction (hereinafter “jurisdiction” refers to “international jurisdiction” unless otherwise required by the context) that were introduced in 2001. Art. 2 in Ch. 1 (General Provisions) lays down general rules on jurisdiction. Arts. 27 and 28 set forth special rules to protect consumers and employees. In June 2014, the Ministry of Justice of Korea (“KMOJ”) established an expert committee (“Committee”) in charge of preparing the draft amending KPILA, the term of which has expired on December 31, 2015. The task of the Committee was to prepare an official draft of the amended KPILA. As of July 25, 2017, however, an official draft of the amended KPILA has not been published.

Since January of 2017 KMOJ had made efforts to complete the remaining works and actually has prepared an unofficial tentative draft (“Draft”) of the amended KPILA. Although the Draft has not been officially released to the public, I am familiar with the contents thereof since I am providing assistance to KMOJ. When I made a presentation on June 5, 2016 at the Conference of the Society of Private International Law of Japan held in Nagoya, Japan, I explained the major contents of the then unofficial draft of the amended KPILA. In this article, I would like to briefly discuss the major contents of the Draft without going into details thereof.

Unlike Japan, which added in 2012 detailed jurisdiction rules only on property law matters in the Civil Procedure Act of Japan (“JCPA”) and Civil Provisional Remedies Act of Japan, respectively, Korea will insert the jurisdiction rules on not only property law matters, but also family law and succession law matters in KPILA, in parallel with existing rules on applicable law. Korea is different from both Japan and China in that Korea plans

to insert detailed jurisdiction rules in the private international law act rather than civil procedure act, whereas both Japan and China have inserted detailed (in the case of Japan) or brief (in the case of China) jurisdiction rules in their respective civil procedure act.

II. Direction and the Regime of the Future Jurisdiction Rules

1. Current Regime: Transitory Codification in 2001

Art. 2 of KPILA states that detailed jurisdiction rules should be developed by consulting, but without being bound by, the venue provisions of Korean law dealing with domestic territorial (or local) jurisdiction, such as Arts. 2 to 25, and Arts. 29 to 31 of the Civil Procedure Act of Korea ("KCPA"). However, it is necessary to take into account the special characteristics of jurisdiction, as distinct from venue provisions.² Insertion of these articles was a transitory measure which implied that detailed jurisdiction rules would follow in the succeeding years. The reason the Korean legislators were then satisfied with the transitory measure was that the "Judgment Project" aimed at developing a comprehensive worldwide convention dealing with jurisdiction and recognition and enforcement of foreign judgments in civil and commercial matters was underway under the auspices of the HCCH. However, since the Judgment Project has failed, it is time for the Korean legislators to complete their plan to provide detailed jurisdiction rules in KPILA.

2. Direction of Amendment: Concretization and Individualization of Art. 2

The purpose of the amendment of KPILA is to insert detailed and refined jurisdiction rules in KPILA. The abstract principles declared in Art. 2 should be replaced by more concrete rules. In preparing these rules, the Committee had considered the jurisdiction rules of the 1999 Preliminary Draft ("1999 Draft") of the Hague Conference on Private International Law ("HCCH") and the rules set forth in the Brussels I Regulation, the Choice of Court Convention of 2005 (in the case of property law matters), the Brussels II bis Regulation, various Hague Conventions including the Children's Conventions and the Adults Protection Convention of 2000, the EU Maintenance Regulations of 2008, the EU Succession Regulations of 2012 and the then draft of the EU Matrimonial Property Regulations (in the case of family law matters).

3. Structure

Ch. 1 of KPILA will be amended as follows:

Current Provisions		Future Structure	
Ch. 1	General provisions (§§1-10) Art. 1 (Purpose) Art. 2 (General Principles) Arts. 3-10 Articles on Governing Law	Ch. 1	Sec. 1. Art. 1 (Purpose)
			Sec. 2 International Jurisdiction Art. 2 (General Principles), new articles to be added here: general jurisdiction, jurisdictions based upon office or activity, presence of property, jurisdiction based upon relationship, counter-claim, jurisdiction agreement, appearance, exclusive jurisdiction, <i>lis pendens</i> , <i>forum non conveniens</i> , exception for family and succession matters, provisional measures, non-contentious matters
			Sec. 3 Governing Law. Existing Articles

In new chapters from 2 to 10 (except for Ch. 3 & Ch. 4), new Sec. 1 on jurisdiction will be added, and the existing articles on governing law will be moved to new Sec. 2.

Current Provisions		Future Structure	
Ch. 2	Person (§§11-16)	Ch. 2	Sec. 1 New Articles on Int'l Jurisdiction
			Sec. 2 Existing Articles on Governing Law
Ch. 3	Juridical Act (§§17-18)	Ch. 3	No change
Ch. 4	Rights <i>in Rem</i> (§§19-23)	Ch. 4	No change
	Protection of Intellectual Property (§24)	Ch. 5	in chapters 5 to 10 Sec. 1 New Articles on Int'l Jurisdiction Sec. 2 Existing Articles on Governing Law
Ch. 5	Obligations (§§25-35)	Ch. 6	
Ch. 6	Family (§§36-48)	Ch. 7	
Ch. 7	Succession (§§49-50)	Ch. 8	
Ch. 8	Bills of Exchange, Promissory Notes and Checks (§§51-59)	Ch. 9	
Ch. 9	Maritime Matters (§§60-62)	Ch. 10	

III. General Provisions on International Jurisdiction (Ch. 1)

Here, I will discuss the jurisdiction rules to be inserted in Ch. 1.

