

HCCH Asia Pacific Week 2017

*3rd(Mon) - 6th(Thu) July 2017
Four Seasons Hotel Seoul*

PROGRAM BOOK

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5-6, July 2017

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Programme

5th July / Wed.

Time	Division	Program
09:30 – 09:45	Welcome Remarks	Jaehyeong CHOE <i>President of Judicial Research & Training Institute</i>
	Introductory Remarks	Byung Suk CHUNG <i>President of the Korea Private International Law Association</i>
Korea’s 20th Anniversary: Retrospect and Prospect		
09:45 – 10:45	Presenter	[Introductory Remarks] Tae-Ak RHO <i>Chief Judge of the Seoul Northern District Court (Korea)</i>
		[Retrospective of Korea’s Early Years as a Member of the HCCH] Young-Hill Liew <i>Judge of Seoul Central District Court (Korea)</i>
		[Secondment of Korean Judges to HCCH] Jiyong Jang <i>Judge on Secondment to the HCCH</i>
		[Publication of the Hague Principles on Choice of Law in International Commercial Contracts (Korean Version)] Hae Rang Lee <i>Judge of Daegu District Court (Korea)</i>
10:45 – 11:00	Intermission	
Session 1		
11:00 – 12:00	Presenter	[Ongoing Issues of the Hague Conference] Christophe Bernasconi <i>Secretary General of the HCCH</i>
		[Ongoing Issues of the Asia Pacific Regional Office] Anselmo Reyes <i>Representative of Asia Pacific Regional Office of the HCCH</i>
12:00 – 13:30	Lunch	
Session 2. International Litigation & Information Technology: Service by Electronic Means		
13:30 – 15:00	Presenter	Mayela Celis <i>Principal Legal Officer of the HCCH</i>
	Moderator	HyongWon BAE <i>Presiding Judge of Seoul High Court (Korea)</i>
	Panelist	Jung Hoon Park <i>Judge of Gwangju High Court (Korea)</i> Marie Vautravers <i>Deputy head of Private International Law Unit of Ministry of Justice (France)</i> Ian M. Catlett <i>Director of Overseas Citizen Services, Office of Legal Affairs (USA)</i> PHAM Ho Huong <i>Deputy Director General of Department of International Legislation, the Vietnam Ministry of Justice(Vietnam)</i>
15:00 – 15:30	Coffee Break	
Session 3. International Litigation & Information Technology: Taking Evidence by Video-Links		
15:30 – 17:00	Presenter	Byung Hie Oh <i>Presiding Judge of Daegu District Court (Korea)</i>
	Moderator	Anselmo Reyes <i>Representative of Asia Pacific Regional Office of the HCCH</i>
	Panelist	Young Gi KIM <i>Judge / Director of Judicial Policy of National Court Administration (Korea)</i> Mayela Celis <i>Principal Legal Officer of the HCCH</i> Aera HAN <i>Attorney at Kim & Chang (Korea)</i> Abdullah MURAT <i>Head Department of Directorate General for International Law and Foreign Affairs within Ministry of Justice (Turkey)</i>
18:00 -	Conference Dinner: Hosted by the JRTI	

6th July / Thu.

Time	Division	Program
Session 4. Validity of Choice of Court Agreement to Evade an Application of Overriding Mandatory Rules		
09:30 – 11:00	Presenter	Masato Dogauchi Professor at Waseda University (Japan)
	Moderator	Sang-Jae YU Chief Professor at Judicial Research & Training Institute (Korea)
	Panelist	Yoon Jong Kim Judge of Judicial Research Division in Supreme Court (Korea)
		Gyoocho Lee Tenured Professor at Chung-Ang University (Korea)
Yongping XIAO Director of Wuhan University (China)		
	Sarala Subramaniam Deputy Director of Ministry of Law (Singapore)	
11:00 – 11:20	Coffee Break	
Session 5. Hague Judgments Project : Recognition & Enforcement of Foreign Judgments		
11:20 – 13:00	Presenter	Tiong Min Yeo Chair Professor at Singapore Management University, Academic Director of Asian Business Law Institute (Singapore)
	Moderator	Kwang Hyun SUK Professor at Seoul National University (Korea)
	Panelist	Junhyok Jang Professor at Sungkyunkwan University (Korea)
		Frank Y.K. Poon next Representative of Asia Pacific Regional Office of the HCCH
		Yuko Nishitani Professor at Kyoto University (Japan)
Injun Hwang Judge of Suwon District Court (Korea)		
	Ning ZHAO Senior Legal Officer of the HCCH	
13:00 -	Closing Ceremony & Lunch	
Closed Session – Regional Meeting for Hague Network Judges (open for non-Network Judges)		
14:30 -	Moderator	Victoria Bennett Judge of Family Court of Australia (Melbourne Registry)

프로그램

7월 5일 / 수요일

시간	구분	프로그램
09:30 - 09:45	환영사	최재형 사법연수원장
	소개사	정병석 한국국제사법학회 회장
대한민국의 HCCH 가입 20주년 기념행사		
09:45 - 10:45	발표 및 기념식	[회고와 전망(사법부를 중심으로)] 노태악 서울북부지방법원장
		[HCCH 회원국으로서 한국의 초창기 회고] 유영일 서울중앙지방법원 판사
		[HCCH 법관 파견제도 소개] 장지용 HCCH 파견 법관
		[헤이그국제상사계약준거법원칙 해설서(국문본) 출간 기념식] 이혜랑 대구지방법원 판사
10:45 - 11:00	휴식	
세션 1. 국제사법의 최근 동향		
11:00 - 12:00	발표 1	[헤이그국제사법회의의 현안] Christophe Bernasconi HCCH 사무총장
	발표 2	[아시아 태평양 지역의 현안] Anselmo Reyes HCCH 아태지역사무소장
12:00 - 13:30	오찬	
세션 2. 국제소송과 IT: 전자적 방식에 의한 송달 (헤이그 송달협약)		
13:30 - 15:00	발표자	Mayela Celis HCCH 수석법무관
	사회자	배형원 서울고등법원 부장판사
	토론자	박정훈 광주고등법원 고법판사 Marie Vautravers 프랑스 법무부 판사 Ian M. Catlett 미국 국무부 법률보좌관 PHAM Ho Huong 베트남 법무부 국제법무과 차장
15:00 - 15:30	커피브레이크	
세션 3. 국제소송과 IT: 영상신문을 통한 증거조사 (헤이그 증거조사 협약)		
15:30 - 17:00	발표자	오병희 부장판사
	사회자	Anselmo Reyes HCCH 아태지역사무소장
	토론자	김영기 법원행정처 사법정책심의관 Mayela Celis HCCH 수석법무관 한애라 김·장 법률사무소 변호사 Abdullah MURAT 터키 법무부 국제법무과 과장
18:00 -	공식 만찬 (사법연수원 주최)	

7월 6일 / 목요일

시간	구분	프로그램
세션 4. 헤이그 관할합의 협약 - 강행규정 회피를 위한 관할합의의 효력		
09:30 - 11:00	발표자	Masato Dogauchi 일본 와세다대학교 교수
	사회자	유상재 사법연수원 수석교수
	토론자	김윤종 대법원 재판연구관 이규호 중앙대학교 교수 Yongping Xiao 중국 우한대학교 교수 Sarala Subramaniam 싱가포르 법무부 국제법무과 차장
11:00 - 11:20	커피브레이크	
세션 5. 외국판결의 승인과 집행 (헤이그 판결승인 · 집행 협약 초안)		
11:20 - 13:00	발표자	Tiong Min YEO 싱가포르 경영대학 교수
	사회자	석광현 서울대학교 교수
	토론자	장준혁 성균관대학교 교수 Frank Y.K. Poon HCCH 차기 아태지역사무소장 Yuko Nishitani 일본 교토대학교 교수 황인준 수원지방법원 판사 Ning Zhao HCCH 수석법무관
13:00 -	폐회식 및 오찬	
헤이그 네트워크 판사 모임(비공개)		
14:30 -	사회자	Victoria Bennett 호주 멜버른 가정법원 판사

Welcome Remarks



Jaehyeong CHOE

President of Judicial Research & Training Institute

Honorable Guests,
Distinguished Delegates,
Respected Participants,
Ladies and Gentlemen,

It is a great honor and privilege to welcome you all here today to the HCCH Asia Week 2017. I am particularly pleased that this special occasion is being attended by honorable judges, distinguished guests from international organizations, professors, and legal professionals from all around the world. For the Judicial Research & Training Institute (JRTI) to organize this part of the symposium jointly with the Permanent Bureau of the Hague Conference on Private International Law (HCCH) also is a true privilege.

Before proceeding, I would first like to extend my very warm welcome to each one of you participating in today's event and commend you for choosing to remain passionate on the issues concerning private international law. I express my deepest gratitude to the more than 50 foreign representatives from 20 different countries and to those with the Permanent Bureau of the HCCH.

Distinguished Guests and Participants,

Countless countries today are connected beyond physical, cultural, and ethnic boundaries. Because of the increased exchanges among countries, disputes that arise frequently involve more than one national jurisdiction. This aspect reinforces the need for cooperation among judiciaries to resolve cross-border legal matters and members of the judiciary to specialize in dealing these issues. In this context, HCCH's function, and the necessity to promote uniformity in international private law in various areas has only intensified. Further, the need for dialogue and cooperation among the International Hague Network of Judges and judiciaries is even more pressing.

Aware of today's transformation in a wide range of cross-border legal matters, the Korean Judiciary strives to strengthen in its legal system by working closely with nations as well as international organizations. The JRTI, established under the Korean Supreme Court, has acted appropriately to ensure and expand cooperation at the global level. The courses JRTI offers in foreign laws and private international laws, as well as the foreign externship opportunities open to our trainees, illustrate its efforts.

The Republic of Korea became a Member State of the HCCH in 1997. On that occasion, the Korean Judiciary reviewed both the Hague Service and the Evidence Conventions and recommended acceptance. Subsequently, the National Court Administration became the Central Authority for these instruments. The Korean Supreme Court has maintained its cooperation by sending judges as representatives to the Council on General Affairs and Policy and to Special Commission meetings.

I am proud to highlight that this year marks Korea's 20th Anniversary of becoming a HCCH Member State. To commemorate this, for the two remaining days of this symposium, issues on cross-border litigation and Information Technology will be discussed pertaining to evidence taking under the Hague Evidence Convention using video-links in and between States, and issues raised by the changing landscape of service of process using electronic means under the Hague Service Convention. We anticipate that the discussion will facilitate further progress in the Judgments Projects, which currently are in their drafting stage. I hope this will be an opportunity to

discuss feasible matters that concerns not only on the past and present of the private international law area but on the prospective issues in relation to the area as well.

Distinguished Guests and Participants,

I would like to take this opportunity to introduce the JRTI's main functions to you. The JRTI was established in 1971 under the Supreme Court of Korea. For over 40 years, the institute has trained more than 20,000 prospective legal professionals (including judges, prosecutors, and lawyers) successfully and devotedly. Because the law school system was implemented in 2009, the JRTI's training function has begun to wane, and ultimately will end in 2020. Despite of this fact, JRTI professors currently are educating law school students nationwide in the practical aspects of civil and criminal trials.

Among other functions, the JRTI also trains Korean judges. Over 2,600 Korean judges annually attend mandatory training programs for every 5 years of judicial experience and take programs designed to enhance judicial performance with respect to specializations in various areas.

Lastly, the JRTI undertakes training of foreign legal professionals. The JRTI's International Judicial Cooperation Center (IJCC) opened on May 9, 2013 to provide international judicial cooperation on a more systemic and competent level. Last year, 275 foreign legal professionals from 33 countries worldwide including judges, prosecutors, court officials, and lawyers, visited IJCC.

JRTI professors have collaborated with the judiciaries of Vietnam, China, and other countries through visits and active exchanges of ideas and information on the judiciary and judicial administration. The IJCC also strives to become a forum for judicial exchanges among legal systems by holding international symposiums and colloquiums. Last year, we held the International Refugee Conference successfully and organized the event jointly with the Office of the United Nations High Commissioner for Refugees and the Korean Judge's Society of International Human Rights. The JRTI was privileged to participate in this event, which was a forum deigned to make progress in possible solutions to address the legal aspects of refugee issues.

In this regard, I want to point out that the Permanent Bureau of the HCCH and the JRTI's work are similar in nature to a certain degree. While the Permanent Bureau assists and cooperates with Member States, and in some cases, educates the Convention's users, the JRTI also engages in judicial and administrative cooperation among different nations and provides capacity building training to foreign legal professionals. Having said that, it is my hope that the Permanent Bureau of the HCCH and JRTI can increase their cooperation to address practical matters related to cross-border legal issues.

With respect to the JRTI, we will continue to search for issues that require the awareness of and attention to cross-border legal issues to allow judges and legal professionals from Korea and elsewhere to engage in active international exchanges.

Ladies and Gentlemen,

As the name of our venue, the Four Seasons Hotel Seoul suggests, Korea's weather displays four truly distinct seasons. After enduring these hot summer months, a beautiful and pleasant autumn season filled with rich harvests follow. Through the time spent and efforts devoted toward this event, I believe our discussions will come to fruition in meaningful ways in the area of international private law, international litigation, and international cooperation.

Finally, I would like to take this opportunity to sincerely thank Mr. Byungsook Chung, President of the Korean Private International Association, Dr. Christophe Bernasconi, Secretary General of the HCCH, for speaking on the ongoing issues concerning the Hague Conference, Dr. Anselmo Reyes, Representative of the Asia Pacific Regional Office, for speaking on the ongoing issues specific to the region. To those of you here today from Korea and elsewhere who are serving as presenters, commentators, and discussion panelists, I thank you all.

Once again, welcome and thank you for coming to this celebrative event. I hope this occasion will be rewarding and productive for all of you and wish you good health and great success.

Thank you.

존경하는 내외 귀빈 여러분,

세계 각국에서 오신 법관, 교수 및 법률 직역 종사자 여러분들을 모시고, 사법연수원이 HCCH(헤이그국제사법회의) 상설사무국(Permanent Bureau)과 공동으로 HCCH 아태워크의 한 부분을 맡아 개최하게 되어 매우 영광스럽게 생각합니다.

바쁘신 가운데에도 국제사법에 대한 큰 관심과 애정을 가지고 HCCH(헤이그국제사법회의) 아태워크 행사에 참석해주신 여러분께 감사드립니다. 특히 외국에서 이 행사를 위해 대한민국을 방문해주신 20여 개국 50여 분의 외국대표단 및 HCCH(헤이그국제사법회의) 상설사무국 여러분들께 진심으로 감사와 환영의 말씀을 전합니다.

친애하는 내외 귀빈 여러분,

세계는 국경, 민족, 문화를 초월하여 점점 긴밀하게 연결되어 가고 있고, 각국의 상호교류도 갈수록 활발히 이루어지고 있습니다. 이에 따라 다양한 국제적인 법률관계가 형성되고 그로 인해 발생하는 법적 분쟁 역시 국제적인 양상을 띠게 되었습니다. 이러한 변화는 법원으로 하여금 국제적 사건에 대한 전문적 역량을 강화하고 적극적인 사법공조를 통하여 세계와 협력하는 시대를 열어갈 것을 요구하고 있습니다.

이러한 점에서 사법 각 분야의 통일적 법규 제정 등을 통한 사법공조를 추구하는 HCCH(헤이그국제사법회의)의 역할은 더욱 더 중요해 질 것이며, 특히 헤이그 네트워크 판사 제도를 비롯한 법원 간의 직접적인 사법공조는 더욱 강화되어야 할 것입니다.

대한민국 사법부는 이처럼 급변하는 시대에 세계 각국 및 국제기구 등과의 상호협력과 교류를 통하여 사법제도를 발전시켜나가기 위해 노력하고 있습니다. 사법연수원도 법조인 양성과정에서 외국법 및 국제사법 분야에 대한 교육과 해외연수에 대한 지원을 실시할 뿐만 아니라, 세계 각국 법관들을 위한 연수프로그램 운영 및 법관연수기관과의 교류 등을 통해 사법교류의 폭을 넓혀가고 있습니다.

대한민국이 1997년 헤이그국제사법회의에 가입할 당시 사법부가 송달협약 및 증거협약에의 가입을 심의한 후 가입의 필요성을 적극적으로 표명하였습니다. 가입 이후에는 법원행정처가 헤이그 송달협약과 헤이그 증거조사협약의 중앙당국(Central Authority)으로서 그 역할을 충실히 수행해왔고 대법원은 HCCH(헤이그국제사법회의)의 일반사무정책이사회, 각종 특별위원회에 법관을 대표로 파견하기도 하였습니다.

2017년은 우리나라가 헤이그국제사법회의에 가입한지 20주년이 되는 해입니다. 오늘부터 이틀간 진행될 심포지엄에서는 IT 기술의 발전에 따라 실용화될 것이 예상되는 국가간 원격 영상증인신문 등 헤이그 증거조사협약과 헤이그 송달협약과 관련한 이행 환경의 변화를 미리 점검해보고자 합니다. 또한 장차 대한민국이 가입할 가능성이 있는 헤이그 관할합의협약과 현재 성안 중인 헤이그 판결승인 집행협약안에 대하여도 심도 있는 논의가 이루어지기를 기대합니다. 이와 같은 풍성한 주제에 대한 논의를 통하여 국제사법의 과거와 현재뿐만 아니라 미래까지도 살펴볼 수 있기를 기대합니다.

내외 귀빈 여러분,

사법연수원은 1971년에 개원한 이래 40여 년 동안 우리나라 최고의 법조인 양성기관으로 2만 여명의 법조인들을 배출했습니다. 법조인양성기능은 2009년 법학전문대학원제도의 도입 이후 점차 축소되어 2020년에는 그 기능이 종료될 예정입니다. 사법연수원의 교수들이 법학전문대학원 과정 중 민□형사재판실무교육을 지원하고 있습니다. 사법연수원은 대한민국의 유일한 법관연수기관으로서 법관경력 5년마다 실시하는 의무연수, 각 직무 및 전문분야 관련 연수 등 다양한 프로그램을 통해 매년 연인원 약 2,600명의 법관들에게 연수를 실시하고 있습니다.

