

〈특집: Current Developments in International Economic Law〉

International Jurisdiction to Adjudicate  
under the Korean Private International Law\*  
- Analysis of Recent Leading Cases  
of the Supreme Court of Korea -

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Abstract

This article aims to explain the principles on international jurisdiction to adjudicate under the Korean private international law, by way of analyzing the recent leading cases published in the Gazette of the Supreme Court of Korea: the Hewlett Packard Co. case (Docket No. 2002Da59788 delivered on January 27, 2005) and the Air China Ltd. case (Docket No. 2010Da18355 delivered on October 15, 2010). The two cases have presented specific criteria and directions to interpret the Article 2 of the Korean private international law amended in 2001. Along with the purpose, this article also gives an explanation on the so-called four-step-formula adopted by the Supreme Court of Korea as well as the legislative situation and scholarly theories before the amendment of the Korean private international law. This article afterwards elaborates the facts and the argumentations of the each party of the above mentioned cases meticulously.

The Article 2 of the Korean private international law set forth the principle of substantial relationship and the doctrine of reasonableness (consideration of interests) in deciding international jurisdiction. The Article 2 also declares that detailed rules on international jurisdiction should be developed by consulting the venue provisions of domestic laws. The Hewlett Packard Co. case and the Air China Ltd. case reaffirmed and specified the general principles: The determination of the international jurisdiction should follow the basic idea of aiming to achieve

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impartiality between the parties, and appropriateness, speediness and economy of litigation, and should take into account not only private interests such as impartiality between the parties, and convenience and predictability of the parties, but also the interests of the court or the state such as appropriateness, speediness and efficiency of litigation and effectiveness of judgment. For the Air China Ltd. case, the Supreme Court of Korea also emphasized the undeniable importance of respecting the provisions of domestic law on intra-territorial jurisdiction. In addition, based on the Hewlett Packard Co. case, this article analyzes the applicability of the doctrine of *forum non conveniens* under the Korean private international law.

Keywords: Korean private international law (*Gukjesabeop*), international jurisdiction to adjudicate, Hewlett Packard Co. case (2002Da59788), Air China Ltd. case (2010Da18355), principle of substantial relationship, doctrine of reasonableness, doctrine of *forum non conveniens*

## 1. Introduction

The question of international jurisdiction to adjudicate is the first of the three gateways provoked by transnational litigations, including other issues such as choosing substantive law applicable to the specific dispute, and the recognition and enforcement of foreign judgments. On account of the increasing globalization of economic activity and the emergence of new technology, adjudicatory authority in the international sense is based on more sophisticated theory and practice; and has obtained greater economic, political, and sociological importance than ever.

The Republic of Korea (hereinafter “Korea”) substituted its private international law from *Seoboeseabeop* (hereinafter “Prior Act”) to *Gukjesabeop* (hereinafter “New Act”) through the Law Amending the Private International Act of Korea promulgated on April 7, 2001 and effective as of July 1, 2001.<sup>1)</sup> The Prior Act as

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<sup>1)</sup> For details on the process of the amendment, see Kwang-Hyun Suk, “The New Conflict of Laws Act of the Republic of Korea,” in Petar Sarcevic et al. ed., *Yearbook of Private International Law*, Vol. 5, Kluwer Law International and Swiss Institute of Comparative Law, 2003, pp.102-108.

promulgated in 1962 had been criticized for its outdated and anachronistic enactment from its very beginning.<sup>2)</sup> While the Prior Act contained no rules on international jurisdiction to adjudicate, the New Act explicitly proclaims that determining international jurisdiction is a matter of the private international law in Korea and presents its Article 2 as a general principle on international jurisdiction.

In this article, Part 2 reviews the legislative attitude of the Prior Act, scholarly theories and court decisions under the Prior Act, and the advent of the general principle (Article 2 of the New Act). Part 3 afterwards deals with facts and decisions of the court below of the two recent leading cases of the Supreme Court of Korea, the Hewlett Packard Co. case and the Air China Ltd. case, officially published through the Korean Supreme Court Judgments Gazette. Analysis based on the two Supreme Court decisions would be presented subsequently in Part 4, with careful classification of several theoretical tools derived from the two court precedents, in order to interpret and apply the Article 2 of the New Act. Finally, Part 5 deals with the applicability of the doctrine of *forum non conveniens* under the New Act and the Supreme Court decisions.

## 2. Theories and Judgments under the Prior Act

### A. Legislative Situation under the Prior Act

The Prior Act had solely contained outdated provisions on the determination of law applicable to various legal relationships with a foreign element and included no rules on international jurisdiction to adjudicate. In Korean law, there were no explicit statutory provisions on international jurisdiction in civil or commercial matters. However, courts and commentators have construed provisions of domestic territorial jurisdiction of the Korean Civil Procedure Act (hereinafter “KCPA”) as

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<sup>2)</sup> The Prior Act imitated a chapter of the Private International Law of the EGBGB (*Einführungsgesetz zum Bürgerlichen Gesetzbuch*) of the Federal Republic of Germany and the Japanese Private International Law (*Horei*) which had been enacted at the end of the 19th century.

the basis for establishing international jurisdiction. The KCPA contains several provisions as to the venue and competence of courts, in other words, the issue of distribution of adjudicatory authority among several Korean courts within the Korean territory.<sup>3)</sup>

## B. Scholarly Theories

In Korea, there had been various scholarly theories as to the criteria by which international jurisdiction to adjudicate should be determined. As a whole, the scholarly debate could be summarized through the following three representative theories: theory of reverse inference (*Yeokchujiseol*); theory of venue distribution (*Gwanhalbaebunseol*); and modified theory of reverse inference (*Sujeong-yeokchujiseol*).<sup>4)</sup> Unlike Japanese academia, the theory of balancing interests was not contended separately by any Korean scholars in the academic controversy concerning international jurisdiction. It should be noted, however, that the perspectives of legal scholars on how international jurisdiction was to be decided under the Prior Act have become obsolete and meaningless under the Article 2 of the New Act.