1. Existing Art. 2: General Principles

Current Status

Art. 2 reads as follows:

- (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 such substantial connection exists, the courts shall follow the reasonable principles in conformity with the ideas underlying the allocation of international jurisdiction.
- (2) The courts shall determine whether or not they have international jurisdiction by reference to the provisions on jurisdiction of domestic laws, having full regard for the special characteristics of international jurisdiction in light of the provisions of paragraph (1).

The idea underlying Art. 2 is to require Korean judges to establish more detailed and refined jurisdiction rules after considering the special characteristics of jurisdiction, instead of mechanically assuming that the ‘rules on international jurisdiction’ are identical to the ‘venue provisions’ of KCPA. The venue provisions of KCPA could be used as a reference for Korean courts in developing detailed and refined jurisdiction rules.

Draft

Art. 2 in the Draft reads as follows:

- (1) The courts shall [... same as Art.2 (1) of the current KPILLA] i.e., fairness to the parties, justice, promptness and economy of trial.
- (2) Where there is no provision on international jurisdiction in this Act, other acts or treaties, the courts shall [... same as Art.2 (1) of the current KPILA].

2. General Jurisdiction

Current Status

KCPA provides that an action is subject to the local jurisdiction of the court located at

the place where the defendant has his domicile (in the case of a natural person) or its principal place of business (in the case of a legal person; KCPA, Arts. 2, 3 & 5). It is generally recognized that this rule (*actor sequitur forum rei*) applies to jurisdiction.

Draft

An article setting forth the *actor sequitur forum rei* rule has been added in the Draft. However, habitual residence has been selected as the point of contact for general jurisdiction for the following reasons: First, in the context of choice of applicable law, KPILA does not use domicile as a point of contact. Second, habitual residence rather than domicile is widely used as the basis of general jurisdiction in various Hague Conventions.

3-1. Jurisdiction based upon the Presence of Office or Branch

Current Status

An action against a person maintaining an office or a business office can be filed before the court located in that area only if the action concerns the business affairs of such office or business office (KCPA, Art. 12). It is generally recognized that this rule applies to jurisdiction. Art 5 (2) of KCPA also provides that the general forum for a foreign corporation shall be the place in Korea where it has an office or a business office. Korean courts used to hold that if a foreign corporation establishes an office or a business office in Korea, it will be subject to Korean jurisdiction generally without regard to whether the particular cause of action is connected with the operation of the Korean office or business office, which can be viewed as supporting the American concept of “doing business”. However, it is not clear whether the Supreme Court still maintains the position expressed in the past, because in a recent case of 2010, the Supreme Court apparently did not follow the approach of a judgment of 2000 in a comparable dispute.

Draft

An article along the lines of the following has been added in the Draft (Cf. Brussels I *bis* (Art. 7 (5)), the 1999 Draft (Art. 9) and JCPA (Art. 3-3 (4)):

An action against a person having an office or establishment in Korea and relates to the activities of that office may be filed in Korea.

3-2. Jurisdiction based upon the Activity of the Defendant

Current Status

There is no provision on this head of jurisdiction.

Draft

An article along the lines of the below has been inserted in the Draft:

An action against a defendant may be filed in Korea where the defendant has continuously and systematically carried on commercial or business activity in, or towards, Korea; provided that the dispute relates to that commercial or business activity.

In order to enhance legal certainty and clarity, the Committee agreed to insert such a provision. Art. 3-3 (5) of JCPA is a good model of such jurisdiction. One could justify such ground of jurisdiction, because foreign companies can conduct business in Korea without establishing any office or establishment in Korea through internet and by other means. This could be described as so-called “transacting business” jurisdiction (*i.e.* special jurisdiction) as opposed to “doing business” jurisdiction (*i.e.* general jurisdiction). It is a ground of jurisdiction based on the “targeted activity criterion”. In order to make clear that a foreign company’s mere operating of a website which Korean residents can access cannot be regarded as carrying on business or commercial activity in Korea, the Committee has added in the Draft the phrase “systematic and continuous activities” which had been used in the U.S. Supreme Court Judgments³ in the past as a ground of general jurisdiction until it was recently abandoned by the judgment in *Daimler AG v. Bauman*.⁴

4. Jurisdiction based upon the Presence of Property of the Defendant

Current Status

An action relating to property rights against a person without a domicile in Korea may be brought before the court located in the area where the subject matter of the claim, the subject matter for security or any attachable property of the defendant, is located (KCPA, Art. 11). This appears to confer local jurisdiction merely on the grounds of the location of any specified subject matter or property. Despite majority view criticizing such a position as allowing exorbitant jurisdiction, the Supreme Court admitted in 1988 that Art. 11 may

be applied to jurisdiction. However, considering a recent case of 2014,⁵ the Supreme Court now appears to depart from its previous position.