사법연수원은 2013년에 국제사법협력센터를 개소하여 외국과의 사법교류를 확대하고, 외국 법관 연수 등 국제적 사법협력업무를 전문적, 체계적으로 수행해 오고 있습니다. 2016년에는 33개국, 약 275명의 외국 법조인이 사법연수원 국제사법협력센터를 방문하였고, 사법연수원 소속 교수진이 베트남, 중국 등을 방문하여 각국 사법부와 사법제도에 대한 정보를 교환하였습니다.

또한 사법연수원은 2016년 국제난민법판사협회, 유엔난민기구와 공동으로 국제 난민컨퍼런스를 성공적으로 개최하였고, 이 난민컨퍼런스를 통하여 세계 각국의 법조인들이 '난민'이라는 공통의 문제를 고민하고 해결책을 모색해 보는 교류의 장을 가진 바 있습니다. 특히 HCCH 상설사무국에서 실시하고 있는 협약가입국에 대한 지원, 교육프로그램은 사법연수원이 수행하고 있는 국가 간 사법교류, 교육 지원과 매우 유사한바, 앞으로 사법연수원과 HCCH가 위와 같은 분야에서 상호 협력할 수 있기를 기대합니다.

사법연수원은 앞으로도 국제적으로 논의할 가치가 있는 주제를 지속적으로 발굴하여 국내외 법관과 전문가들이 함께 토론할 수 있는 국제적 사법교류의 장을 만들기 위해 꾸준히 노력하겠습니다.

친애하는 참석자 여러분,

대한민국은 이 호텔의 이름처럼 4계절이 뚜렷한 나라입니다. 특히 여름에는 덥고 습한 날씨로 활동하는데 불편함이 많지만 이러한 여름의 무더위를 이겨낸 생명력이 풍요로운 가을의 결실을 가져 오는 것처럼, 오늘 여러분들의 발제 및 토론을 위한 노력과 귀한 시간을 내어 동참하시는 수고가 국가 간 사법공조의 발전이라는 결실을 맺을 것이라고 믿습니다.

마지막으로 이번 심포지엄의 성공적 개최를 기원하는 축사를 맡아주신 국제사법학회 정병석 회장님, 국제사법의 최근 동향과 관련하여 헤이그국제사법회의의 현안을 말씀해 주실 Christophe Bernasconi 사무총장님, 아시아태평양지역의 현안을 말씀해 주실 Anselmo Reyes 아태지역사무소장님을 비롯하여 이번 심포지엄의 발표와 토론을 맡아주신 국내외 발표자와 토론자 여러분께 깊이 감사드립니다.

귀한 시간을 내어 이번 HCCH 아태워크 일정에 참석하여 자리를 빛내주신 내외 귀빈 여러분께 다시 한 번 감사드립니다. 오늘의 행사가 참석하신 모든 분들께 유익한 시간이 되기를 바라며, 여러분 모두의 건강과 행복을 기원합니다.

감사합니다.

Introductory Remarks



Byung Suk CHUNG

President of the Korea Private International Law Association

존경하는 내외 귀빈 여러분, 반갑습니다.

대한민국이 1997. 8. 20. 헤이그 국제사법회의(HCCH)에 가입한지 20주년을 맞은 올해 서울에서 『HCCH Asia Pacific Week 2017』을 성공적으로 개최하게 된 것을 진심으로 축하 드립니다.

대한민국 사법부를 대표하여 사법연수원(Judicial Research and Training Institute)에서 『HCCH Asia Pacific Week 2017』의 오늘과 내일 일정을 주관해주셨습니다. 이번 행사를 준비하시느라 애쓰신 최재형 사법연수원장님, 기획교수님을 비롯한 사법연수원 및 법원 관계자 여러분들, 그리고 발표와 토론을 맡아주신 분들께 깊은 경의를 표합니다. 그리고 이 행사를 공동으로 주최하여 주시고 참석하여 주신 헤이그 국제사법회의(HCCH)의 Christophe Bernasconi 사무총장님(Secretary General), 아시아·태평양 지역 사무소(Asia Pacific Regional Office)의 Anselmo Reyes 대표님 (Representative) 및 Frank Poon 신임 대표님(next Representative)께도 감사를 드립니다.

아시는 바와 같이 헤이그 국제사법회의(HCCH)는 지금으로부터 124년 전 1893. 9. 12. 네덜란드 헤이그의 빈넨호프(Binnenhof)에서 첫 회의를 가진 것으로 기록되어 있습니다. 당시 헤이그 국제사법회의의 초석을 다진 인물로 알려진 Tobias (Michael Carel) Asser는 그 공로를 인정받아 1911년도에 노벨 평화상을 받았습니다. 그 이후 헤이그 국제사법회의(HCCH)는 1955. 7. 15. 자로 국제사법에 관한 헤이그회의 규정 (Statute of the Hague Conference on Private International Law)이 발효되면서 공식적으로 설립된 이래 현재 대한민국을 포함하여 총 83개국이 그 회원이며, 회원국이 아닌 많은 국가들도 헤이그 국제사법회의(HCCH)가 성안한 협약에 가입하고 있어 전세계적으로 국제사법 및 관련 법제의 통일에 큰 기여를 하고 있습니다.

헤이그 국제사법회의(HCCH)가 1951년부터 2008년까지 사이에 성안하여 채택한 국제협약은 38건으로 알려져 있습니다. 여기에 공식적인 협약으로 열매 맺지는 않았지만 공들인 노력들까지 더해 보면, 헤이그 국제사법회의(HCCH)가 지금까지 이룬 성과와 업적은 다 헤아릴 수 없을 정도로 많습니다.

이렇듯 헤이그 국제사법회의(HCCH)는 오랜 기간에 걸쳐 세계 각국의 사법부, 행정부와 법조계, 학계간 활발하고 긴밀한 소통을 통해 국제사법 영역에서 전세계적으로 조화로운 법률시스템을 구축해오는 데에 중추적 역할을 담당 해왔습니다. 국제거래에서의 준거법 및 관할 그리고 외국법원 판결의 승인·집행 등에서부터 국제가족법 관계는 물론 다양한 국제민사소송 영역에 이르기까지 상당히 넓은 스펙트럼의 국제사법 분야에서 여러 국가의 국내법 규정을 조화(Harmonize)시킬 수 있도록 이끌어 온 선구자가 바로 헤이그 국제사법회의(HCCH)입니다. 물론 현재까지 많은 발전을 이룩하였지만 앞으로 이루어 나가야 할 목표도 상당히 많을 것입니다.

바로 이 자리에 계신 내외빈 여러분께서 전세계 국제사법계의 구성원이자 글로벌 플레이어(global player)로서 앞으로의 발전을 능동적으로 이끌어 나가실 것으로 기대해 봅니다. 그런 의미에서 이렇게 서울에서 『HCCH Asia Pacific Week 2017』을 개최하여 여러분과 함께 대한민국의 헤이그 국제사법회의 (HCCH) 가입 20주년을 기념하고 한국국제사법학회의 회장으로서 대한민국 국제사법계를 대표하여 국제사법의 비전을 말씀 드릴 수 있게 되어 매우 영광스럽고 기쁘게 생각합니다.

존경하는 내외빈 여러분!

“Think Global and Act Local”이라는 말이 있습니다. 주로 환경보호를 위한 맥락에서 예컨대 지구를 살리기 위해 내 집에서부터 노력하자는 취지를 강조하고자 할 때 종종 사용하는 슬로건입니다. 국제사법의 경우 우선 기본적으로 “Thinking Globally”가 필요함에 여러분들께서도 모두 동의하실 것 같습니다. 유명한 국제사법학자인 Ernst Rabel도 (1945년도에 출판된 그의 저서 “The Conflict of Laws: A Comparative Study”에서) “a radical turn of choice-of-law rules from provincial to worldwide thinking”이 필요하다고 강조한 것으로 알려져 있습니다. 그리고 국제사법에 관한 헤이그회의 규정도 제1조에서 헤이그 국제사법회의의 목적을 국제사법 규칙의 점진적 통일화를 위하여 노력하는 것(“The purpose of the Hague Conference is to work for the progressive unification of the rules of private international law.”)이라고 합의하였습니다.

그렇다면 이번 주 서울에서 『HCCH Asia Pacific Week 2017』 자리에 모인 우리들이 국제사법을 논의함에 있어서는 “Think Global and Act Global”이라는 표현이 어울리지 않나 라는 생각이 듭니다.

이제 전세계의 민상사 거래관계는 물리적인 시간과 공간의 한계를 초월하여, 인터넷이라는 단일화된 네트워크상에서 이뤄지고 있습니다. 대한민국의 경우도 상거래를 비롯한 다양한 법률관계뿐만 아니라 분쟁해결절차 및 제도 또한 새로운 국면에 진입하면서 기존 국제규범으로는 포섭되지 않을 새로운 쟁점들이 점점 대두될 것으로 예상됩니다. 특히 국제민사소송 영역에서 변화와 새로운 환경(landscape)을 감지하여 지속적인 연구와 심도 깊은 검토를 토대로 이를 수용하고 발전시켜서 한 단계 더 도약한 국제규범을 마련하여야 할 필요성이 큼니다. 이러한 국제적 변화와 시대적 요구에 부응하면서도 예측 가능성과 법적 안정성을 지속적으로 담보할 수 있는 국제규범을 형성하고 나아가 세계 각국의 국내 규정이 조화될 수 있기 위한 노력들이 계속되어야 할 것입니다.

마지막으로 『HCCH Asia Pacific Week 2017』을 계기로 대한민국에서 국제사법이 그리고 전세계적으로 국제사법이 한걸음 더 진보하고, 한 단계 더 성장할 수 있게 되기를 희망합니다.

헤이그 국제사법회의(HCCH)의 무궁한 발전과 『HCCH Asia Pacific Week 2017』의 큰 성과, 그리고 무엇보다 이 자리를 빛내주고 계신 국내외 귀빈 여러분들의 지속적인 건승을 기원합니다.

고맙습니다.



HCCH Asia Pacific Week 2017

*3rd(Mon) - 6th(Thu) July 2017
Four Seasons Hotel Seoul*



Korea's 20th Anniversary : Retrospect and Prospect

Presenter

[Introductory Remarks]

Tae-Ak RHO

Chief Judge of the Seoul Northern District Court (Korea)

[Retrospective of Korea's Early Years as a Member of the HCCH]

Young-Hill Liew

Judge of Seoul Central District Court (Korea)

[Secondment of Korean Judges to HCCH]

Jiyong Jang

Judge on secondment to the HCCH

[Publication of the Hague Principles on Choices of Law In International Commercial Contracts (Korean Version)]

Hae Rang Lee

Judge of Daegu District Court (Korea)



Presenter

Tae-Ak RHO

Chief Judge of the Seoul Northern District Court (Korea)

Education

- 1977 - 1981: Han-yang University, College of Law (LL.B.)
- 1995 - 1996: Georgetown University Law Center (LL.M.)

Work Experience

(As a Judge)

- 2017 - Present Chief Judge, Seoul Northern District Court
- 2014- 2017 Presiding Judge, Seoul High Court
- 2012- 2014 Chief Presiding Judge of Criminal Division, Seoul Central District Court
- 2003 - 2006 Law Professor, the Judicial Research and Training Institute

(Other experiences)

- 2016 Visiting Professor, Waseda University
- 2016 Adjunct Professor, Korea University (Maritime Law)
- 2016 - Vice President, the Korea Association of the Law of Civil Procedure
- 2014 - President, the International Trade Law Community of the Supreme Court of Korea
- 2013 - Vice President, the Korea Private International Law Association

Published Books

(English Version)

- Major Judicial Precedents in Private International Law and International Business Transaction IN 2013, Korean Yearbook of International Law Vol 1. 2014 (2015)
- An Analysis of Recent Supreme Court Decisions on International Jurisdiction - Focus on the interpretation of Article 2 of the Private international Act and the Substantial Connection Principle, Supreme Court Law Journal No. 1 Vol 3.(June 2013)

(Japanese Version)

- Recent Legislation and Practice of Korean Insolvency Law- Regarding introduction of the Seoul Rehabilitation Court and Electronic Insolvency Case Management, Osaka Law Review Vol 67 No. 1(No.307) (May 2017)
- Recent changes in the civil appellate procedure and where they are headed- focusing on trial practices of Seoul High Court, Waseda University Comparative Law Review Vol. 48 No.2 (2014. 12. 1.)
- Legal issue of licensing technology transfer under Korean International Private Law, Waseda University Global COE enterprises and Law Creation Competition Research Institute Volume 9 No. 1 No. 33 (2012)
- And more including Korean version articles



Presenter

Young-Hill Liew

Judge of Seoul Central District Court(Korea)

Education

- 1980 Seoul National University (M.A.)
- 1987 Seoul National University (LL.M.)
- 1993 Columbia University (LL.M.)
- 1995 Seoul National University (J.S.D.)

Work Experience

- 2015. Judge, Seoul Central District Court
- 2004-2014 Private Practitioner
- 2007. 7. Lecturer, Hague Academy of International Law
- 2008-2014 Domain Name Panelist, WIPO
- 2003 Presiding Judge, Southern Branch of Seoul District Court
- 2000 Judge, Patent Court
- 1997-2002 Member of the Government Delegation, joined the Discussion of the Hague Judgment Project at the Hague Conference on Private International Law
- 1997-2000 Director of International Affairs, National Court Administration
- 1995 Professor, Judicial Research and Training Institute
- 1993 Judge, Seoul Civil District Court
- 1991 Judge, Northern Branch of Seoul District Court
- 1989 Judge, Jinju Branch of Changwon District Court
- 1988 Judge, Seoul Civil District Court
- 1987 Judge, Seoul Family Court
- 1985 Judge, Euijongbu Branch of Seoul District Court



Presenter

Jiyong Jang

Judge on secondment to the HCCH

Education

- Aug. 2013 ~ June. 2014 : Visiting Scholar at Duke University, USA
- Aug 2009 ~ June 2011 : Finished Doctoral Course(Civil Law), Seoul National University College of Law, Seoul, Korea
- Mar. 2002 ~ Feb. 2008 : Master of Law(Civil Law), Seoul National University College of Law, Seoul, Korea
- Mar. 1997 ~ Feb. 2002 : Bachelor of Law, Seoul National University College of Law, Seoul, Korea

Work Experience

- Aug. 2016 – Present : Judge on Secondment, HCCH
- Feb. 2016 – Aug. 2016: Judge, Seoul Central District Court
- Feb. 2012 – Feb. 2016: Judge, Anyang Branch Court of Suwon District Court
- Apr. 2008 - Feb. 2012: Judge, Daejeon District Court
- Apr. 2007 - Mar. 2008: Judge Advocate at ROK-US Combined Forces Command
- Apr. 2005 - Mar. 2007: Military Prosecutor, Staff Judge Advocate at 2nd Fleet, Navy
- Mar. 2003 ~ Feb. 2004 : The Judicial Research and Training Institute of the Supreme Court of Korea (Attorney License, ROK)
- Dec. 2002 : Passed Korean Bar Examination

Published Books

- Private International Law
 - 'A Recent Development of U.S. Conflict of Laws : Recognition and Enforcement of Foreign Judgment', Private International Law Review, 2016
 - 'A Review on Draft Ruling of Judicial Cooperation', Present and Future of International Conventions, National Court Administration, 2014
 - 'Changes in Adoption Procedure by Joining Hague Adoption Convention', Legal Times, 2013
 - 'A Review on Ratifying Hague Adoption Convention', Present and Future of International Conventions, National Court Administration, 2012
- Other Topics
 - 'Limitation of the Buyer's Right to Require Substitute Goods', Journal of Private Case Law Studies 37, Academy of Private Case Law Studies, 2015
 - 'The Effects of Bankruptcy Procedures on Civil Action', Human Rights and Justice, Korean Bar Association, 2011
 - 'A Study on Assignment of Receivables secured by Mortgage Interest', thesis for Master Degree, Seoul National University, 2008



Presenter

Hae Rang Lee

Judge of Daegu District Court (Korea)

Education

- Mar. 2009 ~ Feb. 2016 : Master of Law (Major : Administrative Law),
Seoul National University Graduate School of Law, Seoul, Korea
- Mar. 2009 ~ Jan. 2011 : The Judicial Research and Training Institute of the Supreme Court of Korea (Attorney License, ROK)
- Mar. 2003 ~ Feb. 2009 : Bachelor of Law, Seoul National University College of Law, Seoul, Korea

Work Experience

- Feb. 2011 ~ Present : Judge, Republic of Korea

Published Books

- A study on the criminal responsibility of a person suffering from a mental disorder. Judicial Training Session(Advance) 2016
(Legal journal published annually by the Judicial Research and Training Institute)
- Remedies in the U.S. administrative litigation Korean Administrative law research
(Legal journal published trimonthly by Ministry of Justice)
(August, 2016)
- A study on 'remedies' in the U.S. administrative law – Focused on special statutory, general statutory and nonstatutory review
A dissertation for Master's degree
(August. 2016)



HCCH Asia Pacific Week 2017

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HCCH Asia Pacific Week 2017

Korea's 20th Anniversary : Retrospect and Prospect

Presentation

Tae-Ak RHO

Chief Judge of the Seoul Northern District Court (Korea)

The 20th Anniversary of Korea's Membership to the HCCH: Retrospect and Prospect

July 5, 2017

Taeak RHO

(Chief Judge of the Seoul Northern District Court,
President of International Trade Law Community
of the Supreme Court of Korea)

1. Introduction

Korea joined the Hague Conference on Private International Law back in August 1997, and this year marks the 20th anniversary of its membership. I would like to offer my sincere congratulations on the opening of the Asia Pacific 2017 in Seoul, co-hosted by the HCCH, the Ministry of Justice, the Ministry of Foreign Affairs, and the Judicial Research and Training Institute to celebrate this meaningful occasion. This event will provide a venue for Korea to have discussion on enhancing international judicial cooperation in civil matters and joining additional HCCH conventions. Personally, it is a tremendous honor and pleasure for me to deliver a presentation under the theme of "The 20th Anniversary of Korea's Membership to the HCCH: Retrospect and Prospect" from the court's perspective.