According to the theory of reverse inference, Korean courts had international jurisdiction to adjudicate if a Korean court had the territorial jurisdiction pursuant to the KCPA provisions that were originally legislated for intra-territorial application. The basis of international jurisdiction was reversely inferred from the analogy of provisions on domestic territorial jurisdiction, regardless of their appropriateness in light of internationality.

The modified theory of reverse inference had emerged with some consideration on exceptional circumstances. In principle, this relatively flexible theory follows

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<sup>3)</sup> For example, on the one hand, as for a general venue, the court at the place of domicile of the defendant is competent to decide all claims (Article 2); on the other hand, the KCPA provides numerous special venues such as a workplace (Article 7), the place of performance of an obligation (Article 8), the location of the property (Article 10) and the place where a tort was committed (Article 18).

<sup>4)</sup> For details, see Kwang-Hyun Suk, *International Jurisdiction to Adjudicate: Basic Theory and Issues on General Jurisdiction in Civil and Commercial Matters*, Seoul National University Press, 2001, pp.150-157 (in Korean).

the original one, unless the international jurisdiction of Korean courts constitutes a special circumstance, a violation of the basic idea of achieving impartiality between the parties, and appropriateness and speediness of litigation.

A large number of Korean scholars were in favor of the theory of venue distribution. As the KCPA provisions on intra-territorial jurisdiction premise their application to domestic cases, they are not appropriate for cases involving a foreign element. Therefore, the theory submitted that the determination of international jurisdiction is that of venue distribution suitable for transnational cases, in terms of impartiality between the parties, and appropriateness and effectiveness of adjudication. Such suggestion, however, did not ignore the KCPA provisions on domestic jurisdiction at all but rather analogized or considered them in the context of internationality. Most scholars in favor of the theory of venue distribution mentioned the nature of things (*Jori* in Korean) as criteria for determining international jurisdiction, but the concept was criticized for its ambiguity impairing predictability.

### C. Case Law: Four - step - formula

The rules or principles regulating international jurisdiction to adjudicate have mainly been developed through a series of court decisions. Established court precedents considered provisions of domestic territorial jurisdiction in the KCPA as grounds for determining international jurisdiction. The premise for this is that both domestic and international jurisdictions share the same purpose of establishing fair and efficient forum for a dispute resolution. Courts and scholars believed that provisions of the KCPA, in the absence of applicable provisions, could at least function as the basis for international jurisdiction by way of analogy.<sup>5)</sup>

The Supreme Court decision of July 28, 1992 (Docket No. 91Da41897) adopted the three-step-formula for the first time.<sup>6)</sup> Non-Korean plaintiffs who had worked

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<sup>5)</sup> Young-Joon Kwon, "Litigating in Korea: A General Overview of the Korean Civil Procedure," *Journal of Korean Law*, Vol. 7, No. 1, 2007, p.125.

<sup>6)</sup> The monumental decision (*Mitsuo Waki et al. v. AMCO A&E Inc.*) seemed to have been influenced by the position of the Supreme Court of Japan revealed in the

in the branch office in Korea established by the U.S. defendant corporation brought an unlawful discharge action to a Korean court. The Supreme Court of Korea rejected the defendant's argument that the Korean court lacked international jurisdiction to adjudicate in this case. The Supreme Court explained the process of determining international jurisdiction with the following three-step-formula:

- “(1) There are no treaties, universally accepted principles of international law or statutory provisions of the KCPA on international jurisdiction for cases involving a foreign element.
- (2) Therefore, whether Korean courts may have international jurisdiction in cases involving a foreign element should be determined in accordance with the nature of things (*Jori*), based upon the basic ideas of fairness between parties, and justice and promptness of a trial.
- (3) As the provisions on distribution of domestic territorial jurisdiction to local courts as established in the KCPA are also based on the above basic ideas, a Korean court has international jurisdiction when the court has domestic territorial jurisdiction under the venue provision of the KCPA.”

The Supreme Court decision of November 21, 1995 (Docket No. 93Da39607; *Maryland Insurance Co., Ltd. v. Nau Precision Co., Ltd.*) has developed another step in addition to the above three steps and the Supreme Court decision of June 9, 2000 (Docket No. 98Da35037; *Kwangju Bank v. Bank of China*) reaffirmed the previous stance. The fourth step provides as follows:

- “(4) However, if any special circumstance exists that contradicts the nature of the thing to conclude that a Korean court has international jurisdiction with respect to a particular case, it is to be deemed that Korean court does not have international jurisdiction with respect to that case.”

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Malaysian Airlines System case on October 16, 1981 (*Michiko Goto et al. v. Malaysian Airline System Berhad*). For details on the Malaysian Airlines System case, see Masato Dogauchi, “Chapter 14. Japan,” in J. J. Fawcett ed., *Declining Jurisdiction in Private International Law: Reports to the 14th Congress of the International Academy of Comparative Law*, Oxford University Press, 1995, pp.304-306.

In the Hewlett Packard Co. case, the court below, Seoul High Court (Docket No. 2002Na4896; delivered on September 25, 2002), described the four steps formula *ad rem*:

“Whether a court has an international jurisdiction over a case containing a foreign element shall be determined by the nature of things pursuant to the basic principle that aims to achieve impartiality between the parties, and appropriateness and speediness of litigation. In this context, the provisions of the KCPA on regional jurisdiction were enacted under the above principle. Therefore, where the jurisdictional base is located in Korea, it is basically appropriate to regard Korean courts as having international jurisdiction to adjudicate over the litigation containing a foreign element, while Korean courts will have no jurisdiction if there are special circumstances violating the nature of things to affirm the international jurisdiction of Korean courts.”