Draft

The Committee had no objection against the rule that the presence of the defendant's property could constitute a ground of jurisdiction for an action relating to property rights where the subject matter of the claim or the subject matter for security is located in Korea. On the other hand, there was much discussion as to whether the presence of the defendant's property could constitute a ground of jurisdiction for an action relating to property rights in general which has nothing to do with that property. The conclusion was that the presence of property could constitute a ground of jurisdiction for an action relating to property if the property can be a subject of arrest or seizure. However, this rule does not apply when (i) the case in dispute has no connection at all, or only a slight connection, with Korea or (ii) the value of the property is substantially small.

5-1. Jurisdiction based upon the Relationship between Claims

Current Status

KCPA contains a provision allowing an action involving several claims to be filed before the court having local jurisdiction over one of the claims (§25 (1)). Some legal commentators take the view that the provision could be applicable to cross-border actions as well. However, the Brussels I and the 1999 Draft do not contemplate such possibility at all.

Draft

An article along the lines of the below has been inserted in the Draft:

Where two or more claims are made jointly in a single action and Korean courts have international jurisdiction over one of them, the action may be filed before Korean courts only if the claims have a close connection between them.

The Committee decided to apply to family matters the jurisdiction rules based upon the relationship between claims but with some qualifications. Accordingly, Korean courts having jurisdiction over a principal (or anchor) claim such as divorce or adoption can have

jurisdiction over an incidental claim such as a claim for appointment of custodian or a claim for child support. However, Korean courts having jurisdiction only for an incidental claim cannot have jurisdiction over a principal claim. .

5-2. Jurisdiction based upon the Relationship between Parties

Current Status

KCPA contains a provision allowing an action by, or against, several persons to be filed before the court having jurisdiction over one of the defendants (§25 (2)). Some legal commentators take the view that the provision could be applicable to cross-border actions as well.

Draft

An article along the lines of the following has been inserted in the Draft:

A plaintiff filing an action against a defendant before a Korean court in which that defendant is habitually resident may also file an action before that court against other defendants not habitually resident in Korea only if the claims against the defendant habitually resident in Korea and the other defendants are so closely connected that they should be adjudicated together to avoid a serious risk of inconsistent judgments.

7. Jurisdiction Agreement (Choice of Court Agreement)

Current Status

In practice, the parties' agreement on jurisdiction plays a very important role. The effectiveness of the parties' agreement on jurisdiction in a cross-border action is generally accepted in Korea, although there is no express provision on point in KCPA. However, the Supreme Court held on September 9, 1997 that in order for a jurisdiction clause conferring exclusive jurisdiction upon a foreign court to be valid, (i) the case does not fall under the exclusive jurisdiction of Korea, (ii) the agreed upon foreign court has valid jurisdiction under its law, (iii) the case should have a reasonable relationship with the chosen foreign court, and (iv) the jurisdiction agreement is not egregiously unreasonable or unfair. Although the condition (iii) has been criticized by legal commentators, the Supreme Court maintains its position.

Draft

In relation to the requirement mentioned in (iii) above, the Committee agreed not to follow the position of the Supreme Court. In addition, considering the entry into force of the “Convention on Choice of Court Agreements” on October 1, 2005 at the HCCH, the Committee agreed to specify as below. Under the Draft a Korean court shall dismiss proceedings where there is an exclusive choice of court agreement in favor of a foreign court, unless (i) the agreement is null and void under the law (including choice of law rules) of the State of the chosen court; (ii) a party lacked the capacity to conclude the agreement; (iii) giving effect to the agreement would be manifestly contrary to the public policy of Korea; or iv) the chosen court has decided not to hear the case or there is a situation in which the agreement cannot properly be performed. However, as to the prorogation aspect of a jurisdiction agreement, the Draft is expected to merely state that the parties may enter into a jurisdiction agreement in respect of a defined legal relationship without expressly specifying that the chosen court shall have jurisdiction to decide a dispute to which the agreement applies.

In family matters, jurisdiction based upon parties’ choice of court is in principle excluded; unless there is an express provision allowing parties’ choice of court agreement. For example, the parties are allowed to enter into a choice of court agreement in the case of maintenance matters (Ch. 7, Sec. 1). However, this exception is not applicable where the chosen court has no connection at all, or has only a slight connection, with the case or the maintenance creditor is a minor or an adult ward.

9. Exclusive Jurisdiction

Current Status

KCPA does not contain any provisions on exclusive jurisdiction. A majority of commentators take the position that Korean courts have exclusive jurisdiction in the following cases: (i) in proceedings relating to the registration in public registers, if the register is kept in Korea; (ii) in proceedings relating to the validity of the constitution, nullity or dissolution of companies or the validity of the decisions of their organs, if the company has been established under Korean law; (iii) in proceedings relating to rights *in rem* in immovable property, if the property is situated in Korea (the same applies to proceedings based upon the right to use immovable property if such rights is registered in public registers and iv) in proceedings relating to the registration or validity of patents, trademarks, or

other similar rights required to be registered, if the registration has been applied for or has taken place in Korea. This is similar to the list of exclusive jurisdictions under the Brussels I Regulations (§22).