Looking back for the past 20 years, many HCCH conventions have served as important international norms, increasing predictability in civil procedural law for service of judicial documents and examination of evidence, as well as ensuring compliance with international standards in the field of international family law while Korea's court has handled a number of civil, commercial, and family cases with international aspects. In addition, the Supreme Court of Korea formed the Committee on Promotion of Judicial Cooperation in Civil Matters when Korea joined the HCCH in 1997, and since then has operated the International Norm Research Association and collaborated actively with the HCCH, participating in international conferences on conventions and projects initiated by the HCCH. The Supreme Court is reflecting the research outcome in its work, and if necessary, is

working on enactment and revision of related laws.

Korea is currently a party of the following 4 conventions made by the HCCH.

① Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (“Service Convention”)

② Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents (“Apostille Convention” or “Convention Abolishing the Requirement of Legalisation”)

③ Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (“Evidence Convention”)

④ Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (“Abduction Convention”). The Abduction Convention is the first convention in the fields of family law and governing law and is the only Hague convention for which Korea enacted an implementation act at the time of joining it.

Korea also signed the Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (“Adoption Convention”) in May 2013, but not yet ratified it.

I would like to first talk about what the above-mentioned conventions mean from the court’s perspective, and as a judge dedicated to handling international trade cases for the last three years, I will also look back on how the conventions have served as international norms. Then I will conclude by briefly touching upon the future prospect.

2. Review of HCCH Conventions Signed by Korea

A. Service Convention

The **Service Convention** took effect on August 1, 2000 and is the first HCCH convention that Korea joined after becoming an HCCH member.

Article 191 of the Civil Procedure Act (“CPA”), under the title of “Method of Service in Foreign Country,” only declares the principle that “Service to be effected

in a foreign country shall be entrusted by the presiding judge to the Korean ambassador, minister or consul stationed therein or the competent government authorities of such country,” but it does not mention any specific method. International judicial cooperation in civil matters is dealt with separately in the Act on International Judicial Mutual Assistance in Civil Matters (“Act on Mutual Assistance in Civil Matters”), which was enacted in 1991. This Act defines the procedures for handling judicial mutual assistance in civil matters, or specifically, service of judicial documents, in Chapter 2 (Entrustment to Foreign Country) and Chapter 3 (Entrustment by Foreign Country). Regulations subordinate to the Act include the Rules on International Judicial Mutual Assistance in Civil Matters (“Rules on Mutual Assistance in Civil Matters”) and the Established Rules on International Judicial Mutual Assistance in Civil Matters, etc. (“Established Rules on Mutual Assistance in Civil Matters”), enacted by the Supreme Court.

As the Korean government joined the Convention, it designated the “National Court Administration” as the Central Authority. With regard to the institution with authority to complete a certificate (Article 6 of the Convention), it stated that other than the Central Authority, an employee of a court which has jurisdiction over the territory where the service will be done can complete a certificate, and Korean courts have been following this principle. But as you are all aware, the Service Convention permits many alternative service channels other than via the Central Authority, including direct service by a diplomat or a consular officer. At the time when Korea joined this Convention, it declared a reservation regarding certain cases of direct service by a diplomat or a consular officer or service by postal channels (Article 10, Paragraph a). But recent advances in technology have enabled safe delivery of documents through e-mail, and thus, now is the time to gradually allow simpler ways of service, as described above, given the need for guarantee of the defendant’s right to defend and more effective judicial cooperation. It seems that this conference has a session on the topic of “Service by Electronic Means.” I expect the discussions to produce good results.

The Service Convention currently allows a high number of entrustments to and from foreign countries, and 80~90% of cases are handled within 6 months.

〈see the attached table〉

When it comes to foreign judgement recognition and enforcement cases, whether

the service of documents followed procedures specified in the Service Convention is occasionally considered in evaluating lawfulness and timeliness of service (Article 217 of CPA).

B. Apostille Convention (Convention Abolishing the Requirement of Legalisation)

The Apostille Convention, which is the second HCCH convention Korea joined, took effect on July 14, 2007. This Convention facilitates the circulation of public documents that are executed in one country and submitted in another by simplifying the cumbersome “chain certification process” – i.e. A document executed by a public official in a country is certified by his senior officials and by the embassy or consulate of the country where the document is to be submitted. Each Contracting State shall exempt from legalisation documents to which the present Convention applies and which have to be produced in its territory (Article 2). For example, if a public document is executed in a foreign country and is to be submitted in Korea, and if the foreign country is a Contracting State, the parties (including Koreans) only need to receive a certificate from the foreign country’s authority and do not need to get the document certified by the Korean consulate. When it comes to notarization of private documents, there are parts of those documents that are of public nature. These parts are recognized as public documents under the Convention, and therefore, only a certificate is required and there is no need to verify qualification of the notary public or to get certification from the Korean consulate. If a public document is executed in Korea and is to be submitted in a foreign country which is a Contracting State (e.g. the United States), the parties (including foreigners) only need to receive a certificate (Apostille) from the Korean authority without the need to get certification from the US consulate.

With the Apostille Convention taking effect, the cumbersome trial process around authenticity of foreign public documents has been greatly simplified, and the number of unnecessary preliminary objections has been reduced with regard to delegation of powers of attorney, allowing for more effective handling of cases.

C. Evidence Convention

The Article 296(1) of CPA states that any examination of evidence to be undertaken in a foreign country shall be entrusted to the Korean ambassador, minister or consul stationed in that country or to a competent public agency of that country. The Act on Mutual Assistance in Civil Matters, which is mentioned above, also regulates examination of evidence abroad as it does the service procedure.

Before Korea joined the Evidence Convention, the court's cooperation in examination of evidence was done through entrustment to a competent court via a diplomatic channel under the Act on Mutual Assistance in Civil Matters, and such indirect way of evidence examination required much time and cost. But as the Evidence Convention took effect on February 12, 2010, it became possible to examine evidence more directly and simply through the Central Authority, etc.

There are not yet many cases where evidence examination is done under the Evidence Convention, but the number is increasing little by little consistently. <See the attached table>

The Korean government made a reservation in the Convention as follows: it accepts a Letter of Request in either English or Korean; execution of a Letter of Request without a Korean translation may be delayed; and it accepts a Letter of Request only in Korean for countries that only accept letters in other languages (Article 4, paragraph 2 and Article 33). It also made a reservation that prevents a diplomatic officer, etc. from taking the evidence of nationals of the State in which he exercises his functions or of a third State and prevents a delegated person from taking the evidence. Accordingly, a foreign diplomatic officer, etc. in Korea may take the evidence of nationals of the country he represents, but cannot take the evidence of nationals of Korea or a third country or take the evidence through a delegated person.

As new technologies have recently been developed and put into use, there is also a need to seek new methods in examination of evidence. I have a high expectation for the session in this conference titled "Taking Evidence by Video-Links."

D. Abduction Convention

Korea joined the Abduction Convention, which took effect on March 1, 2013. Accordingly, it enacted the Act on the Implementation of the Hague Child Abduction Convention ("Implementation Act") and the Supreme Court Rules on the Implementation of the Hague Child Abduction Convention ("Supreme Court Rules") in order to provide for matters necessary for implementation of the Abduction Convention. The Act contains a minimum set of provisions because it refers to existing rules specified in the Family Litigation Act("FLA"). In particular, it has not introduced new rules for executing a child return order or a conciliation of civil disputes that is not connected with a court.

Cases involving return of a child under the Abduction Convention are under exclusive jurisdiction of the Seoul Family Court. Such concentration of jurisdiction is aimed at allowing judges dealing with abduction cases to deepen their experience and enhance their expertise. A person whose right of custody under the Abduction Convention has been breached as a result of a wrongful removal or retention of a child to or in Korea may file with the competent court a petition seeking return of the child (Article 12(1) of the Implementation Act).

The Abduction Convention, the Implementation Act, and the Supreme Court Rules are applied to petitions seeking return of a child. For matters not prescribed in the Supreme Court Rules, the provisions regarding Category E family non-contentious cases under FLA are applied. The court may render a prior disposition under Article 62 or provisional measures under Article 63 of FLA, to protect the rights and interests of a child or prevent further abduction or concealment of a child, in connection with the petition cases set forth in the Implementation Act. A person who intends to institute a litigation or to request an adjudication to the family court for family non-contentious cases of Category E should first make a request for conciliation. Upon receipt of a case, the court should immediately set the date for hearing and order appearance of the other party. For cases of return of a child, the key is to quickly return a child who was illegally abducted to the place where his habitual residence was located before the abduction, and therefore, this should be the focus of pleading. By Implementation Act, the court can issue an order of performance, impose a fine, and issue an order of detention to ensure effectiveness of the court's child return order.

According to the Seoul Family Court statistics on Abduction Convention cases,

2014 and 2015 had 1 decision made respectively, and 2016 and 2017 had 3 decisions made respectively. The number of cases received is slowly increasing, with 4 cases received by the court during the first 6 months of 2017. The key issue in such cases is whether there is any exceptional reasons not to return a child, including an assertion that the child has adapted to a new environment.

3. Impact of Other HCCH Conventions on the Act on Private International Law and the Civil Procedure Act of Korea

There are also other HCCH conventions that Korea did not join but have discussed and reflected in the process of revising the Act on Private International Law ("APIL") or CPA.

First, with regard to law applicable to maintenance, Korea referred to the key provisions of the HCCH's "Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations" ("Maintenance Convention") when it revised APIL in 2001 in order to protect the maintenance creditor. According to Article 46 of the revised Act, maintenance is an independent subject matter that should be connected to certain governing law, and therefore, laws governing all maintenance obligations shall be integrated in principle. It also accepts the principles of the Maintenance Convention to thoroughly protect the maintenance creditor. It states that the principles for deciding laws applicable to maintenance shall be made in consideration of the property-wise characteristics of maintenance, and that the maintenance obligations between the divorced spouses shall be governed by the law applicable to divorce. Simply put, the Act focused on the substantive legal value of "protection of the maintenance creditor" from the perspective of private international law.

In addition, with regard to the form of testamentary dispositions, the key provisions of the HCCH's "Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions" ("Testamentary Dispositions Convention") were reflected in Article 50(2) of APIL.

The revision of the APIL regarding international jurisdiction is also underway. In the course of the revision, the 1999 preliminary draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, the revised draft in 2001,

the Judgments Project, and the “Convention of 30 June 2005 on Choice of Court Agreements” (“Convention on Choice of Court Agreements”) are being reflected to a great extent.

Furthermore, Article 11 of the Convention on Choice of Court Agreements, which deals with punitive damages, had an influence over Article 217-2 (Recognition of Final Judgment, etc. on Compensation for Damage) of CPA which was newly added on May 20, 2014.

4. Conclusion

- Cooperation between HCCH and Korean Judiciary, Future Tasks, etc.

I have introduced many changes and achievements that Korea has made in the field of judicial cooperation in civil, commercial and family matters and private international law for the past 20 years along with the HCCH. Korea has made great progress in international judicial cooperation and international civil procedure by joining the Service Convention and Evidence Convention, and ensured compliance with international standards by joining the Abduction Convention. Many HCCH conventions are also being considered for the revision of the international jurisdiction rules as part of an effort to comply with international standards. It is expected Korea will be a party of the Choice of Court Convention in the near future. Besides, the scope of cooperation with HCCH will be further expanded as Korea ratifies the Adoption Convention.

Going forward, Korean judiciary should actively engage in the process of selecting and promoting key future tasks of the HCCH, and it is critically important to develop experts in private international law with great job competency. In this regard, the Supreme Court of Korea established the International Norm Research Association in 2005 and has conducted research on related topics since then. I was involved as a chief in charge of one section in this Association. The Association’s Judicial Cooperation Team has currently 15 judges who study diverse HCCH conventions and other means of judicial cooperation and attend annual conferences hosted by the HCCH with experts in relevant fields. In 2016, they attended the Meeting on Establishment of a Global System for International Commerce, the Working Group Meeting on the Adoption Convention,

the Special Commission on Implementation of the Apostille Convention, the Special Commission on “Judgment Project” on Recognition and Enforcement of Foreign Judgments, etc. After coming back to office from those international conferences hosted by the HCCH, the judges write reports and share them with the court, and what they have learned are studied further and reflected in the work of the court. For example, Judge Hyerang Lee, a member of the 6th Judicial Cooperation Team, translated the “Publication of the Hague Principles on Choice of Law in International Commercial Contracts” into Korean, based on her experience of attending a relevant HCCH conference. The members are also working on translation of the “Practical Handbook on the Operation of the Service Convention, 4th Edition (2016)” into Korean. In addition, the Korean judiciary has continuously sent judges to the HCCH. Judge Junghoon Park was the first one to be seconded to the HCCH in August 2010, followed by Judge Hakyeong Jeong, Judge Yoonjong Kim, and Judge Injoon Hwang. As of June 2017, Judge Jiyong Jang is on secondment to the HCCH. The judiciary will continue its active engagement with the HCCH going forward. It will conduct in-depth research on joining of various HCCH conventions and their practical operation, and cooperate with the HCCH consistently, sharing the HCCH’s goal of “gradually integrate the regulations on private international law.”

<Attached Table>

Category Year	Service Convention				Evidence Convention			
	Outbound		Inbound		Outbound		Outbound	
	Entrusted	Replied	Entrusted	Replied	Entrusted	Replied	Entrusted	Replied
2000.8	100	32	59	50				
2001	351	189	314	290				
2002	231	199	347	341				
2003	429	331	374	367				
2004	448	379	455	447				
2005	667	563	533	521				
2006	243	183	606	587				
2007	267	195	570	560				
2008	252	203	755	672				
2009	342	289	630	540				
2010	303	251	658	567	4	3	3	2
2011	317	278	604	538	4	4	20	7
2012	323	272	572	565	8	6	19	6
2013	298	230	546	537	6	4	17	6
2014	398	293	435	434	8	7	11	9
2015	401	315	436	429	8	6	2	2
2016	453	303	460	377	10	6	11	2
2017.6	240	56	242	123	6	2	5	0
Total	6063	4561	8596	7945	54	38	88	34

대한민국의 HCCH 가입 20주년: 회고와 전망

2017. 7. 5. 서울북부지방법원장 · 대법원 국제거래법연구회장 노 태 약

1. 들어가면서

한국이 1997년 8월 헤이그국제사법회의의 회원국으로 가입한지 20주년이 되는 뜻깊은 올해, 이를 기념하기 위하여 HCCH와 법무부, 외교부 및 사법연수원이 함께 서울에서 아시아태평양회의를 개최하게 된 것을 진심으로 축하합니다. 이를 계기로 한 단계 차원 높은 국제민사사법공조와 HCCH에서 만든 여러 협약의 추가 가입을 위한 본격적이고도 구체적인 논의가 이루어질 것이라는 점에서 그 의미가 크다고 할 것입니다. 저 개인적으로도 오늘 이 자리에서 법원의 관점에서 본 ‘대한민국의 HCCH 가입 20주년 회고와 전망’이라는 주제로 발표하게 된 것을 무척이나 영광스럽고 기쁜 일이라 생각합니다.

돌이켜보면 우리 법원이 지난 20년간 수많은 외국적 요소가 있는 민사·상사 및 가사사건을 처리해오는 과정에서, HCCH가 만든 협약들은 중요한 국제규범으로 기능을 하여 왔습니다. 재판상 서류의 송달 또는 증거조사에 관하여 절차법적인 예측가능성을 한층 높이고, 국제가족법분야에서는 그 처리와 결론을 이끌어냄에 있어 국제적 정합성을 확보하는데 큰 역할을 하였습니다. 또한 대법원은 1997년 HCCH 가입에 즈음하여 민사사법공조추진위원회를 구성한 이래 현재에 이르기까지 국제규범연구반을 운영하여 오면서, 특히 HCCH가 주관하는 여러 협약이나 프로젝트를 위한 국제회의에 판사를 참석하게 하는 등 적극적으로 HCCH와 교류를 하여 왔습니다. 대법원은 이러한 논의와 연구 성과가 실무상 반영이 이루어지도록 하거나 필요한 경우 관련 법령 제·개정 작업도 아울러 추진하고 있습니다.

현재 한국은 HCCH가 만든 협약 중 다음과 같은 4개 협약(convention)의 당사국입니다.

① “민사 또는 상사의 재판상 및 재판 외 문서의 해외송달에 관한 1965. 11. 1. 협약”(‘송달협약’)

Convention On The Service Abroad Of Judicial And Extrajudicial Documents In Civil Or Commercial Matters (Concluded 15 November 1965)

② “외국공문서에 대한 인증의 요구를 폐지하는 1961. 10. 5. 협약”(‘아포스티유협약’ 또는 ‘인증요구폐지협약’)

Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents

③ “민사 또는 상사의 해외증거조사에 관한 1970. 3. 18. 협약”(‘증거협약’)

Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters

④ “국제적 아동탈취의 민사적 측면에 관한 1980. 10. 25. 협약”(‘탈취협약’)

Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. 탈취협약은 가족법 분야 최초이고 준거법 분야 최초이며, 가입시 이행법률을 제정한 유일한 헤이그협약입니다.

한편 한국은 2013년 5월에 “국제입양에서 아동보호 및 협력에 관한 협약(‘입양협약’에 서명하였으나 아직 비준하지는 않고 있습니다. Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption

한국이 가입한 위 협약에 관하여, 법원의 관점에서 어떠한 의미를 갖는지 또 최근 3년간 국제거래 관련사건 전담재판부를 맡아 재판실무를 처리해 온 입장에서 국제규범으로 어떻게 작동하였는지 돌아보고 앞으로의 전망 등에 대하여도 간단하게 말씀드리고자 합니다.