### 3. Overview of the Recently Gazetted Cases

#### A. Hewlett Packard Co. Case (Docket No. 2002Da59788)

##### (1) Facts

This domain name dispute case, *Yong-Hwan Kim v. Hewlett Packard Co.*, bequeathed three important judgments of the Supreme Court of Korea throughout the entire lawsuit, having proceeded for more than a decade: 2002Da59788 delivered on January 27, 2005; 2005Da75071 delivered on April 24, 2008; and 2009Da15596 delivered on May 26, 2011. The first Supreme Court decision of this case was on the international jurisdiction to adjudicate, whereas the last two decisions dealt with issues mainly on the applicable law of torts and unjust enrichment. According to the first Supreme Court decision, the court below, having duly assessed the evidence before it, found the following underlying facts.

The plaintiff, a Web designer, registered the internet domain name “hpweb.com” on November 23, 1999 to Network Solution Inc. (NSI), which is a registrar of domain names of the United States. The plaintiff had been operating a website

named “digitalcouple.com.” of which its main service was to offer domain names as e-mail addresses to its members who would choose a domain name of their preference among the approximate 450 domain names that the plaintiff had already registered and possessed. The domain name concerned in this case was one of such domain names.

On the other hand, an international organization that administers internet addresses in such a way as by designating the registrar for general top level domain (gTLD) names including as .com, .org, .net, etc, Internet Corporation for Assigned Names and Numbers (ICANN) is implementing a mandatory administrative proceeding such as the Uniform Domain Name Dispute Resolution Policy (UDRP) and its Rules of Procedure in order to resolve disputes as to domain name registration and its use arising between the third party, which is not a domain name registrar, and the registrant. Whoever wishes to register the top level domain name must agree with the registrar over dispute resolution under the Resolution Policy and the Rules of Procedure, which are made public at ICANN’s internet website.

On August 3, 2000, pursuant to the Resolution Policy and the Rules of Procedure, the defendant petitioned to the National Arbitration Forum of the United States (NAF), which is one of dispute resolution institutions approved by ICANN, against the plaintiff, a holder of the domain name in this case, seeking an order to transfer the domain name to the defendant. At the time of filing the above petition, the defendant selected the court(s) located in the city of Herndon, Virginia where NSI, the registrar of the domain name, had its principal office, as the court(s) to which the defendant shall submit, pursuant to Article 3, Paragraph (b), Item xiii. The plaintiff refuted the above petition by submitting the answer on August 18, 2000.

On September 8, 2000, the NAF issued a decision ordering the plaintiff to transfer the domain name in this case to the defendant, for the following reasons: the NAF found that the defendant had registered 23 trademarks featuring the mark “HP” at the United States Patent and Trademark Office and has used the above mark on computer related products, that the defendant established a connection with the worldwide computer network known as Internet, and that the defendant’s

employees, more than 100,000 worldwide, have been using the intranet known as “HPWEB”, and furthermore that the defendant’s mark “HP” is widely known, famous, and distinguishable, and therefore receives a high degree of legal protection. The NAF found, according to the Article 4, Paragraph (1) of the Resolution Policy, that (a) the plaintiff’s domain name in this case is identical or similar to the defendant’s mark, that (b) the plaintiff has no right or legitimate interest in regard of the domain name in this case, and that (c) the plaintiff deliberately attempted to attract internet users and thereby obtain commercial gains, by provoking a confusion that the plaintiff’s website may have a relationship with the defendant’s mark in terms of sponsorship, alliance or endorsement, that the plaintiff was presumed to have registered and used the domain name in this case maliciously, and that the plaintiff failed to rebut the above presumption.

The plaintiff objected to the above decision and filed a lawsuit at Seoul District Court on September 18, 2000 within 10 business days upon delivery of the decision, pursuant to Article 4, Paragraph (k) of the Resolution Policy. However, the above court of first instance was not a competent court where the plaintiff could file a lawsuit for the purpose of staying the execution of the decision, because the defendant, pursuant to Article 3, Paragraph (b), Item xiii of the Resolution Policy, at the time of petitioning pursuant to the Resolution Policy, had selected the court(s) in the city of Herndon, Virginia where the NSI’s principal office is located, as the competent court(s) to which the defendant shall submit. Therefore, on September 29, 2000, NSI, the registrar of the domain name in this case, transferred the domain name to the defendant on September 29, 2000 according to the ward, despite the plaintiff’s filing of the lawsuit.

## (2) Argumentations of the Plaintiff and the Defendant

The plaintiff claims that the defendant should restore the domain name of this case to the plaintiff because the transfer of the domain name constitutes an unlawful or inappropriate transfer and the defendant is not entitled to own the domain name. Alternatively, the plaintiff also seeks the declaration that the defendant has no right to seek to prohibit infringement on the basis of trademark

rights, under the premise that the plaintiff remains the owner of the domain name.

The plaintiff alleges that the regional jurisdiction exists under the KCPA, because the place of the plaintiff's domicile is also (a) the place of tort, (b) the place of performance of the obligation of restoration to the original position, and (c) the place of the location of a proprietary right, and it is also (d) the place where the plaintiff conducted his business using the domain name of this case and where the act of trademark infringement occurred as alleged by the defendant. This case, therefore, has substantial relationship with the Republic of Korea, and the courts of the plaintiff's domicile has international jurisdiction.

The defendant refutes this claim by alleging that the lawsuit is unlawful because it was filed at a court without jurisdiction. When the defendant filed a petition for a decision in the mandatory administrative proceeding, the defendant clarified that his submission was under the jurisdiction of the court(s) located in the city of Herndon, Virginia where NSI, the registrar of the domain name, has its principal office. Therefore, under the Article 4, Paragraph (k) of the Resolution Policy, the holder of the domain name should file his lawsuit at the court to which the petitioner stated to submit as the competent court.