Draft

An article dealing with exclusive jurisdiction has been added in Ch. 1 of the Draft. The list of exclusive jurisdictions of Korean courts is as follows:

- (i) in proceedings relating to the registration in public registers, if the register is kept in Korea;
- (ii) in proceedings relating to the validity of the constitution, nullity or dissolution of a legal person or an association or the validity of the decisions of its organs, if it has been established under Korean law;
- (iii) in proceedings relating to rights *in rem* in immovable property, if the property is situated in Korea (the same applies to proceedings based upon the right to use immovable property if such rights is registered in public registers);
- (iv) in proceedings relating to the registration or validity of patents, trademarks, or other similar rights required to be registered, if the registration has been applied for or has taken place in Korea;
- (v) in proceedings concerned with the enforcement of judgments, if the judgment is to be enforced in Korea.

As to the proceedings mentioned in (i) and (iv) above, there are two exceptions. First, exclusive jurisdiction rules shall not apply when those matters arise as incidental questions. Second, exclusive jurisdiction rules shall not apply when the transfer or registration being the subject matter of the proceedings should be performed by a contract between the parties. This is because in such case, the principal subject matters of the dispute are the interpretation of the contract, and the rights and obligations of the parties under the contract. The purpose of the second exception is to reflect the position of the Supreme Court of Korea.

As to the proceedings mentioned in (iii), there was much discussion as to whether Korean courts should have exclusive jurisdiction or not. Some members supported the position of the Brussels I and the 1999 Draft, whereas other members were in favor of the position of JCPA according to which Korea would not have exclusive jurisdiction. KMOJ decided to take the former position. An action relating to immovable property may be

filed in Korea if the immovable is located in Korea. An action relating to the ownership of immovables falls under this sub-paragraph.

With regard to (iv) above, there was a dispute whether proceedings where the Korean plaintiff requires the Japanese defendant to transfer and register the transfer of the patents registered in Japan pursuant to the contract between the parties is subject to the exclusive jurisdiction of Japan or not. While the Supreme Court admitted that the proceedings where the subject matter is the validity or existence of patents generally fall under the exclusive jurisdiction of the country of registration (in that case in Japan), the Supreme Court, on April 28, 2011,⁶ held that the proceedings in question did not fall under the exclusive jurisdiction of Japan, because the principal subject matters of the dispute were the interpretation of the contract, and the rights and obligations of the parties under the contract.⁷ The judgment was welcomed by legal commentators in Korea.

10. *Lis Pendens*

Current Status

There is no provision on this issue in KPILA or KCPA. Although there is a split of opinion, majority of lower courts appear to take the view that a Korean court before which the second case is brought shall dismiss the case in cases where the foreign court first seised of the case is expected to render a judgment that meets the requirement for recognition in Korea.

Draft

Rules on *lis pendens* along the lines of the below have been inserted in the Draft, which resembles Art. 21 of the 1999 Draft.

When an action that is the same as the case pending before a foreign court is filed before a Korean court, the Korean court may, *ex officio* or upon application of a party, suspend the proceedings if the foreign court is expected to render a judgment capable of being recognized in Korea, unless the Korean court has jurisdiction pursuant to an exclusive jurisdiction agreement or it is manifest that the Korean court is more appropriate to resolve the dispute than the foreign court. Upon application of a party, the Korean court may proceed with the case if the plaintiff in the foreign court has failed to take the necessary steps or if the foreign court has not rendered such a decision within a reasonable time. The Korean court shall dismiss the case as soon as it is presented with a judgment rendered by the for-

eign court that satisfies the requirements for recognition under Korean law.

11. *Forum non Conveniens*: Special Circumstances Theory

Current Status

At present, there is a split of opinion among legal commentators as to whether or not the doctrine of *forum non conveniens*, under which the Korean court may refuse to exercise jurisdiction even if Korean courts have jurisdiction according to the standard established by KPILA, is permitted. In the past, Korean judges could have some amount of flexibility by resorting to the so-called “special circumstances theory” modeled on the Japanese court precedents.

Draft

An article along the lines of the below permitting the *forum non conveniens* doctrine has been added in the Draft. The purpose is to give Korean judges some amount of discretion in concrete cases in exercising jurisdiction.

Article * (Declining of International Jurisdiction)

(1) Even if Korean courts have international jurisdiction under this Act, in exceptional circumstances, a Korean court may, on application by the defendant made no later than at the time of the first defense on the merits, suspend its proceedings or dismiss the case if it is clearly inappropriate for the court to exercise jurisdiction and if a court of another State has jurisdiction and is clearly more appropriate to resolve the dispute, unless the jurisdiction of the court seized is founded on a choice of court agreement.

(2) In the case of para. 1, before suspending the proceedings or dismissing the case, the court should give the plaintiff the opportunity to challenge the application of the defendant.

(3) The parties may bring an immediate appeal against the decision of the court under para. 1.

12. Exceptions in relation to Family Matters and Succession Matters

Current Status

There is no provision on this issue in KPILA or KCPA.