2. 대한민국이 가입한 HCCH 협약에 관한 검토

가. 송달협약

우리나라가 회원국이 된 후 처음으로 가입하여 2000. 8. 1. 발효한 **송달협약**에 관하여 보면,

민사소송법 제191조는 외국에서 하는 송달의 방법이라는 표제 하에 “외국에서 하여야 하는 송달은 재판장이 그 나라에 주재하는 대한민국의 대사·공사·영사 또는 그 나라의 관할 공공기관에 촉탁한다”는 원칙만을 선언하고 그 구체적인 방법을 정하고 있지 않습니다. 국제민사공조에 관하여는 1991년 제정된 국제민사사법공조법(‘민사공조법’)이 따로 제정되어 있습니다. 민사공조법은 민사사건에서 외국으로의 사법공조촉탁 규정과, 외국으로부터의 사법공조촉탁 규정으로 나누어 민사사법공조, 즉 재판상 서류의 송달에 관한 처리절차를 규정하는데, 하위규범으로는 대법원에서 제정한 “국제민사사법공조규칙”(‘민사공조규칙’)과 “국제민사사법공조 등에 관한 예규”(‘민사공조예규’)가 있습니다.

우리나라 정부는 송달협약에 가입하면서, ‘법원행정처’를 중앙당국(central authority)

으로 지정하였고, 송달증명서의 작성권한 기관(송달협약 제6조)에 관하여는 중앙당국 이외에 송달을 실시할 지역을 관할하는 법원의 직원이 송달증명서를 작성할 수 있다고 명시하였으며, 이에 따라 법원의 실무가 운용되어 오고 있습니다. 그런데 잘 아시는 것처럼 송달협약은 중앙당국을 통한 송달 외에도 외교관 또는 영사관원에 의한 직접송달 등 여러 대체적인 송달경로를 허용하고 있습니다. 우리나라는 송달협약 가입 당시 위 외교관 또는 영사관원에 의한 직접송달의 일정한 경우나 우편에 의한 송달(송달협약 제 10조 a호)에 대하여는 유보선언을 하였습니다. 오늘날 첨단기술의 발전에 따른 전자우편 등에 의하여도 안정적인 송달이 가능하게 되었다는 점에서 피고의 방어권 보장이나 신속한 사법공조의 필요성 등을 고려할 때, 위와 같은 간이한 송달을 점진적으로 허용할 필요성이 있는 것으로 보입니다. 이번 회의에서도 전자적 송달이라는 주제로 논의가 예정되어있는 것으로 알고 있는데 좋은 논의결과가 나오기를 기대합니다.

현재 송달협약에 따라 많은 수의 외국으로부터의 촉탁과 외국으로의 촉탁이 이루어지고 그 처리기한도 대체로 6개월 이내에 80-90%의 사건이 처리되고 있습니다. <별표 참조>

한편 외국재판에 대한 집행판결을 구하는 사건에서 민사소송법 제217조 송달의 적법성과 적시성 요건을 판단함에 있어 송달협약에 따른 절차로 이루어졌는지 여부가 쟁점이 되는 경우도 있습니다.

나. 아포스티유협약(인증요구폐지협약)

우리나라가 두 번째 가입한 아포스티유협약은 2007. 7. 14. 발효되었습니다. 아포스티유협약은 작성국 이외의 외국에서 공문서를 제출함에 있어 과거 요구되었던 불편한 일련의 연쇄적인 인증절차를 단순화한 것입니다. 각 체약국은 자국 영역에서 제출되어야 하는 일정한 공문서에 대해 인증을 면제하여야 하므로 외국에서 작성된 외국공문서를 우리나라에서 제출하는 경우 당해 외국이 체약국이면, 당사자들(한국인도 포함)은 당해 외국의 권한당국으로부터 증명서를 받으면 족하고, 우리 영사관의 확인은 불필요하게 되었습니다. 또한 사문서를 공증하면 공성부분은 인증협약상의 공문서이므로 그 범위 내에서는 증명서로 족하고, 공증인의 자격증명이나 그에 대한 우리 영사관의 확인 역시 불필요하게 되었습니다. 한국 공문서를 외국에서 제출하는 경우에도 당해 외국이 체약국이면, 당사자들(외국인도 포함)은 예컨대 미국 영사관의 확인 없이 한국의 권한당국으로부터 증명서(아포스티유)를 받으면 되므로 역시 업무상의 부담을 덜게 되었습니다.

아포스티유협약이 발효되면서 외국공문서에 대한 진정 성립문제를 둘러싸고 번거롭

던 종래의 재판실무가 크게 개선되고 소송대리권의 위임 여부에 관하여 불필요한 본안 전 항변이 줄어들어 더 신속한 사건의 처리가 가능하게 되었습니다.

다. 증거협약에 관하여

민사소송법 제296조 제1항에서 외국에서 시행할 증거조사는 그 나라에 주재하는 한국 대사·공사·영사 또는 그 나라의 관할 공공기관에 촉탁한다고 규정하고 있습니다. 국제간 증거조사에 관하여 앞서 본 민사공조법에서 송달절차와 같이 규정하고 있습니다.

증거협약 가입 전 민사공조법에 따른 법원의 증거조사공조는 외교경로를 통한 관할 법원への 촉탁방법, 즉 간접실시방법으로 이루어져 많은 시간과 비용을 요하는 한계가 지적되었습니다. 그러나 2010. 2. 12. 증거협약이 발효됨으로써 중앙당국 등을 통한 간이한 증거조사가 가능해지게 되었습니다.

현재 증거협약에 따라 증거조사가 이루어지는 경우가 많지는 아니하나, 꾸준히 이루어지는 것으로 보입니다. <별표 참조>

한편 우리 정부는 유보사항으로, 한국어 및 영어 촉탁서를 접수하고, 한국어 번역문이 첨부되지 않은 촉탁서의 집행은 지체될 수 있으며, 기타 언어로 된 촉탁서만을 접수하는 국가에 대하여는 한국어 촉탁서만을 접수한다는 선언을 하였습니다. 그리고 외교관 등에 의한 주재국·제3국 국민대상 증거조사 및 수임인에 의한 증거조사는 할 수 없도록 하는 유보선언을 하였습니다. 이에 따라 한국에서 외국 외교관 등이 파견국 국민에 대한 증거조사를 할 수는 있지만, 한국인 또는 제3국 국민에 대한 증거조사와 수임인을 통한 증거조사는 할 수 없습니다.

증거조사에 관하여도 최근 첨단 기술의 발전과 안정적인 운용이 정착됨에 따라 새로운 방법이 모색되어야 할 것으로 보입니다. 이번 회의에서도 국제간 영상 신문을 통한 증거조사라는 주제로 논의가 이루어지는 것으로 알고 있습니다.

라. 탈취협약에 관하여

한국은 탈취협약에 가입하여 2013. 3. 1.부터 발효되었습니다. 그에 따라 탈취협약을 이행하는 데 필요한 사항을 정한 이행법률로서 헤이그 국제아동탈취협약 이행에 관한 법률(‘헤이그아동탈취법’)을 제정하였습니다. 헤이그아동탈취법은 가사소송법상의 기존 제도를 활용하는 것을 전제로 최소한의 조문을 두었는데 특히 법원과 연계되지 않은 민사조정이나 아동탈취명령을 집행하기 위한 새로운 제도를 도입하지는 않았습니다.

탈취협약에 따른 아동반환사건은 서울가정법원의 전속관할에 속합니다. 이는 관할을

집중함으로써 탈취사건을 다루는 법관의 전문성을 제고하고 경험을 축적하도록 하려는 것입니다. 아동의 한국으로의 불법적인 이동 또는 유치로 인하여 탈취협약에 따른 양육권이 침해된 자는 관할법원에 아동의 반환을 청구할 수 있습니다(헤이그아동탈취법 제12조 제1항).

아동의 반환청구에 관하여는 탈취협약, 이행법률 및 대법원규칙(헤이그국제아동탈취협약 이행에 관한 대법원규칙)에 따르고, 대법원규칙으로 정한 사항을 제외하고는 가사소송법에 따른 (ㄸ)류(類) 가사비송사건에 관한 규정을 준용하고 있습니다. 법원은 이행법률의 청구 사건에 관하여 아동의 권익 보호 또는 아동의 추가적인 탈취나 은닉을 예방하기 위하여 가사소송법 제62조에 따른 사전처분 또는 제63조에 따른 가처분을 할 수 있습니다. (ㄸ)류 가사비송사건은 가정법원에 소를 제기하거나 심판을 청구하고자 하는 자는 먼저 조정을 신청해야 합니다. 법원은 사건이 접수되면 즉시 변론기일을 정하고 상대방의 출석을 명하여야 합니다. 반환사건의 핵심은 불법탈취된 아동을 신속하게 아동의 탈취 전 상거소로 반환하는 것이므로 변론의 초점도 그에 한정됩니다. 이행법률은 법원의 아동반환명령의 실효성을 확보하기 위한 수단으로서, 이행명령, 과태료 부과와 감치명령을 할 수 있게 하였습니다.

최근 서울가정법원 사건수를 살펴보면, 2014년, 2015년 각 1건, 2016년과 2017년 각 3건 선고되었고, 접수는 2017년 1월부터 6월 현재까지 4건이 접수되어 조금씩 늘어나고 있습니다. 심리에서의 쟁점은 주로 새로운 환경적응 주장 등 반환예외사유가 있는지에 대하여 이루어지고 있는 것으로 보입니다.

3. 기타 HCCH 협약이 한국 국제사법과 민사소송법에 미친 영향

비록 한국이 가입한 협약은 아니지만 HCCH 협약의 주요 내용이 국제사법이나 민사소송법 개정작업을 하는 과정에서 논의가 되어 반영되는 경우도 있었습니다.

먼저 부양의 준거법에 관하여, 2001년 개정된 국제사법은 부양권리자를 보호하고자 헤이그회의의 1973년 “부양의무의 준거법에 관한 헤이그협약”(“부양협약”)의 주요내용을 수용하였습니다. 즉 국제사법 제46조에서는 부양을 하나의 독립된 연결대상으로 취급하여 원칙적으로 모든 부양의무의 준거법을 통일하고, 부양협약의 원칙을 수용하여 부양권리자를 두텁게 보호하고, 부양의 재산적 특성을 고려하여 준거법 결정원칙을 정하되, 이혼당사자 간의 부양의무에 관하여는 이혼의 준거법에 의하도록 하였습니다. 국제사법의 태도는 부양권리자의 보호라고 하는 실질법적 가치를 국제사법적 차원에서 고려한 것이라고 할 수 있습니다.

또 유언의 방식에 관하여 1961년 “유언에 의한 처분의 방식에 관한 법의 저축에 관

한 헤이그협약”(‘유언방식협약’)의 주요내용을 국제사법 제50조 제2항에 반영하였습니다.

현재 국제재판관할에 관한 국제사법 개정작업이 진행 중인데 그 과정에서 HCCH의 “민사 및 상사사건의 국제재판관할과 외국재판에 관한 협약”의 1999년 예비초안(Preliminary Draft)와 이를 수정한 2001년 초안, 재판프로젝트(Judgment Project)에 있었던 논의와 2005년 성안된 “국제재판관할합의에 관한 협약(Convention on Choice of Court Agreements)”(‘관할합의협약’)의 규정을 많이 참고하고 있는 것으로 알고 있습니다. 또 관할합의협약 제11조의 징벌적 손해배상에 관한 규정은 2014. 5. 20.자로 개정되어 신설된 민사소송법 제217조의2(손해배상에 관한 확정재판 등의 승인)에 영향을 주기도 하였습니다.

4. 결론을 대신하여

- HCCH와 대한민국 사법부 사이의 교류확대 및 장래 과제 등

지금까지 말씀드린 것처럼 우리나라는 HCCH에 가입한 후 20년간 민사사법공조나 국제사법 분야 등에서 많은 변화가 있었습니다. 특히 송달협약 및 증거협약 가입을 계기로 국제사법공조분야나 국제민사소송절차에서 많은 진전과 발전이 있었고, 탈취협약 가입을 통하여 국제가족법 분야에서 국제적 정합성을 갖추었습니다. 앞으로 입양협약 비준이 있게 되면 HCCH와 협력범위는 더욱 확대될 것입니다. 2001년 국제사법의 개정과정에서도 HCCH의 여러 협약이 반영되었고, 현재 관할합의협약에 관하여는 현재 진행 중인 국제사법개정에 많은 참고가 되며 더 나아가 관할합의협약에의 가입도 기대하고 있습니다.

앞으로도 우리나라는 HCCH가 진행하는 장래 주요 과제 선정작업과 이를 추진하는 과정에 더욱 적극적으로 참여해야 하고, 이를 위하여 실무 감각을 갖춘 국제사법 전문가를 계속 양성하여야 합니다. 대법원은 2005년부터 대법원 산하에 국제규범연구반을 두고 있고 관련주제에 관하여 연구를 계속 해오고 있습니다. 저도 초대 연구반장의 한 사람으로서 관여한 바 있습니다. 국제규범연구반 산하의 사법공조반은 현재 15명의 판사가 활동 중입니다. HCCH 관련 각종 협약 및 기타 사법공조에 관하여 연구하고, 매년 HCCH가 주최하는 국제회의에 전문가들과 함께 꾸준히 참석하고 있습니다. 2016년에는 HCCH의 국제상거래 글로벌체계 구축을 위한 회의, 입양협약 실무작업반 회의, 아포스티유협약의 이행에 관한 특별위원회, 외국판결의 승인과 집행에 관한 프로젝트(Judgment Project) 특별위원회 회의 등에 참가하였습니다. HCCH에서 주최하는 국제회의에 참가한 판사들은 출장에서 돌아와 출장보고서를 작성하여 그 내용 및 결과를

법원에 소개하고, 그것이 법원의 실무에 반영되며 향후의 연구과제가 되기도 합니다. 6기 사법공조반의 일원인 이해랑 판사는 관련 HCCH에 출장을 다녀온 경험을 토대로 HCCH에서 출간한 헤이그국제상사계약준거법원칙 해설서를 번역하여 이번 행사에서 출간 기념식을 가질 계획이고, 또 현재 HCCH의 2016년 개정 송달협약 핸드북 [Practical Handbook on the Operation of the Service Convention, 4th edition (2016)]을 한국어로 번역하여 발간하여 국내에 소개하려는 작업을 하고 있습니다. 또한 대법원은 HCCH에 판사를 꾸준히 파견하여 왔습니다. 2010년 8월 처음으로 박정훈 판사가 파견되었고, 이어서 정하경 판사, 김윤중 판사, 황인준 판사가 다녀왔으며, 2017년 6월 현재 장지용 판사가 파견되어 있습니다. 향후에도 우리 사법부는 HCCH 여러 협약의 가입 여부 및 올바른 실무상 운용에 관하여 심도 있게 연구하고, 지속적이고도 적극적으로 교류해나감으로써 ‘국제사법 규정의 점진적인 통일을 위한 업무를 수행하는 것을 목적’으로 하는 HCCH와 그 뜻을 항상 같이 해나가고자 합니다.

〈별표〉

구분 년도	송달협약				증거협약			
	국외		국내		국외		국내	
	촉탁	회신	촉탁	회신	촉탁	회신	촉탁	회신
2000.8	100	32	59	50				
2001	351	189	314	290				
2002	231	199	347	341				
2003	429	331	374	367				
2004	448	379	455	447				
2005	667	563	533	521				
2006	243	183	606	587				
2007	267	195	570	560				
2008	252	203	755	672				
2009	342	289	630	540				
2010	303	251	658	567	4	3	3	2
2011	317	278	604	538	4	4	20	7
2012	323	272	572	565	8	6	19	6
2013	298	230	546	537	6	4	17	6
2014	398	293	435	434	8	7	11	9
2015	401	315	436	429	8	6	2	2
2016	453	303	460	377	10	6	11	2
2017.6	240	56	242	123	6	2	5	0
총계	6063	4561	8596	7945	54	38	88	34



HCCH Asia Pacific Week 2017

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Korea's 20th Anniversary : Retrospect and Prospect

Presentation

Retrospective of Korea's Early Years
as a Member of the HCCH

Young-Hill Liew

Judge of Seoul Central District Court (Korea)

Retrospective of Korea's Early Years as a Member of HCCH

July 5, 2017
Young-Hill Liew
Judge
Seoul Central District Court

1st Encounter with HCCH

2nd Special Commission to discuss Hague Judgment Convention
(June 1997)

📦 Invited as a prospective member – 2 months before the accession

📦 The draft convention

- Jurisdiction and enforcement of foreign judgments – core issue of the Judiciary
- Ambitious goal of a global double convention – great impact anticipated on the law and practice of Korea

1st Impression

Meeting of experts with a long history of participation

- In-depth understanding of the subject
- Mutual respect and harmony
- Beginning of learning and adaptation period

Suggestion to think about the possibility of acceding to the Hague Adoption Convention

- Another area of HCCH' s focus
- Reminder of human rights as a value of priority

3

Judiciary & International cooperation

Korean Judiciary's Proactive Approach

Increasing need to resolve issues arising from litigations of international nature

- Delay in service of process in a foreign country (no reply, 10 to 40%)
- Frustrated evidence collection abroad
- Request for bilateral judicial cooperation received from Mongo, Bulgaria in 1996

Creation of a division specializing in international matters (Court Administration Rule revised on 1997. 2. 26.)

- Systematic and organized approach
- Judicial policy – forward looking, consistent

4

Judiciary & International cooperation

Korean Judiciary's Proactive Approach

Compatibility , Competitiveness

- Law and Practice
- Judicial Administration
- Responsibility as a member following OECD accession in 1996 (being reviewed from a global standard)

Vision for Korean Judges in international community

- Encourage active interaction with the international community
- Possibility of becoming members of international courts, like ICC or ICJ

5

Steering Committee for International Judicial Cooperation in Civil Matters

Members (1999. 9. 30)

Judiciary	Judges	3
Ministry of Justice	International Affairs Bureau	1
Ministry of Foreign Affairs	Directors of Treaty Division	2
Professors	Private/Public international Law	2
Attorneys	Domestic/International Practice	3
KERI	Association of Business Entites	1

6

Background

- Court take responsibility on matters related to judicial function
- Coordinate and cooperate with relevant government bodies at an early stage
- Reflect need and views of judicial service consumers

Scope of review – Supreme Court Regulation No 240(1997. 5. 15.)

- Accession to multilateral Conventions (including reservation issues)
- Conclusion of bilateral treaties, drafting model treaties
- A variety of cooperation with foreign judiciaries or International institutions

7

Steering Committee for International Judicial Cooperation in Civil Matters

Activities (1997. 6. - 1999. 3. 22.)