The prior registrant of the domain name filed the lawsuit mainly for the purpose of regaining the registrant's title after the Administrative Panel issued the decision ordering the transfer of the domain name pursuant to the mandatory administrative proceeding and its Rules of Procedure. While there may be a room for disputes over what types of lawsuit should be possible in terms of legal technicalities, the essence of the determination on the merits in question is whether the prior registrant's act of registration and use of the domain name constituted an unlawful act infringing upon the defendant's preexisting intellectual property rights in the off-line environment.

### (3) Decision of the Lower Court

The court below (Seoul High Court; Docket No. 2002Na4896) reasoned: (a) first, even assuming that the tort did occur as alleged by the plaintiff, both the place where the torts took place and the place where its result arose should be regarded

as being the United States; (b) second, even assuming that the transfer of the domain name constituted an unjust enrichment, the place of performance of the obligation to restore it should be regarded as being the United States, the locus of the registrar of the domain name; (c) third, the legal relationship between the plaintiff and the registrar as to the registration, maintenance and administration of the domain name is that of a delegation under the Civil Code or other similar relationship, and the plaintiff's right to the domain name is an obligation arising out of the contract between the plaintiff and the registrar or a right similar thereto; because the domicile of the obligor, i.e. the registrar, lies in the United States, the location of the property of the plaintiff's right to the domain name should be regarded as the United States; (d) fourth, although the Article 2 of the Private International Act as wholly amended on April 7, 2001 is not applied to this case, considering the fact that the above provision was enacted for the international jurisdiction of the courts of the Republic of Korea, pursuant to the basic principle of ensuring impartiality between the parties, and appropriateness and speediness of litigation, the jurisdiction of the court of first instance may be recognized if the jurisdiction should lie with the courts of the Republic of Korea under the above provision.

In this case, however, under the following reasoning that (a) the jurisdiction would not lie within Korean courts if the venue rules under the KCPA were to be followed; (b) that in the absence of special circumstances, it does not contravene the nature of things to recognize the courts located in the place of the defendant's domicile, which is a passive party, as having an international jurisdiction; (c) that there is an aspect of effectiveness of judgment in that, where the court of the registrar's location renders a judgment ordering transfer of a domain name, it will be difficult to assume that the registrar refuse the judgment of the court of the registrar's location; (d) that taking into account all those considerations, as well as the justice in litigation procedure, which means impartiality between the parties in a dispute related to a domain name, and also the appropriateness and speediness of litigation, the above circumstances do not suffice to justify the argument that the plaintiff or the case have substantial relationship with the Republic of Korea

but rather it would be consistent with the idea of the allocation of international jurisdiction to recognize an international jurisdiction of the courts of the state where the registrar of the relevant domain name is located. The court below consequently dismissed the case acknowledging that the international jurisdiction in this case does not lie with the court of first instance.

## B. Air China Ltd. Case (Docket No. 2010Da18355)

### (1) Facts and Argumentations

Family members of the one of the flight attendants who died on the flight sued Air China Ltd. in Korea. This damages claim case was considered somewhat unusual because all of the plaintiffs were Chinese residents, the defendant was a Chinese company, the deceased flight attendant was a Chinese national and a Chinese resident, and the employment relationship between the victim and the airline was governed by Chinese law. The plaintiffs alleged the airline with both tort claims and breach of the employment contract. They argued that the Korean courts had jurisdiction to hear the case because the accident occurred in Korea and Air China maintained an office in Korea.

The plaintiffs, Chinese nationals, are the parents of the non-party, also a Chinese national, who had signed a labor contract with the defendant corporation, Air China Ltd., a Chinese corporation established upon the statutes of the People's Republic of China, on around April 1, 1997 and had worked for the defendant corporation since then. The defendant corporation has been a Chinese corporation engaged in international air transportation with an established business office within Korea as well, and which operated the Boeing 767-200 of this case.

The aircraft departed Beijing, China on around 08:37 of April 15, 2002 and, while making a circular flight to approach runway 18R at Gimhae International Airport of Korea, crashed halfway up Mountain Dotdae (altitude 204m) at a point 4.6km from the threshold of runway 18R at approximately 11:21 of April 15, 2002. Of the 166 passengers aboard the aircraft, 129 people were killed, including the above non-party, who had boarded the aircraft as a flight attendant, and the remaining 37 sustained injuries. Some of the victims of the accident and other

remaining families filed a damages claim at a Korean court against the defendant corporation.

#### (2) Decision of the Lower Court

The court of first instance (Busan District Court; Docket No. 2006Gahap12698) acknowledged the defendant corporation's liability and delivered a decision partially accepting the damages claim filed by the remaining family. Based on the same grounds, the appellate court (Busan High Court; Docket No. 2009Na10959) delivered a decision partially accepting the damages claim filed by the remaining family as well, upon which only the remaining family filed an appeal. This appeal was dismissed in part, resulting partial confirmation of the original decision, while the part of the original decision related to consolation money for the remaining family was remanded after reversal. Based on these facts, the court of first instance judged all claims filed by the plaintiffs to be illegitimate as they had no international jurisdiction at the Korean court they were filed at, and the court below affirmed this decision.