Draft

Several new articles that have been inserted in Ch. 1 of the Draft (such as choice of court agreement and jurisdiction based upon appearance) will not be applied in the case of family matters and succession matters, unless otherwise set forth in this Act. A typical example is the maintenance matters set forth in Ch. 7, Sec. 1, where the parties are allowed to enter into a choice of court agreement within certain limit.

13. Provisional Measures

Current Status

There is no provision other than provisions on local jurisdiction in KCPA and the Korean Civil Enforcement Act.

Draft

An article along the lines of the below have been inserted in the Draft. (Cf. 1999 Draft, Art. 13 and JCPA, Art. 11):

A petition for an order of provisional relief may be made before a Korean court where Korean courts have international jurisdiction over an action on the merits or where the asset to be provisionally attached or seized or the object of the dispute is located in Korea. In addition, a petition for an order of provisional relief may be made before a Korean court where there is an urgent need, in which case the effect shall be limited within Korea.

14. Non-contentious Matters

Are detailed jurisdiction rules for non-contentious matters available?

Current Status

There is no provision other than provisions on local jurisdiction in the Family Litigation Act and the Act on Procedures of Non-contentious Matters.

Draft

KMOJ decided to take the below approach.

As to family matters, succession matters and personal matters, KPILA will set forth ju-

jurisdiction rules for non-contentious matters (非訟事件) as well as contentious matters (訴訟事件). Articles in this category will provide that “Korean courts shall have jurisdiction over certain matters”. For example, jurisdiction rules for inter-country adoption that will be included in Ch. 7 on family matters will be applicable to non-contentious matters as well as contentious matters.

As to the other matters, KPILA will set forth jurisdiction rules for contentious matters. Articles in this category will provide that “An action on certain issues may be filed before Korean courts.” As to non-contentious matters of this category, jurisdiction shall be determined pursuant to the general principles set forth in Art. 2 of KPILA unless otherwise set forth in KPILA. For example, in determining whether or not it has international jurisdiction for non-contentious matters on registration of legal persons or trusts, a Korean court shall refer to the provisions on jurisdiction of the Non-contentious Matters Procedure Act of Korea, having full regard for the special characteristics of international jurisdiction.

In addition, an article on non-contentious matters in Ch. 1 will expressly provide that the jurisdiction rules in Ch. 1 shall apply, *mutatis mutandis*, to non-contentious matters unless it is against their nature. For example, the rules on jurisdiction agreement in Ch. 1 shall apply, *mutatis mutandis*, to non-contentious matters unless it is against their nature.

IV. Special Provisions on Jurisdiction: Articles to be inserted in Ch. 2 through 10 (except for Ch. 3 and 4): Rules on Special Jurisdiction

Here I will discuss the rules on special jurisdiction in the order of the articles to be inserted in Ch. 2 through 10 (except for Ch. 3) of KPILA. In principle, the jurisdiction rules in Ch. I and the rules on special jurisdiction of each chapter include exhaustive rules on jurisdiction for the matters falling under each chapter. However, there are exceptions in matters falling under Ch. 5 (Intellectual Property) and Ch. 10 (Maritime Matters).

1. Person (Ch., Sec. 1)

Current Status

There is no provision other than the below venue provisions in the KCPA (Arts. 15 & 16) similar to those of Art. 5 Item 8 of the JCPA concerning, inter alia, an action by a company or other association against its member, or an action by a member against a member, each of which is based on his status as a member.

Draft

Declaration of Disappearance: Korean courts shall have jurisdiction over matters relating to a declaration of disappearance of natural person in any of the following cases: (i) where the absentee is a Korean national, (ii) where the last habitual residence of the absentee was in Korea, or (iii) where the absentee has property in Korea or there is a legal relationship governed by Korean law or other justifiable ground. **Management of Property:** Korean courts shall have jurisdiction over matters relating to management of the absentee's property if the absentee was last habitually resident in Korea or has property in Korea.

Special Jurisdiction: Special jurisdiction mirroring the first category of the venue provisions of KCPA (Arts. 15 & 16) mentioned above will be inserted in KPILA (Cf. JCPA, Art. 3-3 (7)). On the other hand, there will be no provisions in the mirroring the second and the third categories of the venue provisions of KCPA.

2. Real Property (Ch. 4, Sec. 1)

Current Status

There is no provision other than the venue provisions in KPCA (Art. 20).

Draft

An action relating to rights in *rem* in immovable property may be filed in Korea if the immovable is located in Korea. An action relating to the ownership of immovables falls under this sub-paragraph. The jurisdiction is exclusive. This provision will be inserted in Ch. 1.

3. Intellectual Property Rights (Ch. 5, Sec. 1)

Current Status

There is no provision other than the venue provisions in KPCA (Art. 24).

The most problematic disputes relating to intellectual property are those involving the registration or validity of patents or other similar rights requiring registration. It has been generally thought that Korean courts have exclusive jurisdiction in proceedings relating to the registration or validity of patents or other similar rights, if the registration has taken place in Korea. However, in a recent case of 2011 mentioned above, the Supreme Court distinguished (i) proceedings in which the subject matter is the validity or existence of patents on the one hand, and (ii) proceedings in which subject matters are the interpreta-

tion and effects of the contractual obligations between the parties on the other, and held that only the first category falls under the exclusive jurisdiction of the country of registration.