1	1997. 6.	Current Law and Practice/HCCH Conventions as an option to resolve issues
2	1997. 7.	Hague Civil Procedure Convention/Hague Service Convention
3	1997. 9.	Hague Service Convention
4	1998. 4.	Domestic Legislation required to implement Hague Service Convention
5	1998. 6.	Current practice of international evidence collection in aid of Korean/foreign litigation

8

6	1998. 7.	Hague Evidence Convention (1)
7	1998. 8.	Hague Evidence Convention (2)
8	1998. 11.	Draft Convention on International Jurisdiction and Enforcement of Foreign Judgment (Preparation for the indicative vote at the 3rd Special Commission)
9	1999. 3. 15.	Korea – Australia Treaty on Judicial Assistance (1) (Korean Draft for Negotiation)
10	1999. 3.	Korea – Australia Treaty on Judicial Assistance (2) (Korean Draft for Negotiation, issues for coordination)

9

Continued Participation in the Hague Judgment Project

Change of Scheme of the Convention

Double ➤ Mixed ➤ Choice of Court ➤ Recognition and Enforcement

Special Commission 1998. 3.

➤ Recognition and Enforcement of Foreign Judgments

Special Commission 1998. 11.

➤ Indicative Vote on the draft Convention

Special Commission 1999. 6. & 10.

➤ Comprehensive draft of the Convention reviewed (WD 320 E)

10

Informal Meetings to discuss key areas

- **Electronic Commerce**
- **Activity based jurisdiction**
- **consumer protection**

Diplomatic Conference (2001. 6. 6 – 6. 20)

- **Serious attempt to finalize the draft (36 countries, 141 experts)**
- **37 interventions and 5 working documents by the Korean delegation (WD 22, 25, 29, 77, 107)**

11

Activities of the Korean Delegation

Comments during the Discussion

- **Sharing thoughts to make a contribution**
- **Inform the delegations of Korea specific law or practice**

Submission of Working Documents

- **Joint proposal by a like-minded group included**

Comprehensive opinion on the draft Convention (preliminary document No. 14)

- **Professor Suk, Kwang Hyun played a pivotal role**
- **Comments of the Court sent to the Ministry of Foreign Affairs (2001. 1.) – Preliminary meeting among the Delegation members on January 27.**

12

An Example of Working Document

Proposal by the delegation of the Republic of Korea (Working Document No. 23
0 of the Special Commission 7-18 June 1999)

Article 35 Communication or Consultation with Foreign Judges

1. Under the situations provided for in Articles 23 and 24, a judge of a Contracting State (the requesting court) may communicate or consult with a judge of other Contracting States (the receiving courts) for the purpose of determining which court is manifestly in a better position to try the case at issue.
2. a) Each Contracting State may designate a national authority to receive requests from foreign courts to facilitate the communication or consultation referred to in paragraph 1, above. b) Where a national authority has been designated as provided in paragraph 2 a), a judge of the requesting court shall first contact the national authority and not communicate or consult with the judges of the receiving court.

Note: This proposal is designed either to replace Article 35 (Transfrontier Communication between the judges) of Information Document No. 2. or to be inserted as a part of Article 23 (lis pendens) and Article 24 (declining jurisdiction)

13

EU & U.S.'s Bilateral Talks with Korea

Video Conference with EU Delegation (2011. 11.)

- A bilateral talk to overcome deadlock of the grand scheme Convention
- Large and Mixed Convention vs. Small sized Convention
- Pragmatic and flexible approach suggested

U.S. Delegation visits Korea (2011. 12.)

- Prior exchange of issues and comments
- Feedback from the business community – large and mixed Convention is impractical or premature to adopt
- Serious reconsideration related to IP rights or Electronic Commerce

14

Accession to the Hague Service Convention Completed

Whether or not domestic legislation is required

- Service Convention, Evidence Convention

Consent by National Assembly

- Korean Constitution Article 60

The National Assembly shall have the right to consent to the conclusion and ratification of treaties pertaining to any restriction in sovereignty; peace treaties; treaties which will burden the State or people with an important financial obligation;

or treaties related to legislative matters.

- Episode In the Standing Committee on Unification, Foreign Affairs and Trade in 1999

15

Hidden Efforts to Upgrade Judicial Assistance In Real Life

JAMS(Database program)

Importance of Software

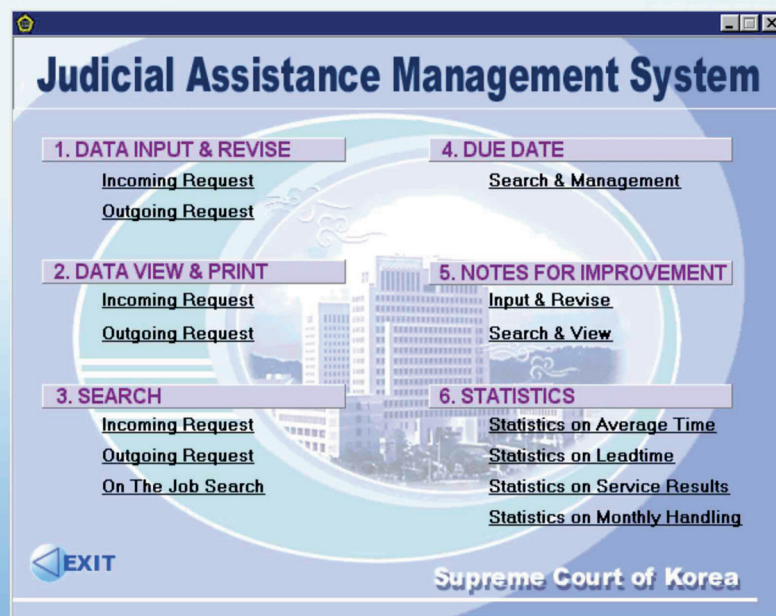
Local courts fully occupied with domestic cases
Special attention required to execute foreign request
Operation of treaties on a workable level imperative

JAMS introduced in 1998

- Judicial Assistance Management System
- manages operation of judicial assistance to and from foreign countries

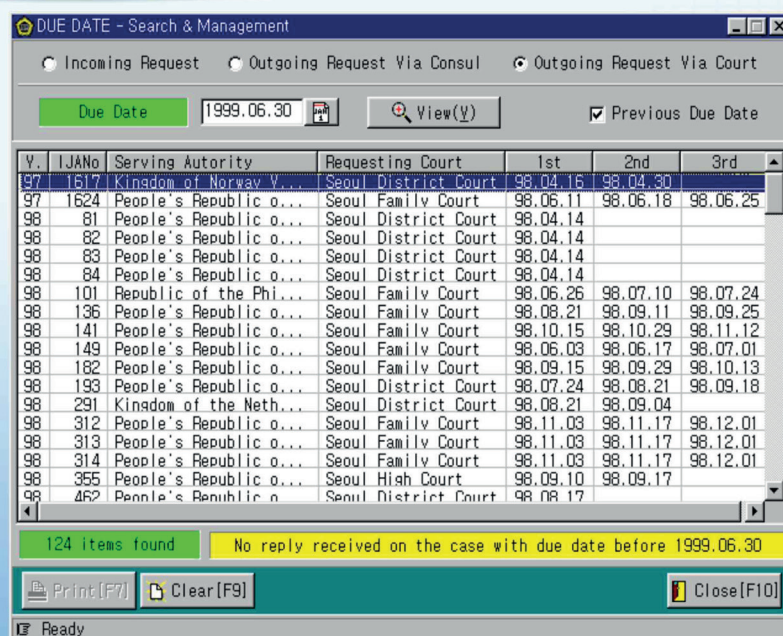
16

Overview of JAMS



17

Need for a Bilateral talk detected



18

Due date check - prevent stale document

DUE DATE - Search & Management

☒ Incoming Request
 ☐ Outgoing Request Via Consul
 ☐ Outgoing Request Via Court

Due Date: 1999.06.30

☒ Previous Due Date






V.	IJANo	Court of Execution	Requesting Court	1st	2nd	3rd
98	65	Seoul District Court	Japan Kobe District	99.05.03		
98	143	Chonju District Court	Japan Tokyo District	99.04.13		
98	193	Cheju District Court	Japan Sapporo District	99.06.16		
99	31	Taejeon District Court	People's Republic of...	99.03.09		
99	32	Taejeon District Court	People's Republic of...	99.03.10		
99	36	Seoul District Court	State of Kuwait Expe...	99.05.08		

6 items found No reply received on the case with due date before 1999.06.30

Ready

19

Korea-Australia Judicial Assistance Treaty(1999)

-  **1st Treaty between Korea and a Common Law Country on Mutual Judicial Assistance in Civil and Commercial Matters**
-  **Active participation of the Judiciary**
-  **Flexible Coordination between Civil Law and Common Law – cost bearing, commissioner and etc.**
-  **Modern technology into the Treaty – video linked testimony**
-  **Reciprocity as a requirement for recognition and enforcement of foreign judgment – progress in a matter that remained outside of the Treaty**

20

Asia Pacific Chief Justices' Conference in Seoul (1999. 9.)

A topic of the Conference

- Promotion of International Judicial Assistance in Civil and Commercial Matters in the Asia-Pacific Region – 1st session

Seoul Statement on Mutual Judicial Assistance in the Asia Pacific Region(1999. 9. 9.)

- Agreed understanding among 29 chief justices of the region
- Reference to HCCH Conventions – Hague Service, Evidence Conventions
- Concerted efforts in the Asia Pacific region to promote mutual judicial assistance

21

Thank you

HCCH Asia Pacific Week 2017

Korea's 20th Anniversary : Retrospect and Prospect

Presentation

Secondment of Korean Judges to HCCH

Jiyong Jang

Judge on secondment to the HCCH

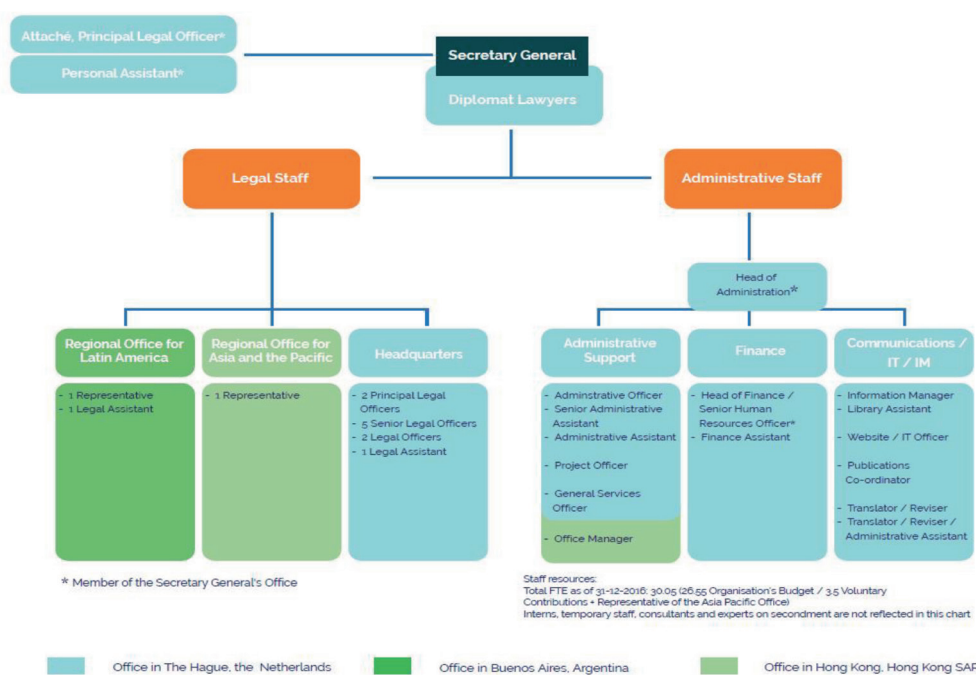
Secondment of Korean Judges to HCCH

HCCH Asia Pacific Week 2017

Seoul, 3-6 July 2017

Jiyong Jang
Judge on Secondment

Organisation Chart



Organisational chart of the Permanent Bureau (2016)

What is the Secondment?

- ✓ 派遣, Détachement
 - ✓ Detachment from regular organisation for temporary assignment elsewhere
 - ✓ Temporary position to work for the HCCH
-
- ✓ Not employed by the HCCH, Paid by her/his government
 - ✓ Working for the HCCH (not for the government)
 - ✓ As a(n) Expert / Legal Officer / Consultant / Technical Assistant etc.

Qualification

- ✓ Who?
 - Public Servant from the government of a Member State
 - Expert from a Central Authority, University, Judiciary
-
- ✓ Law School Education including conflicts of laws, familiarity with comparative law; knowledge of public international law is desirable
 - ✓ Good command, both written and spoken, of at least one of the official languages (French or English); knowledge of another language is desirable
 - ✓ Good drafting capabilities

Objectives / Duties

- ✓ To exchange experiences and skills / For international co-operation / Liaison
 - ✓ For training / career development
 - ✓ To share experiences at the PB with the people in the Member State after the secondment
- ✓ Research on particular points of private international law or comparative law
 - ✓ Prepare and take part in various meetings organised by the HCCH
 - ✓ Preparatory work of translation or documentary research in accordance with the agenda of the HCCH

Secondment Agreement

- ✓ Discussion with interested government
 - ✓ Conclusion of an agreement – 4 ~ 8 months
 - ✓ Combined with Working Agreement & Working Programme
- ✓ New MOU with Korean National Court Administration
 - On July 7 at the Korean Supreme Court



Former Secondees

- ✓ Ms Jennifer Degeling (Former Secretary), An Expert on Secondment from the Government of Australia before joining PB in 2005
- ✓ From Department of Justice, Central Chong Kong SAR, China (2001-2002)
- ✓ From the Kyoto University, Japan (2004)
- ✓ From the Ministry of Quebec, Canada (2005)
- ✓ From the Government of British Columbia, Canada (2008-2009)
- ✓ From the Territorial Division of Social Welfare of Alicante of the Generalitat Valenciana, Spain (2010)
- ✓ From the Department of State, USA (2010, 2011-2012)

Former Secondees (Cont.)

- ✓ From the Central Authority for the 1980 Abduction Convention, Switzerland (2011 – 2012)
- ✓ Professor from the University of Neuchatel, Switzerland (2014-2015)
- ✓ From the Ministry for Justice and Consumer Protection, Germany (2014-2015)

- ✓ Current Status
 - Chair of the Experts' Group, the Working Group
 - Delegation to the HCCH meetings including Diplomatic Session, Council on General Affairs and Policy, Special Commissions
 - Working at Central Authorities

Former Korean Secondees

- ✓ Judge Jung Hoon Park (2010), Gwangju High Court
 - ✓ Judge Ha-Kyung Jung (2013), Studying at Cambridge Univ.
 - ✓ Judge Yoonjong Kim (2014), Supreme Court
 - ✓ Judge Injun Hwang (2015), Suwon District Court
- ✓ Why from Judiciary ?
 - Leading Role in joining a Membership of the HCCH
 - Central Authority for 2 (out of 4) Hague Conventions
 - Neutral, Independent Position / Judicial Co-operation
 - Specialised in Judgment, R&E, Family Law (Research Group)

Current Secondees / Merits

- ✓ Keith LOKEN (USA, from June 2014)
- ✓ Daniel ZHU (China, from 2013)
- ✓ Jiyong JANG (Korea, from August 2016)

- ✓ Win-win
- ✓ Benignant Circle
- ✓ Mutual Understanding, International Co-operation

Thanks for your kind attention

Jiyong Jang – jj@hcch.nl



www.hcch.net



HCCH Asia Pacific Week 2017

*3rd(Mon) - 6th(Thu) July 2017
Four Seasons Hotel Seoul*



SESSION 1.

Presenter

Ongoing Issues of the Hague Conference

Christophe Bernasconi
Secretary General of the HCCH

Ongoing Issues of the Asia Pacific Regional Office

Anselmo Reyes
Representative of Asia Pacific Regional Office of the HCCH



Presenter

Christophe Bernasconi

Secretary General of the HCCH

Christophe Bernasconi is the fourth Secretary-General of the Hague Conference on Private International Law. He took office on 1 July 2013. He joined the Permanent Bureau (Secretariat) of the Hague Conference in September 1997.

As Secretary-General, Dr Bernasconi is responsible for the administration of the Hague Conference (with currently 146 connected States, and a total of 80 Members from around the world) and the operation of its Permanent Bureau (approx. 30 FTEs). He has long-standing expertise in the field of international civil procedural law (jurisdiction of courts, recognition and enforcement of foreign judgments, service of process and taking of evidence abroad, access to justice, etc.), international administrative cooperation (Apostille; he is the designer and principal administrator of the electronic Apostille Program, e-APP), international commercial and finance law (intermediated securities), as well as international child protection law (parental child abduction, protection of children generally). He has been responsible for various meetings of Special Commissions, Experts' and Working Groups, both in relation to normative work of the Hague Conference and post-Convention services. His current focus is on developing and implementing various management improvement initiatives at the Permanent Bureau, and on furthering the global visibility of the Hague Conference.

He holds a law degree from Fribourg University in Switzerland (magna cum laude; bilingual German/French), an LL.M. degree in comparative law from McGill University in Montreal (Canada), and a doctoral degree in Private International Law from Fribourg University (summa cum laude).

Before joining the Permanent Bureau, Dr Bernasconi lectured at the University of Fribourg, worked as Legal Expert at the Swiss Institute of Comparative Law in Lausanne, and as Scientific Collaborator at the Federal Office of Justice in Switzerland. He also advised practitioners on various Private International Law matters.

Dr Bernasconi was a Member of the Model Notary Act Revision Committee (USA), which produced the Model Notary Act 2010, published by the National Notary Association (NNA). He was also a Member of the International Bar Association Capital Markets Forum Subcommittee on Legal Certainty for Intermediated Securities, and was Co-Rapporteur of the International Law Association's former Committee on Transnational Enforcement of Environmental law. He is an Honorary Fellow of the Australian New Zealand College of Notaries (ANZCN). He is a member of the advisory board of the Hague Project Peace and Justice Foundation.