### 4. Interpretation of Article 2 of the New Act

#### A. Article 2 of the New Act as a General Principle

The New Act introduced in the first Chapter titled General Provisions, a new provision setting forth general principles on international jurisdiction to adjudicate.<sup>7)</sup> Article 2, Paragraph (1) of the New Act stipulates that “the courts shall have international jurisdiction to adjudicate if the parties or the case in dispute have substantial relationship with the Republic of Korea. In determining whether or not such substantial relationship exists, the court shall follow reasonable principles in conformity with the idea of the allocation of international jurisdiction to adjudicate”,

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<sup>7)</sup> The New Act simultaneously introduced special provisions, Articles 27 and 28 in Chapter 5, to protect the interests of consumers and employees who are regarded as socio-economically weaker parties. For details, see Suk, *supra* note 1, pp.114-116.

and subsequently Paragraph (2) stipulates that “the courts shall determine the existence of international jurisdiction to adjudicate by reference to the internal law provisions on venue, along with sufficient regards to the special characteristics of international jurisdiction to adjudicate in light of the legislative purpose of Paragraph (1).”

Since the first Supreme Court decision of the Hewlett Packard Co. case in 2005, the Supreme Court has declared that Article 2 of the New Act expresses and affirms the following general principle:

“The determination of the international jurisdiction should follow the basic idea of aiming to achieve impartiality between the parties, and appropriateness, speediness and economy of litigation, and should, more concretely, take into account not only the interests of individuals such as impartiality between the parties, and convenience and predictability of the parties, but also the interests of the court or the state such as appropriateness, speediness and efficiency of litigation and effectiveness of judgment. The issue of which interest among them deserve protection should be determined reasonably, applying in each individual case an objective criteria of substantial relationship between the forum and the parties and substantial relationship between the forum and the case in dispute.”

In fact, the Hewlett Packard Co. case did not have to be governed by the New Act as the case had already been pending at the time when the New Act became effective.<sup>8)</sup> However, the Supreme Court, on the grounds of the general principle on the basic idea of venue allocation, approved international jurisdiction of Korean courts:

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<sup>8)</sup> The Supreme Court also made the following remarks: “Article 2 of the International Private Act (wholly amended by Law No. 6465 of April 7, 2001) declares a general principle, but Article 3 of the addenda stipulates that the provision of this Act concerning international jurisdiction does not apply to the case already pending at the time when this Act became effective. Accordingly, Article 2 of the above Act, a general provision as to the international jurisdiction, does not apply to this case that had been initiated before the above act became effective, as it is clear on the record.”.

“Because there are no other statutory provisions directly regulating international jurisdiction, and we are in the state where neither the treaty nor a generally recognized, clear principle of international law exists on international jurisdiction, the question of whether or not Korean courts have international jurisdiction in this case should be determined in light of the basic idea on the allocation of international jurisdiction.”

Meanwhile, since the provisions of the New Act on international jurisdiction are not complete, drafters and legislators expect them to be supplemented or completed in due course by subsequent legislation. The drafters believed that in the long run it would be desirable to set forth detailed and refined rules on international jurisdiction for various categories of legal relationships regulated by the New Act. However, given the absence of a well-balanced discussion on the subject matter, they also believed that it was premature to develop such detailed rules and that it was advisable to wait and monitor the efforts of the Hague Conference on Private International Law. Accordingly, as an interim measure, the drafters decided to incorporate only three articles on international jurisdiction into the New Act. The first of these provisions is Article 2 in the General Provisions that lays down general rules on international jurisdiction. Article 2 is based on principles originated from decisions of the Supreme Court of Japan, as accepted by the Supreme Court of Korea. However, in an effort to streamline the principles, Article 2 underwent some modifications, underlining the difference between venue provisions of various domestic laws and international jurisdiction.<sup>9)</sup>

#### B. Principle of Substantial Relationship

Article 2, Paragraph (1) of the New Act adopted the principle of substantial relationship. This principle means that the courts shall have international jurisdiction to adjudicate if the parties or the case in dispute have substantial connection with Korea. To some extent, this principle was influenced by established court precedents and scholarly debates in Korea, and by theoretical development in foreign

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<sup>9)</sup> Suk, *supra* note 1, p.112.

countries, especially that of the United States.

The Supreme Court of the United States had applied Pennoyer rule since 1878 to the cases involving an inter-state element. Pennoyer rule refers to the principle that a court may not issue a personal judgment against a defendant over which the court has no personal jurisdiction. According to *Pennoyer v. Neff*,<sup>10)</sup> a state court was not able to exercise personal jurisdiction over a non-resident who has not been personally served while within the state and whose property within the state was not attached before the onset of litigation. A court may enter into a judgment against a non-resident only if the party is personally served with process while within the state, or has property within the state, and that property is attached before litigation begins, i.e. *quasi in rem* jurisdiction. Justice Oliver W. Holmes expressed the principle as follows: “The foundation of jurisdiction is physical power.”

However, in *International Shoe Co. v. Washington*,<sup>11)</sup> the majority of the Supreme Court of the United States chose to create a new doctrine, while still adhering to a “presence” rationale. The basic formulation is that a state may exercise personal jurisdiction over a defendant, so long as that defendant has “sufficient minimum contacts” with the forum state, from which the complaint arises, such that the exercise of jurisdiction “will not offend traditional notions of fair play and substantial justice.” The “traditional notions of fair play and substantial justice” are drawn from the Due Process Clause of the Fourteenth Amendment.

The Supreme Court of Korea proclaimed in 2005 the principle of substantial relationship in the first decision of the Hewlett Packard Co. case. The Court has affirmed the principle in subsequent judgments including the Air China Ltd. case in 2010. In the Hewlett Packard Co. case, the Supreme Court acknowledged the existence of affinitive relationship between Korea and the parties or the case in dispute, because the main language used in the website was Korean; and the main service area of the Website, the place where business losses occurred, and the place of all the related evidences were Korea:

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<sup>10)</sup> 95 U.S. 714, 24 L. Ed. 565 (1878).

<sup>11)</sup> 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945).