Draft

The position of the Supreme Court will be maintained under the Draft. Three articles along the lines of the below have been inserted in the Draft.

First, an action relating to validity and extinction of intellectual property rights created by registration may be filed before Korean courts only when they are registered in Korea. The foregoing shall not apply when those matters arise as incidental questions. The foregoing shall not apply when the transfer or registration being the subject matter of the proceedings should be performed by a contract between the parties. Second, an action relating to contractual matters such as assignment or license of intellectual property rights may be filed before Korean courts if such rights are protected, exploited or registered in Korea. Third, an action relating to the infringement of intellectual property rights may be filed before Korean courts if the infringement took place in Korea or the infringement has been directed towards Korea.

4. Obligations (Ch. 6, Sec. 1)

A. Ordinary Contract

Current Status

KCPA provides that an action relating to property rights may be brought before the court located in the place of abode or the place of performance (Art. 8). In a case involving payment of contractual obligations, the Supreme Court held in 1972 that Art. 8 could be a basis of jurisdiction. Although Art. 8 on its face is not limited to the performance of a contractual obligation, the majority view maintains that the provision should not apply to non-contractual obligations. It is not clear whether the Supreme Court still maintains the former position expressed in 1972, because in a recent case of 2008 the Supreme Court⁸ apparently did not follow the approach of the 1972 Judgment in a dispute based upon contractual obligations.

Draft

An article along the lines of the following has been added in the Draft under the strong

influence of Art. 6 of the 1999 Draft:

1. An action relating to contracts may be filed before Korean courts if:
 - a. in matters relating to the supply of goods, the goods were supplied in Korea;
 - b. in matters relating to the provision of services, the services were provided in Korea; or
 - c. in matters relating both to the supply of goods and the provisions of services, performance of the principal obligation took place in Korea.
2. An action relating to contracts other than those listed above may be filed before Korean courts if the place where the obligation constituting the ground of the claim has actually been performed in Korea or the place where the obligation constituting the ground of the claim has been agreed to be performed in Korea.

This means that the place of performance of a contractual obligation can be a ground of jurisdiction in a relatively limited situation. For example, in the absence of the parties' agreement on the place of performance of obligation, the place where the obligation should be performed under the law applicable to the contract cannot be a ground for jurisdiction. The reason for such limitation was that the factual situations of contracts were so diverse that the jurisdiction based upon the place of performance of a contractual obligation cannot always be justified. In addition, if we base jurisdiction on the place of performance in question, two different States can have jurisdiction over the disputes arising from one contract depending upon who files an action as plaintiff. At first, the Committee preferred to insert only paragraph 1. However, KMOJ decided to add paragraph 2 since the scope of contracts covered by paragraph 1 appeared to be narrow in that it does not deal with, for example, lease contracts, license agreements and other mixed contracts. Therefore, KMOJ has combined the approach of the 1999 Draft and the modified traditional approach in Korea.

B. Protection of Socio-Economically Weaker Parties: Consumer Contracts

Current Status

In order to protect socio-economically weaker parties, KPILA sets forth special rules on jurisdiction in respect of passive consumer contracts and individual employment contracts (Arts. 27 & 28), which are modelled on the Brussels Convention (Arts. 13 through 15),

the Brussels I Regulation (Arts. 15 through 17) and on the 1999 Draft (Arts. 7 & 8). This is the so-called “protective jurisdiction”.

In order for a consumer contract to be eligible for protection, the contract should be entered into by a consumer for a purpose that can be deemed to be outside his profession or business activity, and it should be a so-called ‘passive consumer contract’, *i.e.*, falling into one of the categories mentioned in Art. 27.

Draft

The scope of consumers under Art. 27 has been slightly expanded along the lines of the Brussels I and the Rome I.

C. Protection of Socio-Economically Weaker Parties: Employment Contract

Current Status

Art. 28 sets forth special rules on employment contracts. Whereas the consumer’s habitual residence is relevant in consumer contracts, the place where the employee habitually performs his work is relevant in individual employment contracts.

Draft

There will be no amendment except for the structural change in order to split the provisions on applicable law and the provisions on jurisdiction.

D. Torts: no separate rules on Jurisdiction for special types of tort

Current Status

An action for tort may be filed before the court of the place where the tortious act occurred (KCPA, Art. 18). It is generally recognized that Art. 18 could apply in determining the question of jurisdiction. Where the tortious act occurred in one place and the consequence of the injury occurred in another, each of them could be a ground for jurisdiction. The places should be determined rationally from the viewpoint of jurisdiction and that, in the case of product liability in particular, it should be taken into account whether the place of acting or the place of injury was one of the areas that the defendant was reasonably able to foresee. The Supreme Court endorsed such view in the product liability case of 1995.⁹ This judgment was apparently influenced by the idea of ‘reasonable foreseeability’ and ‘purposeful availment’ appearing in the decisions of the Supreme Court of the U.S.¹⁰

Draft

An article along the lines of the Brussels I *bis* (Art. 7 (2)), the 1999 Draft (Art. 10) and JCPA (Art. 3-3 (8)) has been inserted in the Draft. The so-called 'mosaic rule', as in the *Shevill* case of 1995 of the ECJ,¹¹ is not contemplated. There will be no separate rules on special types of tort, such as product liability, etc.