He was born in 1964 in Basel, Switzerland. He is married and has 3 children.



Presenter

Anselmo Reyes

Representative of Asia Pacific Regional Office of the HCCH

Education

- AB (Harvard), BA, LLM, PhD (Cambridge)

Work Experience

- Professor of Legal Practice, University of Hong Kong -- 2012 to present
- International Judge, Singapore International Commercial Court -- 2015 to present
- Judge, Court of First Instance, Hong Kong -- 2003 to 2012
- Senior Counsel, Temple Chambers, Hong Kong -- 2001 to 2003
- Barrister, Temple Chambers, Hong Kong -- 1989 to 2001

Published Books

- 淺談新民事司法訴訟 (Reflections on Civil Procedure under Civil Justice Reform) (Sunny Chan, trans.), Joint Publishing (HK) Co. Ltd., March 2012.
- 淺談香港仲裁法 (How to be an Arbitrator - A Personal View) (Sunny Chan, trans.), Joint Publishing (HK) Co. Ltd, June 2013.



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SESSION 1.

Presentation

Ongoing Issues of the Hague Conference

Christophe Bernasconi

Secretary General of the HCCH



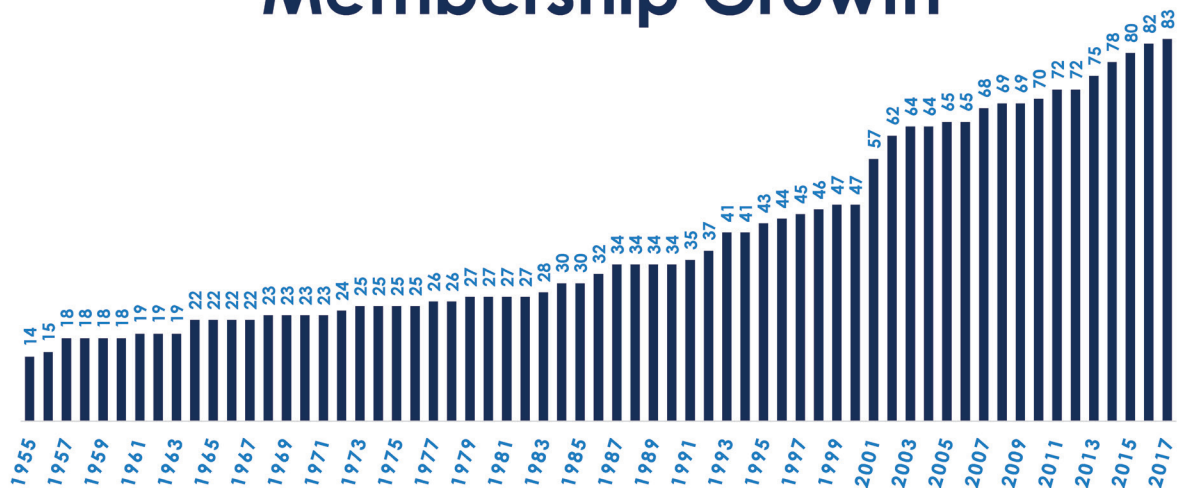
The Continuing Evolution of the HCCH: Looking at Some Key Figures

Seoul, Republic of Korea
5 July 2017

Dr Christophe BERNASCONI
Secretary General



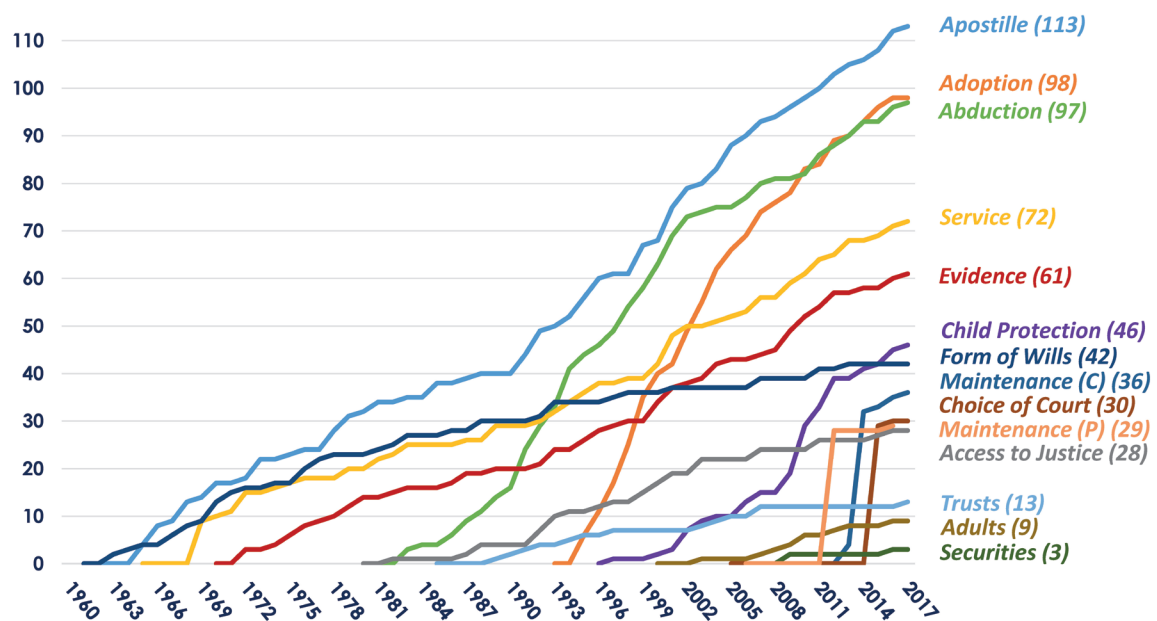
Membership Growth



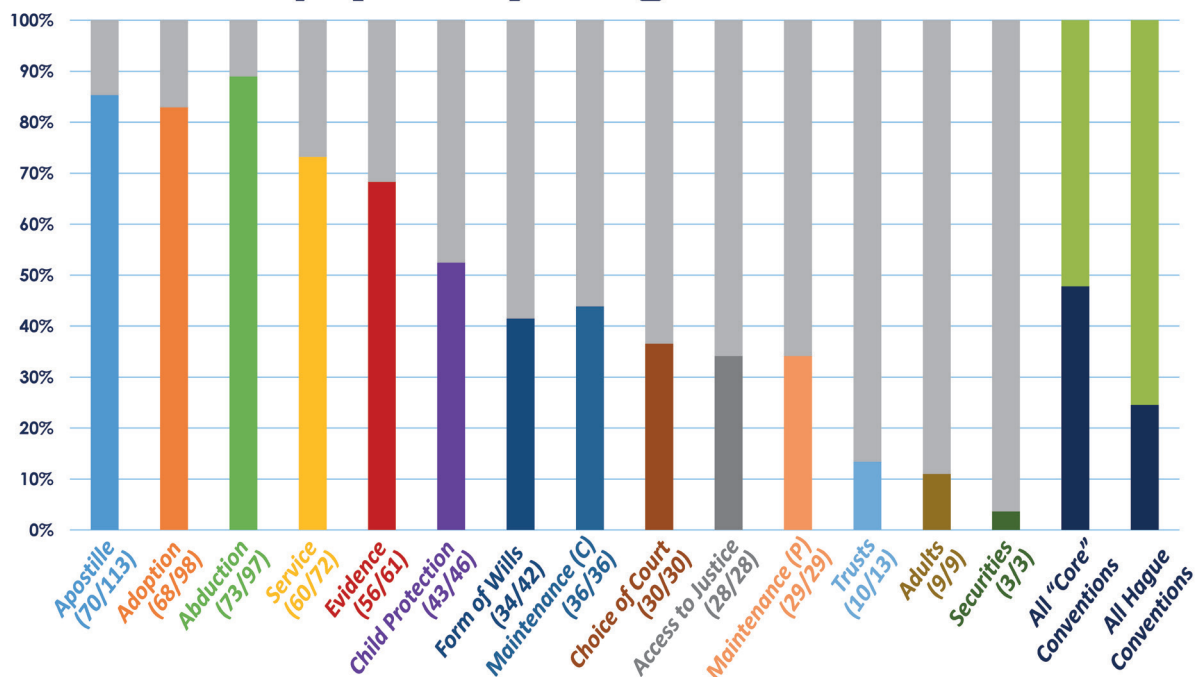
36 New Members since 2000:
(43% of the Membership)

- 13 in Asia
- 11 in Europe
- 5 in Africa
- 4 in South America
- 2 in North America
- 1 in Oceania

Number of States/REIOs bound by the Core Hague Conventions



Percentage of Members bound by (core) Hague Conventions



Hague Conventions



On average, HCCH Members are party to:

"Core" Conventions



Average Time between Adoption and Entry into Force

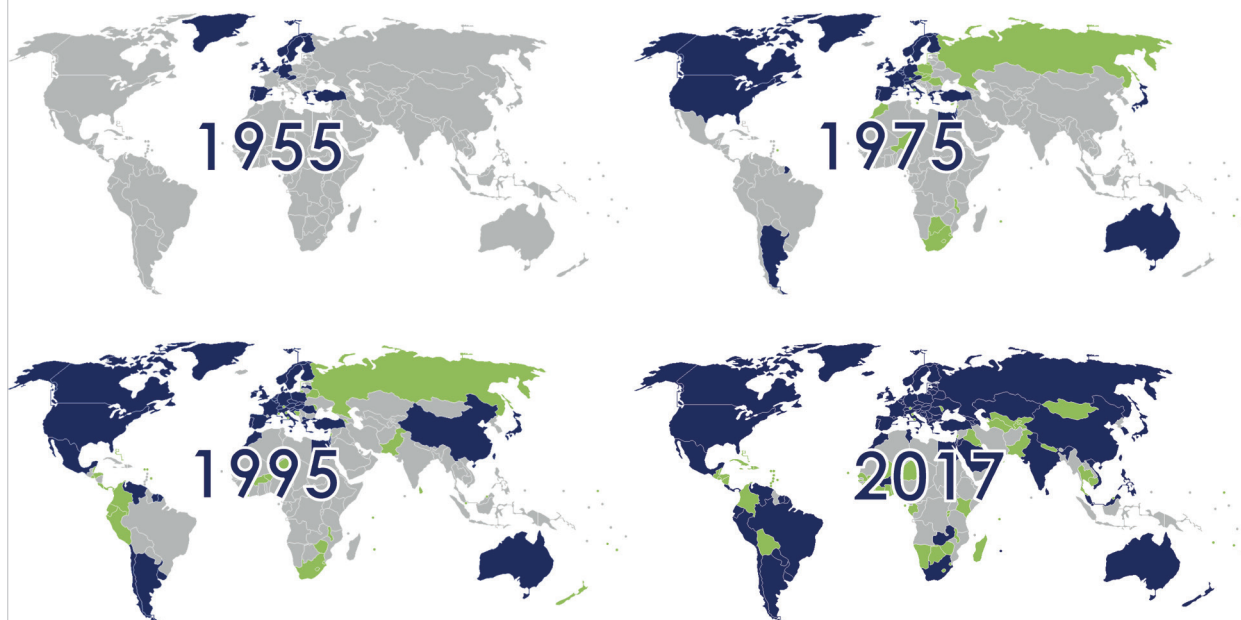
- Across all instruments: **7.28 years**
- For the “Core” Conventions: **5.44 years**

Average Time between Diplomatic Session and Entry into Force

- Across all instruments: **8.72 years**
- For the “Core” Conventions: **6.12 years**

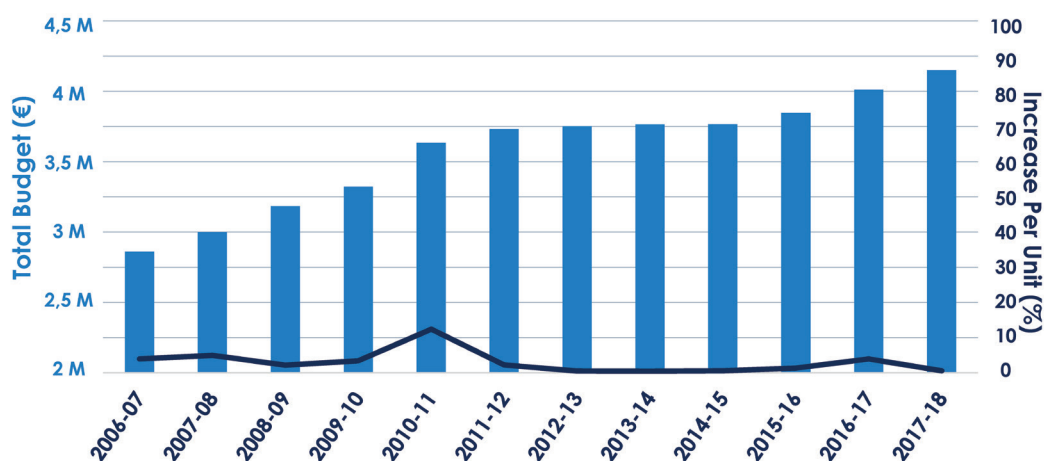


Connected States over the years...



Budget Evolution

(Financial Year LXIII: 2017-2018)



Work in the Pipeline

Work relating to possible new instruments:

- **Judgments** Project
- Recognition and enforcement of cross-border **family agreements involving children**
- Use of **video-link** and other modern technologies in the taking of evidence abroad
- Private international law issues surrounding the **status of children**, including issues arising from international surrogacy arrangements
- Co-operation in respect of **protection of tourists** and visitors abroad
- Recognition and enforcement of foreign **civil protection orders**



Looking Forward (and beyond!)

- 2016** • The **Council on General Affairs and Policy**:
“strongly supported the pursuit of universality of the Hague Conference and decided to continue discussion of the matter” (C&R No. 22)
- 2017** • **Current financial year**:
- Budget of just **EUR 4.1 million** (approx. USD4.5 million)
 - *Approximately 30 members staff* at the Permanent Bureau
 - Continue work on **legislative projects** and **post-Convention services** pursuant to Council mandate
 - Implementation of organisational initiatives such as new **Staff Rules** (and continuing implementation of new **Financial Regulations**)
- 2018** • **HCCH 125th Anniversary** • Continuing to **strive toward universality**
- **Possible Diplomatic Session on Judgments** • Increasing **regional presence** (see, e.g. Africa Strategy)
 - Enhancing **resources** and **capabilities** – both human and financial
- ...

Dr Christophe BERNASCONI

cb@hcch.nl



www.hcch.net

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HCCH Asia Pacific Week 2017

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SESSION 2.

International Litigation & Information Technology : Service by Electronic Means

Moderator

HyongWon BAE
Presiding Judge of Seoul High Court (Korea)

Presenter

Mayela Celis
Principal Legal Officer of the HCCH

Panelist

Jung Hoon Park
Judge of Gwangju High Court (Korea)

Marie Vautravers
Deputy head of Private International Law Unit of Ministry of Justice (France)

Ian M. Catlett
Director of Overseas Citizen Services, Office of Legal Affairs (USA)

PHAM Ho Huong
Deputy Director General of Department of International Legislation,
the Vietnam Ministry of Justice (Vietnam)



Moderator

HyongWon BAE

Presiding Judge of Seoul High Court (Korea)

Education

- 1990. Seoul National University(LL.B.)
- 2000. Columbia Law School(LL.M.)

Work Experience

- 1995. Judge, Incheon District Court
- 1997. Judge, Seoul Central District Court
- 2003. Judge, Seoul High Court.
Director of International Affairs, National Court Administration.
- 2006. Legal Attache, Embassy of Korea in Austria and Representative of Korea for International organization in Vienna
- 2008. Presiding Judge, Kwangju District Court
- 2011. Director General for Personnel, National Court Administration
- 2013. Presiding Judge, Seoul Central District Court
- 2014. Presiding Judge, Busan High Court
- 2016. Presiding Judge, Seoul High Court



Presenter

Mayela Celis

Principal Legal Officer of the HCCH

Education

- UNED (Universidad Nacional de Educación a Distancia), Madrid, Spain – Doctor of Laws (expected in 2019/2020)
- NYU (New York University) – Master of Laws (LL.M.) (2003-2004)
- Universidad Panamericana, Mexico, Bachelor of Laws (1996-2001)

Work Experience

- Hague Conference on Private International Law (2005-present). Principal Legal Officer as of January 2015
- Prior to joining the Permanent Bureau, Mayela worked in private practice, mainly focusing on litigation and corporate law in Mexico. She also worked at the Mexican Public Defender's Office in family law matters.

Published Books

- Carried out the main preparatory and drafting work of the updated and expanded 4th edition of the Practical Handbook on the Operation of the Service Convention (2016).
- Mayela has authored a book on Letters of Request in Civil and Commercial Matters (published by the General Council of the Judicial Branch of Jalisco and the Universidad Panamericana in 2003) and has published a range of articles on Private International Law.

Awards

- Chamber of Commerce of Guadalajara award for Bachelor of Law's thesis



Panelist

Jung Hoon Park

Judge of Gwangju High Court (Korea)

Education

- LL.M, 2009, Columbia Law School
- Certificate of Completion, 2001, Judicial Research and Training Institute
- B.A., 1997, Seoul National University

Work Experience

- 2003-2017: Judge at various courts including the Patent Court of Korea
- 2010-2011: Secondment at the Permanent Bureau of Hague Conference on Private International Law
- 2001-2003: Apprentice Judge

Published Books

- Co-authored 'Intellectual Property Litigation Practice', 3rd ed. (Parkyousa, 2014)



Panelist

Marie Vautravers

Deputy head of Private International Law Unit of Ministry of Justice (France)

Education

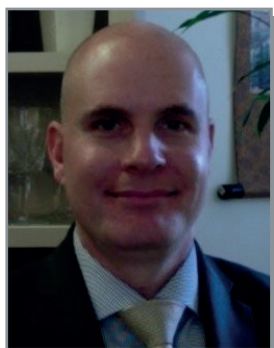
I hold a degree in Human Sciences (LL.L) and I am a graduate of "Sciences-Po Paris" (Political Sciences and Public Administration School of Paris) and the "Ecole Nationale de la Magistrature" (French National Judiciary School).