“[U]ntil the Administrative Panel’s decision was issued and implemented, the plaintiff, the prior registrant of the domain name in this case, had used the domain name, having his domicile in the Republic of Korea to serve as the seat of business, by way of conducting a service business offering various domain names, including the domain name in this case, to members, so as to be used as their e-mail addresses, that the main language used in the Website was Korean, that its main service area also appears to have been the Republic of Korea, that the place where business losses occurred due to the decision ordering transfer of the domain name is also the seat of the plaintiff’s business. Accordingly, all the evidences for determining whether or not such utilization constitutes an infringement and whether or not the damage accrued appear to be located in the Republic of Korea. Therefore, it should be said that there is a substantial relationship between the facts of the case in dispute and the Republic of Korea to such an extent that it may justify the exercise of jurisdiction to adjudicate by the courts of the Republic of Korea.”

### C. Ideal of the Allocation of International Jurisdiction

Since the Hewlett Packard Co. case in 2005, the Supreme Court has declared that “the determination of the international jurisdiction should follow the basic idea of aiming to achieve impartiality between the parties, and appropriateness, speediness and economy of litigation.” Contrary to the past preceding judgments, the Supreme Court expressly mentioned “economy of litigation” as one of the four factors considered in determining international jurisdiction.

In addition, the Supreme Court chose not to mention the nature of things (*Jori*), a rather ambiguous legal concept, which had functioned as criteria for determining international jurisdiction by Korean practitioners. As explained above, most of Korean scholars were for the theory of venue distribution which presumed the nature of things as a principal conceptual means to reach concretely justifiable conclusion of venue determination. However, “the basic idea of civil lawsuit” and “the basic idea on the allocation of international jurisdiction” became ascended to ultimate criteria sufficient to decide whether Korean courts may exercise adjudicatory authority to the cases containing a foreign element, with a notion that a vague criterion could impair legal stability and predictability.

#### D. Principle of Reasonableness and Consideration of Interests

The Supreme Court marked the importance of balance of interests among the related subjects in the Hewlett Packard Co. case. The decision provoked academic debates surrounding the “interests of individuals” and the “interests of the court or the state.” The Court presented more sophisticated judgment based on interest-oriented rationale in the Air China Ltd. case. Although this kind of approach was neither common nor familiar with the past practice in Korea, it is meaningful to analyze various interests of jurisdiction not only in a sense of establishing general rules on international jurisdiction but in an aspect of determining the exercise of international jurisdiction to specific transnational disputes.

Interests of jurisdiction would be divided into two categories: private and public. The latter includes the interest of the court (*Gerichtsinteresse*) and that of the state (*Staatsinteresse*). There exists another one, the interest of order (*Ordnungsinteresse*), which means that the allocation of international jurisdiction should contribute to the international uniformity of decisions (*internationaler Entscheidungseinklang*). The parties to the case, the court and the state all share the interest of order at the same time.<sup>12)</sup>

In a series of Supreme Court decisions since 2005, the Hewlett Packard Co. case, the Supreme Court has proclaimed that “the issue of which interest deserves protection should be determined reasonably, applying in each individual case objective criteria requiring substantial relationship between the court and the parties, and substantial relationship between the court and the case in dispute.” This argument suggesting reasonableness as a standard in comparing various interests and deciding substantial relationship could be described as the principle of reasonableness.

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<sup>12)</sup> For details, see Jan Kropholler, *Handbuch des Internationalen Zivilverfahrensrecht*, Band 1, Kapitel 3, *Internationale Zuständigkeit*, Tübingen: Mohr, 1982, Rn. 17-18, 22-23, 133; Haimo Schack, *Internationales Zivilverfahrensrecht: ein Studienbuch* (3. Auflage), München: C.H. Beck, 2002, Rn. 199-213 (Quoted from Kwang-Hyun Suk, “Basic Theory of International Jurisdiction to Adjudicate: Comment on the January 27, 2005 Judgment on Domain Name of the Supreme Court of the Republic of Korea,” *Private International Law and International Litigation*, Vol. 4, Seoul: Pakyoungsa, 2007, pp.108-112).

(1) Consideration of Private Interests

According to the series of the Supreme Court decisions, the private interest in terms of international jurisdiction includes impartiality between the parties, convenience and predictability: “Determination of international jurisdiction [...] should [...] take into account [...] private interest such as impartiality between the parties, convenience and predictability.” The Supreme Court emphasized impartiality or equity between the parties in the Air China Ltd. case:

“As the defendant corporation has an established business office within Korea and operates aircraft within Korea to gain profit, the defendant corporation should duly submit to the jurisdiction of a Korean court in such a case where its aircraft has crashed within Korean territory and resulted in injuries and deaths of people. [...] Applying different jurisdiction to the damages claims according to their different nationalities and different purposes in boarding, when these claimants underwent the same accident on the same aircraft, would be unacceptable from the viewpoint of equity.”

Moreover, in the Hewlett Packard Co. case, the Supreme Court explicitly mentioned convenience and predictability as components of private interest as well:

“Article 1 of the Rules of Procedure enlists both the court(s) of where the registrar’s principal office is located and the court of the domain name registrant’s domicile side by side when it defines the mutual jurisdiction of petitioner’s choice where the petitioner can file a lawsuit to stay an execution of the Administrative Panel’s decision. This provision is partly based on the consideration that the registrant is a passive party at the time of the petitioning for a decision according to the mandatory administrative procedure; but, on the other hand, it is also possible to understand it as being based on the consideration that, in a litigation relating to a domain name, it is highly likely that the domain name registrant’s domicile, together with the registrar’s principal business office, would have substantial relationship with the dispute over the domain name. Because the defendant was able to acknowledge sufficiently well, at the time of petitioning that

the petition would affect the plaintiff's business, it could have been easily assumed by the defendant that a lawsuit would be filed at Korean courts besides the court of mutual jurisdiction that the defendant himself had designated.”