5. Family (Ch. 7, Sec. 1)

Current Status

In its leading case of 1975,¹² the Supreme Court held that (i) in principle, the domicile of the defendant should be located in Korea in order for Korean courts to have jurisdiction, because the *forum rei* principle is also valid for family matters including divorce cases; and that (ii) however, by way of exception, the Korean courts may have jurisdiction even if the domicile of the defendant is located outside of Korea, where the refusal to entertain the action could amount to a denial of justice. However, it is not clear whether the Supreme Court still maintains such position after the amendment of KPILA in 2001, because a subsequent judgment of the Supreme Court did not mention the foregoing jurisdiction rules. The position of the lower courts is split into two classes: (i) one which makes efforts to establish the jurisdiction rules on a case-by-case analysis and (ii) the other one which adheres to the jurisdiction rules established by the Supreme Court in the case of 1975.

Draft

Articles dealing with jurisdiction on the following six categories of family matters have been added in the Draft, respectively. In family matters jurisdiction based upon parties' choice of court or appearance is in principle not allowed unless otherwise set forth in KPILA. In certain family matters, Korea has jurisdiction if both parties have Korean nationality. This is the case with marriage-related matters, whereas this is not the case with establishment of adoptive parent-child relationship or maintenance. I am not sure whether the jurisdiction rules based upon nationality in the Draft are consistent in diverse family matters.

A. Matters relating to Marriage

Korean courts have jurisdiction over the matters relating to marriage in any one of the

following cases: (i) the applicant and one or all of the minor children are habitually resident in Korea, (ii) either of the spouses is habitually resident in Korea and the spouses were last habitually resident in Korea, (iii) both spouses have Korean nationality or (iv) a Korean applicant with a habitual residence in Korea files an action solely for the purpose of dissolving the marriage relationship. However, the Korean nationality of either of the spouses (in particular the applicant) cannot be a ground of jurisdiction. In addition, Korean courts have jurisdiction if the respondent is habitually resident in Korea under Ch. 1 of KPILA. However, KPILA will not permit *forum actoris* such as those in the Brussels II *bis* on the ground that it is not fair to the respondent.

B. Matters relating to Establishment of parent-child relationship

Korean courts have jurisdiction over the matters relating to establishment of parent-child relationship and its dissolution if the child has his habitual residence in Korea or the child and one of the parents have Korean nationality.

C. Matters relating to Adoptive parent-child relationship

Korean courts have jurisdiction over the matters relating to establishment of adoption if a prospective adoptee or the prospective adoptive parent has his or her habitual residence in Korea. Korean courts have jurisdiction over matters relating to confirmation of adoptive parent-child relationship or its dissolution if the child has his habitual residence in Korea or the child and one of the adoptive parents have Korean nationality. Although Korea has signed the Adoption Convention in May 2013, Korea has not ratified the same.

D. Matters relating to Parental right (parental responsibility)

Korean courts have jurisdiction over the matters relating to parental rights, custody, rights of visitation or guardianship of a minor child if the child is habitually resident in Korea. The rationale behind this rule is that it enables the authorities to take necessary measures promptly and lower the burden of the child in need, and the place is near evidence and assistance to children. That is also the position taken by the Abduction Convention of 1980 Korea has acceded to and the Child Protection Convention of 1996. Korean courts also have jurisdiction over the matters relating to guardianship for a minor child if the ward has his assets in Korea and there is a need to protect the ward.

E. Matters relating to Maintenance

It is not clear whether the courts for the place where the creditor is habitually resident have jurisdiction. In order to protect weaker parties, the Committee agreed to insert an article expressly granting jurisdiction on the courts for the place where the creditor has his habitual residence. Under Ch. 1 of the Draft Korean courts also have jurisdiction if the respondent is habitually resident in Korea. In addition, the parties may enter into a choice of court agreement on maintenance matter under certain conditions.

F. Adult Guardianship

Korean courts have jurisdiction over the matters relating to guardianship for adults in any of the following cases: (i) where the ward is habitually resident in Korea; (ii) where the ward is a Korean; or (iii) where the ward has his assets in Korea and there is a need to protect the ward.

6. Succession (Ch. 8, Sec. 1)

Current Status

An action relating to a succession, a bequest (or a testamentary gift) or other acts taking effect upon death may be filed before the court located in the area where the general forum of the deceased was located at the time when such succession commenced (KCPA, Art. 22). In addition, an action relating to a succession claim and the liability of an estate, which does not fall under Art. 22, may be filed before such court, if the whole or part of the estate is located in the jurisdiction area of the court under Art. 22. It is generally recognized that these rules apply to jurisdiction.

Draft

Under the Draft Korean courts shall have jurisdiction to rule on the succession as a whole, if the deceased had his habitual residence in Korea at the time of death. Korean courts shall also have jurisdiction, if the deceased has his estate in Korea, provided, however, that the foregoing is not applicable when the value of the estate is significantly small.