Work Experience

I am currently Deputy Head of the Private International Law and Judicial Cooperation Unit at the French Ministry of Justice, in charge of the European and Private International Law Department.

I have previously worked as the iSupport Legal/Project Coordinator at the Hague Conference on Private International Law. I was involved in the development of the iSupport case management and secure communication system for more than two and half years (Sept 2014-March 2017) and was responsible for coordinating administrative, financial and legal aspects of the project as well as the promotion of the system.

Before joining the Hague Conference, from 2006 to 2014, I was Family Judge in France (Court of Evreux and Nanterre).



Panelist

Ian M. Catlett

Director of Overseas Citizen Services, Office of Legal Affairs (USA)

Ian M. Catlett joined the U.S. Department of State, Bureau of Consular Affairs – Overseas Citizen Services as an Attorney-Adviser in February 2017. He first joined the U.S. Department of State in 2010, and worked as a Program Officer, Iraq Justice Team Lead, and Africa Division Chief for the Bureau of International Narcotics and Law Enforcement Affairs (INL).

Prior to his service in the Department, Ian was an immigration attorney and legal counsel in the Commonwealth of the Northern Mariana Islands (CNMI), an INL Rule of Law Advisor in Iraq, and a supervising criminal prosecutor for Middlesex County, Massachusetts.

Ian received an L.L.M. in European Union Studies from Leeds University, England; a J.D. from the University of Maine; and a B.A. in International Affairs from the George Washington University. He speaks French and some Arabic and is admitted to the state bars of Maine, Massachusetts, and the CNMI, and the U.S. District Court for the CNMI. He lives in Washington, DC.



Panelist

Pham Ho Huong

Deputy Director General of Department of International Legislation,
the Vietnam Ministry of Justice(Vietnam)

Education

- 1999 – 2001: Master of Law - School of Law, Vietnam National University, Hanoi
- 1992 – 1996: Bachelor in Law - Faculty of Law, Vietnam National University, Hanoi

Work Experience

- 1998 – 6/2011 : Department of International Laws, Ministry of Justice, Vietnam
Position: Legal Expert- Deputy Head of Division of the International Trade Law and International Economic Integration.
- 6/2011 – 4/2015: Department of International Cooperation, Ministry of Justice, Vietnam
Position: Legal Expert- Head of Division on Mutual Judicial Assistance.
- 12/2015 – present: Department of International Law, Ministry of Justice, Vietnam
Position: Deputy Director General

Main Tasks and Experience

- Drafting and/or providing legal opinion for Vietnam normative legal documents such as: laws, ordinances, decrees, decision, especially ones that related to the international law, international private law and international integration areas, for example, involving in drafting the Civil Code 2015 and Civil Procedure Code 2015;
- Reviewing and comparing international agreements with Vietnamese laws;
- Drafting, negotiating and examining international agreements on mutual judicial assistance;
- Preparing the Legislative Program and other legal conditions for Vietnam accession to international conventions/agreements such as Vietnam accession to HCCH, Vietnam's accession to the HCCH Service Convention; Participating in drafting, negotiating bilateral agreements on judicial mutual assistance between Vietnam and other countries;
- Being responsible for implementing international agreements on judicial mutual assistance in civil matter between Vietnam and other countries such as proposing the governmental action plan for implementation of the Service Convention, making guidelines for implementation for the local authorities; being the contact person of the Center Authority in cooperation with Hague Conference and HCCH member countries;
- Participating in preparation legal opinions for the Government in resolving international disputes, which Vietnam involved;
- Conducting training courses on international trade law and private international laws, judicial mutual assistance on civil matter for the officials of ministries and provinces;
- Researched and lectured on international private law such as involving in the governmental project on the possibility of Vietnam to access to the HCCH (in 2013) and governmental projects on the possibility of Vietnam to access to some HCCH's Conventions (Service Convention; Taking of Evidence Convention and the Abduction Convention (in 2014-2016); Ministerial Research Project on "Feasibility for Making a International Private Law in Vietnam", 2014-2016; Ministerial Research Project on "The role of the Ministry of Justice in Solving International Disputes of Vietnam", 2010-2011.

Published Books

- Paper entitled "The Key Issues of the Section 5 of Civil Code 2015 on the Civil Relations Involving Foreign Elements" the Special Edition on International laws in the international integration of the Democracy and Laws Journal, 2016
- Paper entitled "The requirements and orientations for amendment and supplement of the Section 7 of Civil Code 2005", the Special Edition on International laws in the international integration of the Democracy and Laws Journal, 2014
- Paper entitled: "Vietnam's legal framework for meeting WTO commitments on services". Vietnam Law and Legal Forum, August 2007
- Paper entitled: "The Legal service in the trade in services framework of WTO", the Special Edition on International Economic Integration of the Democracy and Laws Journal, February 2005.
- Paper entitled: "Some issues on trade in services in the Bilateral Trade Agreement between Vietnam and the US", the Democracy and Laws Journal, March 2002.

SESSION 2.

Presentation

International Litigation & Information Technology: Service by electronic means

Mayela Celis

Principal Legal Officer of the HCCH



International Litigation & Information Technology: Service by electronic means

HCCH Asia Pacific Week, July 2017

Mayela Celis, Principal Legal Officer, HCCH

This presentation will be divided into two parts:

- I. Service Convention
- II. Service by electronic means in the context of the Service Convention

Part I

Service Convention

*Hague Convention of 15 November
1965 on the Service Abroad of
Judicial and Extrajudicial Documents
in Civil or Commercial Matters*

Objective

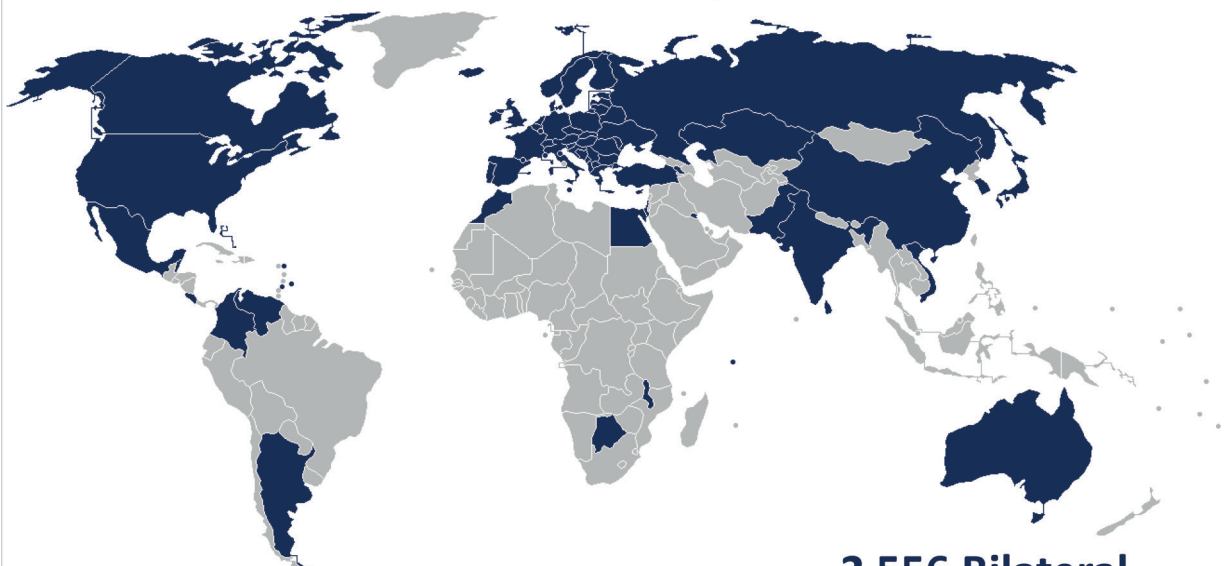


- The Service Convention deals primarily with the **transmission of documents** from one State to another State for the purpose of service in the latter
- The Convention does **not** address or comprise substantive rules relating to the actual service.
- There are two channels where the transmission process includes service on the ultimate addressee (Arts 8 and 10(a))

Global Coverage



72 Contracting States



1 Convention...

instead of

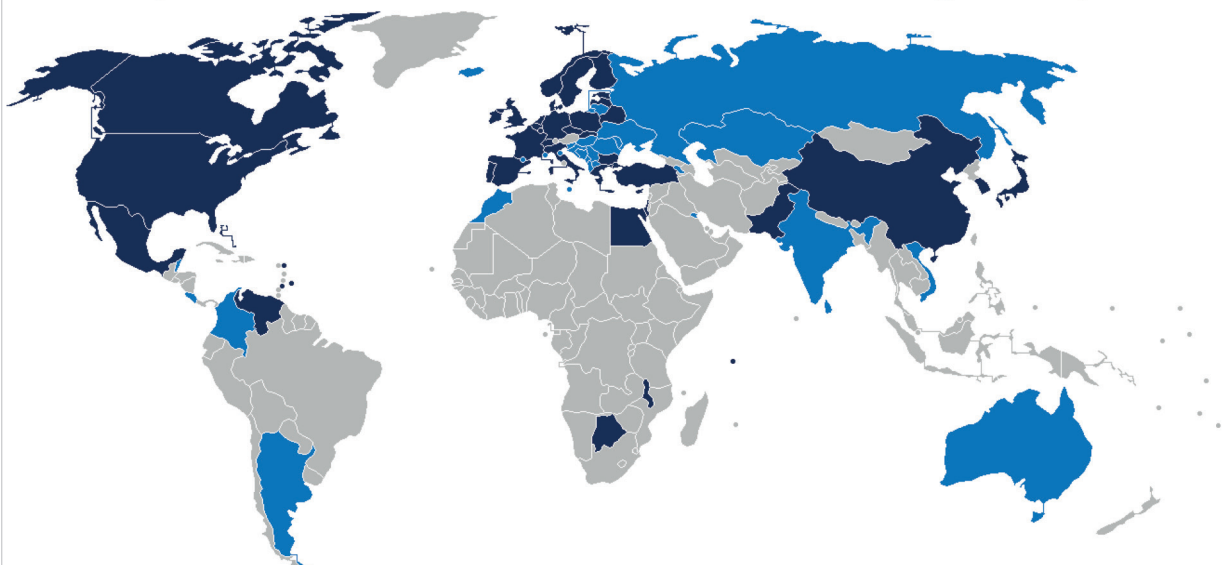
2 556 Bilateral Agreements!

NB: Boundaries on this map are based upon those used by the UN Cartographic Section. The number of States reflects the Parties as recorded by the Depositary (NL MFA). Neither should be taken to imply official endorsement or acceptance.

Continuing Interest



25 new Contracting States since 2000 (Over 30% of the total number of Contracting States)



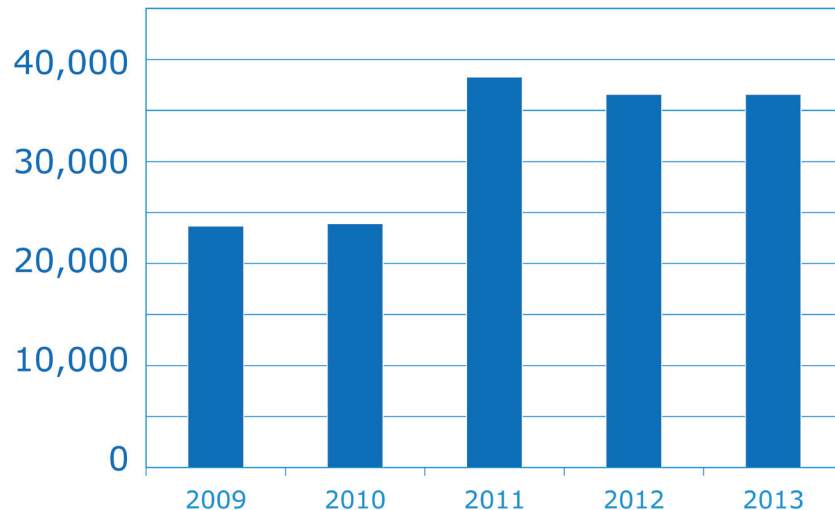
(Andorra, Costa Rica, Viet Nam, Kazakhstan, Armenia, Montenegro, Morocco, Malta, Serbia, Australia, FYR of Macedonia, Iceland, Bosnia-Herzegovina, Monaco, India, Albania, Croatia, Hungary, Romania, Argentina, Russian Federation, Ukraine, Lithuania, Slovenia, Sri Lanka)

NB: Boundaries on this map are based upon those used by the UN Cartographic Section. The number of States reflects the Parties as recorded by the Depositary (NL MFA). Neither should be taken to imply official endorsement or acceptance.

The Convention in Action



Number of Requests for Service



75% of requests executed in under 2 months

The above figures are taken from statistical information received in 2014 from 47 Contracting States to the Service Convention

Four Conditions of Application



- 1) Document to be transmitted for service from one ***Contracting Party to the Convention to another Contracting State***

When using e-mail, how to determine when service is abroad?

- 1) Document to be served must be ***judicial or extra-judicial*** in nature
- 2) Document to be served must relate to a ***civil or commercial matter***
- 3) The ***address*** of the person to be served must be known

An e-mail is not an “address” for the purposes of the Convention

E-communications and forwarding docs



**e-Communication
between
authorities**

**Forwarding
Requests for
Service by
electronic means:
e-mail, fax**

Part II **Service by electronic means**

*Hague Convention of 15 November
1965 on the Service Abroad of
Judicial and Extrajudicial Documents
in Civil or Commercial Matters*

Service abroad *with* the Convention



Service by electronic means may be possible:

1. The main channel

The Central Authority

2. The alternative channels

Art 10(a) and 10(b)

3. The derogatory channels

Service abroad *with* the Convention



Service by electronic means may be possible:

1. The main channel

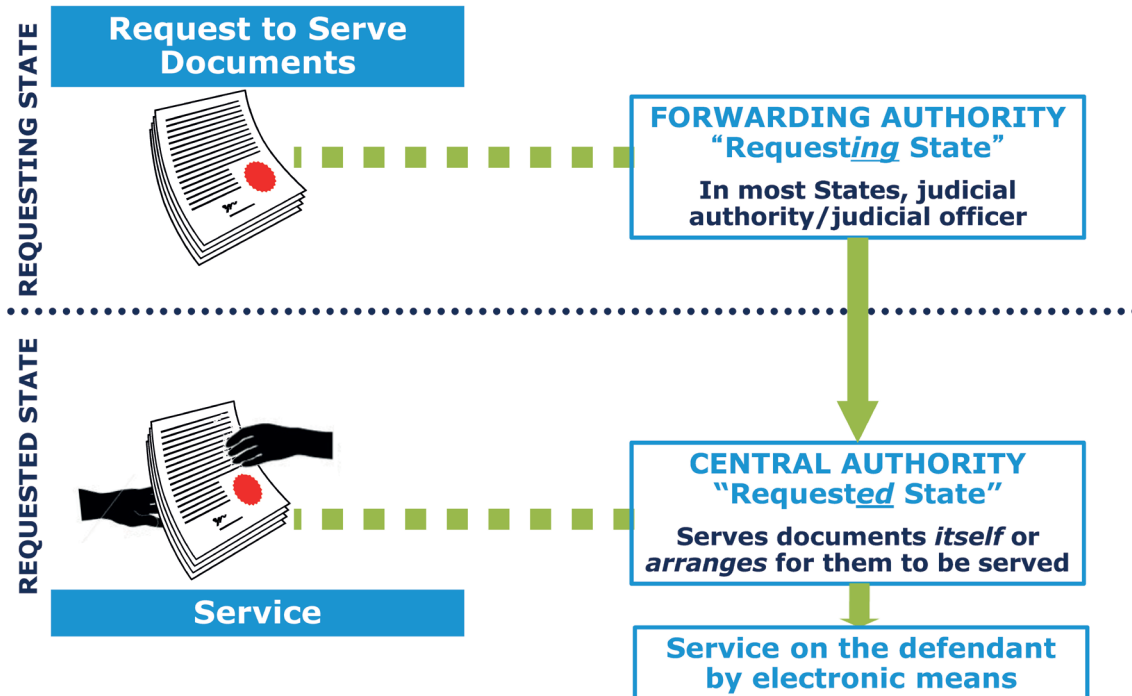
The Central Authority

2. The alternative channels

Art 10(a) and 10(b)

3. The derogatory channels

The Main Channel



The Main Channel



Service by electronic means under **the law of the Requested State** (or service by a particular method):

- 1) **Service of process** (previous authorisation of the defendant needed? – required by many civil law States)
- 2) **Service of other judicial or extrajudicial documents**

Things to consider:

- Scanning the documents to be served
- Electronic signature

Service abroad *with* the Convention



Service by electronic means may be possible:

1. The main channel

The Central Authority

2. The alternative channels

Art 10(a) and 10(b)(c)

3. The derogatory channels

Alternative Channels



Diplomatic and consular channels

↪ Art. 8 and 9

Postal channel

↪ Art. 10(a)

Direct communication

↪ Art. 10(b) and (c)

**A Contracting State may object to the use of
any one of these alternative channels**
(the declarations/objections are available on the HCCH website)

Postal Channels (Art. 10(a))



Under a “functional equivalence” approach, “postal channels” provided for by Article 10(a) may include information technologies such as e-mail or fax in **States Parties that have not objected to Article 10(a)** and to the extent that documents are sent by postal agencies.