In the Air China Ltd. case, the Supreme Court made sure that private interest consisted of convenience and predictability:

“As international jurisdiction is of a non-exclusive character which can coexist, the jurisdiction of a Korean court should not be denied merely on the ground that Chinese court is more convenient in terms of geography, language, and communication. The plaintiffs' clear wish to receive trial at a Korean court should not be easily dismissed. [...] The defendant corporation could have amply foreseen the possibility of a damages claim being filed against the corporation to a Korean court in such a circumstance. Therefore, in the respect of private interest as well, jurisdiction of a Korean court must not be excluded.”

## (2) Consideration of Interests of the Court or the State

The Supreme Court has described public interests as “interests of the court as well as of the state”, a mixture of both interest of the court and the state. According to the series of the Supreme Court decisions, interests of the court or the state, as a factor shaping the ideal of the distribution of international jurisdiction, include appropriateness of adjudication, speediness thereof, efficiency thereof, and effectiveness of judgment: “Determination of international jurisdiction [...] should [...] take into account [...] interests of the court as well of the state such as appropriateness, speediness, and efficiency of adjudication, and effectiveness of judgment.”

In the Air China Ltd. case, the Supreme Court emphasized that, in terms of interests of the court or the state, international jurisdiction is one of sovereign state's authorities: “International jurisdiction is a matter of defining the scope of a country's sovereignty, and thus should not be unjustly widened upon perfunctory reasons, but neither should it be hastily renounced by any State upon minor reasons.”

Moreover, the Supreme Court suggested in the same case that the application of Chinese law as a governing law was not sufficient ground to deny its substantial relationship with Korea, because the issues of international jurisdiction and governing law are based on the different and separate theoretical grounds. Regardless of the applicable law, Korean courts have to exercise *facultas jurisdictionis* if they are appropriate forum for the dispute:

“While determining governing law is a matter related to which country’s substantial legal order is more suitable in resolving the dispute, international jurisdiction is governed by a different idea, a matter of which court can better ensure appropriateness and impartiality. Therefore, in light of the fact that determining international jurisdiction cannot depend solely on the governing laws, and especially that jurisdiction and governing laws are often resolved separately from each other today in cases of legal relations involving foreign countries, the application of Chinese law as a governing law for this case does not qualify as disregard the substantial relationship between the lawsuit of this case and the Korean court.”

Meanwhile, according to the Supreme Court decision of the Hewlett Packard Co. case, despite the agreement on exclusive mutual jurisdiction between a registrant of the domain name and a petitioner for decree, a Korean court, being an appropriate forum, could have international jurisdiction to adjudicate:

“Although the Resolution Policy is structured as acquiring a binding force according to the serial consents given by the registrant and the petitioner for the Administrative Panel’s decision through the registrar acting as an intermediary, Article 4, Paragraph (k) leaves open a possibility of each party filing a lawsuit at the court with lawful jurisdiction besides the mandatory administrative proceeding. In light of the above, it cannot be interpreted as to indicate that a registrant of the domain name and a petitioner for decree has reached an agreement to make the court selected as mutual jurisdiction as having an exclusive jurisdiction on disputes over the pertinent domain name. Selecting a particular court as a mutual jurisdiction under the Rules of Procedure merely refers to the fact that if the registrant trying to appeal against the

Administrative Panel's decision files a lawsuit at a court other than the court of mutual jurisdiction designated by the petitioner, the registrant will lose his or her opportunity to stay an execution of the decision, which would be the object of the appeal. Therefore, the issue on whether the court has jurisdiction over the litigation of seeking appeals to it or not should be decided on a different dimension according to the legal principles on judicial jurisdiction. Under these legal principles, it would be wrong to say that an agreement has been concluded to recognize an exclusive jurisdiction of the court(s). In this regard, the Resolution Policy and the Rules of Procedure on the mutual jurisdiction do not interfere with the recognition that the Korean courts have international jurisdiction."

In the Air China Ltd. case, the Supreme Court has mentioned speediness and efficiency of jurisdiction as components of public interests. However, the Supreme Court has put more weight on the criterion of reasonableness over evidential conveniences resulting from coincident. It implies that reasonableness in individual cases prevails over the values of, at least, speediness and efficiency of jurisdiction:

"Acknowledging jurisdiction to the court of a state where aircraft accident has occurred generally holds the advantage of being convenient when examining the related issues and evidences. Nevertheless, in the related case the evidence examination has already been completed and the party admitted his liability for the case, such circumstances was purely coincidental. Circumstantial status depends heavily on the timing of the filing of the case. Thus it would be unreasonable to decide the existence of jurisdiction based on such coincidental circumstances."

Effectiveness of court judgments is mainly guaranteed by the procedure of its enforcement. In the Air China Ltd. case, the Supreme Court expressly mentioned that the possibility of enforcement is one of the interests of the court:

"As the defendant corporation has office in Korea, there is the possibility that it possesses, or will accumulate, property within the country which can be executed pending a decision for the plaintiffs, which can be seen as a factor for the plaintiffs filing their case at a Korean court. Therefore, there are sufficient grounds to acknowledge the jurisdiction of a Korean court in the aspect of interests of the court."

### E. Respect of Provisions on Domestic Territorial Jurisdiction

Article 2 of the New Act says that detailed and refined rules on international jurisdiction should be developed by consulting, but without being bound by, the venue provisions of domestic laws and regulations, most notably those of the KCPA in civil or commercial matters. At the same time, it is necessary to take account of the special characteristics of international jurisdiction, as distinct from domestic territorial jurisdiction.<sup>13)</sup> In the *Air China Ltd.* case, the Supreme Court explicitly emphasized that “whether territorial jurisdiction exists under the KCPA is an undeniably important element when determining if the party or the disputed issue holds a substantial relationship to Korea.”