The Committee agreed to set forth jurisdiction for matters relating to wills, which generally fall within the category of non-contentious matters. Korean courts shall have jurisdiction to rule on the will, if the deceased had his habitual residence in Korea at the time of the will or the property, which is the subject of will, is located in Korea. Finally, consid-

ering that succession is closely related to the property and KPILA permits party autonomy within a certain limit in the context of applicable law, the Committee agreed to permit a choice of court agreement between the parties concerned, except where the parties are a minor or an adult ward or the place chosen has no connection at all, or only a slight connection, with the case.

8. Maritime Matters (Ch. 10, Sec. 1)

Current Status

There is no provision other than the venue provision of KCPA (Arts. 10, 13 & 14).

Draft

An action relating to limitation of liability of the shipowner, charterer, manager, operator or other users ("shipowner and others") of the ship may be filed before Korean courts if any one of the following places is located in Korea: (i) the place of registration of the ship in respect of which the accident took place; (ii) habitual residence or principal place of business of the shipowner and others; (iii) the place of accident; (iv) the first place at which the ship arrived after an accident; (v) the place where assets of the shipowner and others have been arrested; or (vi) an action based upon limitation claim has been filed against the shipowner and others.

An action against a shipowner and others relating to a ship or navigation may be filed before Korean courts if the arrest of the ship has been effected in Korea ("*forum arresti*"). The venue provision, whereby an action based on a claim secured by maritime lien or any other security interest in a ship may be filed in the place where the ship is located, will not be transformed into a rule on jurisdiction. This means that Art. 3-3 (6) of JCPA will not be inserted in KPILA. The reason is that mere presence without attachment or arrest is not sufficient to secure the creditor's exercise of his right against the ship.

In addition, detailed jurisdiction rules on an action relating to general average, an action relating to a collision of ships or any other accident at sea, an action relating to salvage have been inserted in the Draft.

Although Korea is not a party to the "International Convention on Arrest of Ships" of 1999, the Committee accepted the proposal that *forum arresti* be a ground for jurisdiction for maritime matters, such as limitation of liability of the shipowner and others, general salvage, collision of ships and salvage. The place of arrest encompasses the place of arrest or

provisional arrest and the place where the ship could have been arrested, but bail or other security has been given in lieu of the arrest or provisional arrest.

V. Concluding Remarks

I have explained the major contents of the jurisdiction rules to be inserted in the amended KPILA. For the first time in the history of Korean private international law the Committee and KMOJ have tried to prepare the comprehensive jurisdiction rules. Unfortunately, the Committee could not succeed in preparing the draft of the amended KPILA even though the Committee could reach agreements on various tricky issues. Since January of 2017 KMOJ has made efforts and has recently prepared the Draft which has not been released to the public. I hope that KMOJ will publish the final draft of the amended KPILA as soon as possible. I am confident that those rules will definitely enhance the legal certainty on jurisdiction in Korea while leaving certain amount of flexibility to Korean courts which they could exercise under the doctrine of Korean version of the doctrine of *forum non conveniens*. The jurisdiction rules of KPILA would certainly serve as the solid basis for the future development.

¹ This paper is based upon the presentation I made on June 5, 2016 at the Conference of the Private International Law Association of Japan held in Nagoya, Japan and the presentation I made on July 4, 2017 at the HCCH Asia Pacific Week 2017 held in Seoul. Given the limit on the number of words, I have deleted explanations on jurisdiction on counter-claims, jurisdiction based on appearance, jurisdiction on promissory notes, bills of exchange and checks, trust and insurance contracts. I also deleted the comparison between the jurisdiction rules of Korea and Japan. After the author submitted this paper, the KMOJ has finally finished preparing a final draft of the amended KPILA and made a prior legislative notice to the public on January 19, 2018. Detailed rules on international jurisdiction along the lines of the jurisdiction rules above (with some variations) have been inserted in the final draft. The author understands that the KMOJ plans to submit the final draft with some minor changes to the National Assembly within the year 2018.

² For more details on the position of the KPILA, refer to Kwang Hyun Suk, Recognition and Enforcement of Foreign Judgments in the Republic of Korea, *Yearbook of Private International Law*, Vol. 15 (2013/2014), pp. 423 *et seq*

³ *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952) and *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984).

⁴ 134 S. Ct. 746 (2014).

⁵ Judgment of April 10, 2014, Docket No. 2012 Da 7571

⁶ Judgment of April 10, 2014, Docket No. 2012 Da 7571

⁷ Docket No. 2009 Da 19093.

⁸ Judgment of May 29, 2008, Docket No. 2006 Da 71908, 71915.

⁹ Judgment of November 21, 1995, Docket No. 93Da 9607.

¹⁰ *World-Wide Volkswagen Corp v Woodson*, 444 U.S. 286 (1980) and *Asahi Metal Industry Co v Superior Court*, 480 U.S. 102 (1987).

¹¹ C-68/93.

¹² Judgment of July 22, 1975, Docket No. 74 Meu 22.