Accordingly, the venue provisions of the KCPA may be classified into the following three categories for the purpose of determining international jurisdiction: (1) provisions that could be used unmodified as a basis for international jurisdiction; (2) provisions that could be used as a basis for international jurisdiction only if modified; and (3) provisions that could not be used at all as a basis for international jurisdiction and should therefore be excluded entirely. In addition, there may be other bases for international jurisdiction, although no corresponding venue provisions exist. Thus, it is necessary to determine whether such bases exist and, if so, to examine their contents.<sup>14)</sup>

In the *Air China Ltd.* case, the Supreme Court mentioned that “as the plaintiffs claim that the defendant corporation caused damages through torts and non-fulfillment of labor contract obligations, a Korean court can rightfully be deemed as possessing territorial jurisdiction under the KCPA, as the competent court for the place where the torts were committed (the place where the accident of this case and the results thereof occurred, or the arrival place of the aircraft of this case) and the place where the defendant corporation has an established business office.” The KCPA enacted provisions on the special venue of business office (Article 12) and on the special venue of the place where the torts were committed (Article 18). The former is considered as provision that could be used

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<sup>13)</sup> Suk, *supra* note 1, p.113.

<sup>14)</sup> *See ibid.*

as a basis for international jurisdiction without modification and the latter as the useful one with some modification.<sup>15)</sup>

## 5. Doctrine of *Forum Non Conveniens*

During the preparation of the New Act, the drafters disagreed on whether the New Act should introduce the doctrine of *forum non conveniens* and its fairly strict requirements. Even though Korean courts have international jurisdiction, this would permit them to refuse to exercise their jurisdiction by staying or dismissing proceedings in cases where there is an alternative forum in a foreign country that is clearly more appropriate to resolve the dispute at hand. Even though the final decision was to exclude such a provision, this should not be interpreted as meaning that resorting to the doctrine of *forum non conveniens* is not permitted under the New Act. It is up to the courts and academics to decide. Under the highly strict and narrow conditions, the doctrine of *forum non conveniens* could be permitted in Korea.

The question of international jurisdiction is a question of the exercise, not the possession, of adjudicatory authority to the cases involving a foreign element. The Supreme Court inadequately mentioned in the Hewlett Packard Co. case that the issue of international jurisdiction is “a question of deciding the courts of which state(s) have an authority to decide in regard of a dispute containing an international element.” However, as the Supreme Court has properly described in the same case, the question of international jurisdiction is the question whether the courts having adjudicatory authority would exercise it to a specific transnational dispute:

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<sup>15)</sup> To refer to Article 18 of the KCPA as the basis of international jurisdiction, it should be modified, at least, in the cases concerning product liability. For details, see Kwang-Hyun Suk, *Private International Law and International Litigation*, Vol. 1, Seoul: Pakyoungsa, 2001, pp.233-238 (in Korean) and the Supreme Court decision (Docket No. 93Da39607 delivered on November 21, 1995).

“Jurisdiction to adjudicate is open to be recognized in multiple locations, to say nothing of the principle that the court governing the defendant’s seat according to the traditional basic principle of judicial jurisdiction that the plaintiff follows the defendant’s forum. In light of surrounding circumstances established by the substantive facts of the above dispute and other facts on the records, Korea is not recognized as a forum state that is conspicuously inappropriate for exercising international jurisdiction over the dispute in this case.”

In the meanwhile, through the Law for Partial Amendment of the Japanese Civil Procedure Act and the Japanese Civil Provisionary Remedies Act, Article 3-9 of the Japanese Civil Procedure Act provides the court with the power to dismiss actions in special circumstances.<sup>16)</sup> Even though Article 3-9 is necessary to have a sound determination on international jurisdiction, its existence seems to make the result of a Japanese court’s application of the jurisdictional rules ambiguous. There seems to be a risk that Article 3-9 might impair the foreseeability of the parties with respect to how courts will determine issues of jurisdiction.

## 6. Conclusion

The New Act contains only fragmentary provisions on international jurisdiction. Therefore, the practice of developing rules on international jurisdiction on the basis of venue provisions of the KCPA based on court precedents could in principle be used even under the New Act. However, when using special circumstances as an adjusting tool to draw a correct conclusion in a specific case,

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<sup>16)</sup> This provision was drafted in large part to follow the wording of Article 17 which provides for the transfer of a case from one district court to another district court if the transferring court determines such transfer is necessary in order to avoid an undue delay in the proceedings, taking into consideration: (a) the domicile of each party and witness to be examined; (b) the location of any subject of an observation to be used in the proceedings; and (c) any other relevant circumstances. For details, see Masato Dogauchi, “Forthcoming Rules on International Jurisdiction,” *Japanese Yearbook of Private International Law*, Vol. 12, 2010, p.219.

the problem arises that the concept of special circumstances is so vague that it might give the judge too much discretion.

The underlying idea of Article 2 is to require judges to establish more detailed and refined rules on international jurisdiction after considering the special characteristics of international jurisdiction instead of mechanically assuming that ‘rules on international jurisdiction equals to venue provisions’, which could lead them to invoke special circumstances to rectify a conclusion based on an incorrect assumption. In this process, the focus should be on how to distinguish the venue provisions that could be used as a basis for international jurisdiction only if modified; and how to modify them, thus enabling them to be utilized as a basis in determining international jurisdiction.

Our future task is to further develop and refine rules on international jurisdiction by classifying general jurisdiction and special jurisdiction and further sub-classifying special jurisdiction into various grounds of jurisdiction. To establish internationally acceptable rules on international jurisdiction, we need to use domestic venue provisions such as the KCPA as a starting point and do more extensive research in comparative law manner on the Brussels Regulations and the efforts of the Hague Conference on Private International Law.<sup>17)</sup>

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<sup>17)</sup> Suk, *supra* note 1, pp.113-114.

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