- Which postal agencies may send documents by e-mail?
 - ❖ Examples: France, Switzerland

Service by electronic means (national and int’l cases)



- **Rapidly evolving area of law**
- **Evasive defendants**
- **Service by e-mail (incl. service of process):** generally employed by courts in *common law States* (alternative or substituted service)
 - United Kingdom (1996), Canada, Australia
 - United States: **Rio Properties, Inc. v. Rio Int’l Interlink, 284 F.3d 1007 (9th Cir. 2002)**
 - Only US Federal Appeals Court to date
 - Benchmark for service whether or not it concerns a Contracting State to the Convention
 - Service by e-mail was the most likely method of service to reach to defendant

Service by electronic means (national and int'l cases)



- **Service by e-mail (in particular, service of process):** generally employed by courts in *common law States* (by way of alternative or substituted service)
 - In a few cases, courts ordered service by email when the Convention was not practical due to time delays or because the Central Authority showed no disposition to act
 - **Civil law States** have passed laws authorising service by electronic means provided that the recipient has given his or her prior consent
 - **Spain** (service by e-mail via a secure platform upheld by Supreme Court in 2013)

Service by electronic means



- The Service Convention is **exclusive** and time delays are not a sufficient reason to circumvent the Convention, particularly if no previous attempts have been made under the Convention's channels of transmission

Service by electronic means (national and int'l cases)



- **Service by Facebook:** Australia (2008), Canada, United Kingdom, United States
- **Service by Twitter:** United Kingdom – Caution: 140-characters limitation
- **Service by message board:** Canada

More recently:

- **Service by LinkedIn:** Ireland (2014)

Or a combination of several of the above

Service by electronic means (national and int'l cases)



Common features for service by electronic means by e-mail and social media:

- In the majority of cases the Service Convention did not apply:
 - **The address was unknown**
 - The State where service was to be transmitted was not a Contracting State to the Convention
- Usually, it is ordered when:
 - Traditional methods of service were unsuccessful
 - Defendant prefers to communicate via electronic means
 - Evasive defendants
- *Is this better than the Official Gazette?*

Judicial Officers (Art 10(b) and (c))

Examples of European secure platforms:

- **e-Palais (France):** secure electronic platform that allows judicial officers to serve documents by electronic means on lawyers and public prosecutors
- **EJS (e-Justice Service of Documents - EU):** seeks to create an electronic platform for the secure cross-border exchange of documents between judicial officers in the European Union.

Service abroad *with* the Convention

Service by electronic means may be possible:

1. The main channel

The Central Authority

2. The alternative channels

Art 10(a) and 10(b)

3. The derogatory channels

Derogatory Channels

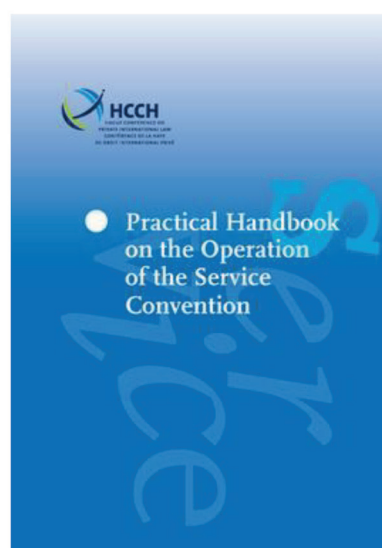


- The Service Convention allows Contracting States to agree on other channels of transmission
 - For example, bilateral agreements providing for direct communication between courts
- The Service Convention does not affect internal laws of a Contracting State which may permit other (more favourable) methods of transmission of incoming documents for service
- The Service Convention gives priority to other treaties dealing with service of documents abroad

Publications



- The Practical Handbook (4th Edition, 2016) offers *detailed explanations on the general operation* of the Conventions and provides *analysis of the major issues* that arise in practice
- **Annex 8** – the use of IT in the operation of the Service Convention
- **THE authoritative guide**, regularly consulted by government authorities, courts and practitioners
- *Available for purchase in English and French*



Service Section - www.hcch.net



Français Other languages Search...

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SERVICE SECTION

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Practical Handbook (4th ed. 2016)

The Practical Handbook offers detailed explanations on the general operation of the Service Convention as well as authoritative commentaries on the major issues raised by practice over the past fifty years.

Since the publication of the 3rd edition of this Handbook in 2006, there have been important developments in case law and State practice in relation to the Hague Service Convention. These developments are the most important basis for this updated and expanded 4th edition. In addition, it includes comprehensive research and analysis relating to the use of information technology in the operation of the Convention, an area that continues to evolve.

More information on purchasing the Practical Handbook is available here.

To view the table of contents, click here.

Text of the Convention

Translations

Updated list of Contracting States

(status table)

How to read the status table

Central and other Authorities

(contact details, practical information)

Table reflecting applicability of Articles 8(2), 10(a), (b) and (c), 15(2), 16(3)

Explanatory documents

Mandatory Form (Request - Summary - Certificate)

The form is mandatory when the main channel of transmission is used (i.e., via a Central Authority) - the "Summary" part of the form is recommended when an alternative channel is used

- Outline of the Convention
- Practical Handbook (2016)
- FAQs

- Fillable version (multiple languages)
- Instructions for filling out the "Summary" and recommended Warning
 - Recommendation on the warning
 - Explanatory Report on the recommendation

Specialised Section

Full text

Status table

Authorities

Practical operation documents

Questionnaires & Responses

Seminars

HCCH Publications

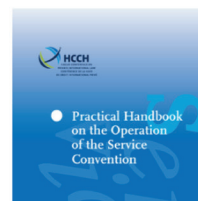
Translations

Case law

Bibliography

Miscellaneous

Latest updates



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SESSION 2.

Discussion

Jung Hoon Park

Judge of Gwangju High Court (Korea)

Hello everyone! It is my pleasure to participate as a panelist in this session. I would like to focus my discussion on developments in Korea regarding service by electronic means. These comments are my personal opinion and do not constitute the official view of the Korean Judiciary.

When Korea acceded to the Service Convention, it objected to the alternative channels under Article 8 and subparagraph (a) (b) (c) of Article 10. As a result, the forwarding authority may not serve documents on a Korean national directly within Korea. In addition, the forwarding authority may not serve a Korean citizen or entity by electronic means. The National Court Administration, which is the central authority of Korea, receives requests and documents to be served only in paper form. However, they actively exchange communications with forwarding authorities via email and fax regarding any issues involving requests for service.

Electronic litigation is used extensively for cases brought before Korean courts. About 60 percent of new civil cases in Korea were filed electronically last year. Electronic litigation has a lot of advantages over paper-based litigation. It saves paper because parties do not need to submit documents or evidence in paper form. Each party may submit documents and evidence and access documents and evidence submitted by the other party, 24 hours a day 7 days per week. It also drastically reduces time spent by court clerks to serve documents and evidence on the parties. A court clerk may carry out service by just clicking on the website. In addition, it enables judges to work from distance without going to their court office.

The Korean Judiciary created a website on which parties to the lawsuit may upload a complaint, answer, pleadings, other documents and evidence. In electronically filed cases, the court serves only the defendant electronically who gave his or her prior consent. In case where the defendant gives his or her consent to electronic service, an email address or cell phone number must be entered on the website. After that, whenever the party uploads a new document or evidence on the website, the court clerk informs the other party by sending an email and/or text message. When the recipient opens the uploaded document on the website, that document is considered to be served. If the recipient does not open the uploaded document, it is deemed that the document has been served 7 days after the recipient received the email or text message. If the recipient could not access documents on the website because of a system failure for a certain period of time, that time period is not counted in calculating 7 days.

The law governing electronic litigation does not apply to cases brought before foreign courts. There is another practical difficulty for foreigners to use this website for electronic litigation. In order to create an account and to log in, users must have public key certificate which is normally issued by Korean banks. Foreigners may find it somewhat burdensome to get their public key certificates issued by Korean banks. If the law is amended to cover cases filed with foreign courts, and a simpler method of verifying the identity of users is introduced, the foreign plaintiff may have the possibility of serving judicial documents on Korean defendants through this website.

SESSION 2.

Discussion

Ian M. Catlett

Director of Overseas Citizen Services, Office of Legal Affairs (USA)

International Litigation & Information Technology: Service by electronic means

Ian M. Catlett
Attorney-Adviser
U.S. Department of State

- Hague Service Convention
 - Information technology
 - e-Service methods
 - Challenges
- Update: *Water Splash v. Menon*

Discussion

Hague Service Convention

- Convention is about transmission, not service itself
- The scope of the Convention is limited to service of documents (U.S. Supreme Court)
- Requirements:
 - State parties to Convention ("Contracting State"),
 - Defendant's address,
 - Judicial or extra-judicial document, and
 - Civil or commercial matter
- Main channel (Central Authority)
- Alternative channels (diplomatic, post, direct communication)
- Derogatory channels (other agreements, domestic law)

Overview

- No mention of IT in Convention (1965)
- Since 2009, much more attention
- “Functional equivalence” to traditional service
- Should “address” include “electronic address?”

Information Technology

- Secure transmission
 - Postal agency
 - IT company
 - “e-Palais”
- Email
- Social networking site (Facebook, Twitter)
- Message board
- SMS/text message

e-Service methods

- Convention doesn't apply (e.g., non-contracting states, no address)
- Differing domestic laws on service and e-service
- Civil vs. common law systems
- Security
- E-signatures
- Proof of receipt (due process)

Challenges

Water Splash v. Menon
U.S. Supreme Court (May 22, 2017)

- Defendant Menon began to work for a competitor of Water Splash, Inc. while still a Water Splash employee. Water Splash sued for unfair competition, conversion, etc.
- Menon resided in Canada. Texas-based Water Splash obtained permission to serve her by mail, served her, and a default judgment entered.
- Menon moved to set aside the judgment, arguing service by mail did not comport with Hague Service Convention requirements.
- Split in U.S. Circuit Courts of Appeal
- *HELD*: The Hague Service Convention does not prohibit service of process by mail.

Water Splash v. Menon, 581 U.S. ____ (2017)

- Article 10 and “service”
- Provided the State of destination does not object, the present Convention shall not interfere with –
 - a) the freedom to send **judicial documents**, by **postal channels**, directly to persons abroad,
 - b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect **service of judicial documents** directly through the judicial officers, officials or other competent persons of the State of destination,
 - c) the freedom of any person interested in a judicial proceeding to **effect service of judicial documents** directly through the judicial officers, officials or other competent persons of the State of destination.

Water Splash v. Menon, 581 U.S. ____ (2017)

- Service by mail is consistent with text
 - “judicial documents”
 - “send”
 - “adresser”
- Service by mail is consistent with treaty interpretation
 - Drafting history
 - Executive branch interpretation (“great weight”)
 - Other signatories adopt this view (Canada)

Water Splash v. Menon, 581 U.S.
(2017)

Thank you to Mayela Celis

QUESTIONS?

CatlettIM@state.gov



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SESSION 2.

Discussion

PAHM Ho Huong

**Deputy Director General of Department of International Legislation,
the Vietnam Ministry of Justice(Vietnam)**

SERVICE OF DOCUMENT IN VIETNAM

*Pham Ho Huong
Ministry of Justice*

1. Overview

- The dramatic development of civil, commercial and investment relations involving foreign elements in Viet Nam

Vietnamese people living, working and studying in **103** countries

To 2016: Vietnamese labors working abroad equals to **126.296**; foreign tourist visiting Viet Nam reached to more than **10 million**.

- The increasing of cases involving foreign elements in Viet Nam

From 2005 to 2014: the Ministry of Justice approved more than **10,000 international adoption cases**

From 2010-2016: The provincial People's courts of Vietnam solved around **4,000 foreign-related civil cases each year**

3

- A large number of service of document requests going out and coming into Vietnam each year

Year	Out going requests (to oversea)	In coming requests (from foreign countries)
2013	3,777	872
2014	3,360	825
2015	3,149	805

* Annual Report of the Government to National Assembly in 2013, 2014, 2015, 2016

The top 5 of out going requests sent to the US, Canada, Australia, Korea and China

The most of incoming requests are from Korea, China, France, Czech Republic and Germany.

4

2. Implementation of the Service Convention

- Having effect to Vietnam since 1/10/2016
- Action Plan of the Government on Implementing of the Service Convention
- The Civil Procedure Code 2015, Join Circular No.12/2016/TTLT-BTP-BNG-TANDTC
- Plan to translate the Practical Handbook of HCCH into Vietnamese; draft an domestic handbook for the local authorities

5

- The number of requests of serving of document under the Convention in the first six months of 2017:

Receiving nearly 100 requests from member countries: Korea, China, US, France, Germany, Finland, Canada, Italia and Netherland.

Sending out requests to Korea, China, France, US, Australia, Germany, UK, India, Denmark, Hong Kong and Pakistan.

6

3. Electronic Service in Vietnam

- Civil Procedure Code 2015

Article 173. Modes of providing, notifying and serving procedural documents : “[2.] providing, notifying and serving effected by electronic means at the request of the involved parties or other participants in accordance with law regulations on electronic transaction”

7

- Resolution No. 04/2016/NQ-HDTP of Supreme People's Court of Vietnam (had effect on 15/2/2017)

Required certain forms and conditions (such as having email address, a valid certified electronic signature, successfully registered with the court)

Required specific procedures for receipt and handling of legal documents which are electronically sent to the court

- However, electronic service in proceedings is very new in Vietnam.

8

Thank you for your attention

Pham Ho Huong
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9

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SESSION 3.

International Litigation & Information Technology : Taking Evidence by Video-Links

Moderator

Anselmo Reyes

Representative of Asia Pacific Regional Office of the HCCH

Presenter

Byung Hie Oh

Presiding Judge of Daegu District Court (Korea)

Panelist

Young Gi KIM

Judge / Director of Judicial Policy of National Court Administration (Korea)

Mayela Celis

Principal Legal Officer of the HCCH

Aera HAN

Attorney at Kim & Chang (Korea)

Abdullah MURAT

Head Department of Directorate General for International Law and Foreign Affairs
within Ministry of Justice (Turkey)



Moderator

Anselmo Reyes

Representative of Asia Pacific Regional Office of the HCCH

Education

- AB (Harvard), BA, LLM, PhD (Cambridge)

Work Experience

- Professor of Legal Practice, University of Hong Kong -- 2012 to present
- International Judge, Singapore International Commercial Court -- 2015 to present
- Judge, Court of First Instance, Hong Kong -- 2003 to 2012
- Senior Counsel, Temple Chambers, Hong Kong -- 2001 to 2003
- Barrister, Temple Chambers, Hong Kong -- 1989 to 2001

Published Books

- 淺談新民事司法訴訟 (Reflections on Civil Procedure under Civil Justice Reform) (Sunny Chan, trans.), Joint Publishing (HK) Co. Ltd., March 2012.
- 淺談香港仲裁法 (How to be an Arbitrator - A Personal View) (Sunny Chan, trans.), Joint Publishing (HK) Co. Ltd, June 2013.



Presenter

Byung Hie Oh

Presiding Judge of Daegu District Court (Korea)

Education

- Aug. 2000~ Aug. 2011 : The University of Melbourne(Visiting Scholar), Australia
- Mar. 1999 ~ Feb. 2001 : The Judicial Research and Training Institute of the Supreme Court of Korea (Attorney License, ROK)
- Mar. 1990 ~ Feb. 1994 : Bachelor of Engineering, Department of Aerospace Engineering, Seoul National University College of Engineering, Seoul, Korea

Work Experience

- Feb. 2016 - Present: Presiding Judge, Daegu District Court
- Feb. 2001 - Present: Judge, Republic of Korea
- Feb. 2014~ Feb. 2017 : Residing at Vietnam as an advisor for Judicial Training and Research at the Court Academy of Supreme People's Court of Vietnam

Published Books

- "A Study on the Treaty on Judicial Assistance in Civil and Commercial Matters between the Republic of Korea and Australia" in International Judicial Assistance Study, Judiciary Development Foundation of National Court Administration, March 2010.
- "Corporate Reorganization", Seoul Central District Court Bankruptcy Law Study Group(Co-Author), Parkyoung-sa, July 2014.
- "Individual Rehabilitation", Seoul Central District Court Bankruptcy Law Study Group(Co-Author), Parkyoung-sa, July 2014
- "Judicial Electronic System" in Journal of Korean Judicature, the National Court Administration of the Supreme Court of Korea (vol. 1, 2008), pp. 814-819.
- "Taking Evidence by Video-link in the Process of International Judicial Assistance in Civil Matters-Centered on Hague Evidence Treaty", Judicial Review(Vol. 50), Supreme Court Library, May 2011.
- "A study on Electronic Litigation and Virtual Court", Journal for research abroad, Supreme Court Library, November 2011.
- "A study on the Subsequent Proceeding After Filing a Late Claim in Reorganization Proceedings", Journal for Bankruptcy Law Study Association(Vol. 3, No. 2), Bankruptcy Law Study Association, November 2012.
- "A Review on the draft of Korea-Vietnam Treaty on Civil Judicial Assistance", National Court Administration, 2016.



Panelist

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Education

- Aug. 2015 ~ May 2016 : UCLA School of Law (LL.M. ; IP Specialization), USA
- Mar. 2011 ~ Feb. 2013 : Master of Law (Major : Administrative Law),
Korea University Graduate School of Law, Seoul, Korea
- Mar. 2004 ~ Jan. 2006 : The Judicial Research and Training Institute of the Supreme Court of Korea (Attorney License, ROK)
- Mar. 1997 ~ Feb. 2004 : Bachelor of Law, Korea University College of Law, Seoul, Korea

Work Experience

- Feb. 2017~ Present : Director of Judicial Policy at the National Court Administration of Republic of Korea (Concurrent Position)
- Feb. 2006~ Present : Judge, Republic of Korea
- Sep. 2016~ Feb. 2017 : Visiting Judge for Fellowship at the U.S. District Court for the Eastern District of Texas, USA
- Sep. 2015~Dec. 2015 : Conflict Resolution Specialist at Asian Pacific American Dispute Resolution Center, Los Angeles, California, USA
- April 2015~Oct. 2015 : Expert Adviser for Judicial Committee for Promotion of " IP Hub Court", Supreme Court of Korea

Published Books

No. Title Journal

- Issues of Family Law Related Claims of North Korean Residents and Refugees in South Korean Court Supreme Court Law Journal (English publication)
(Vol.5 December 2015)
- The Actual Appearance of the Mediation in American Free Legal Market Mediation & Open Dialogue (Mediation Journal by Seoul Central District Court
(Nov. 2015)
- The Main Issues and Precedents on Helping-the-Defection Contract Unification & Law (Legal journal published trimonthly by Ministry of Justice)
(May 2015)
- A Study on the Central and Local Governments' Liability for Damages in Case of Violation of Obligation to Maintain Environmental Standards A dissertation for Master's degree
(Dec. 2012)
- Critical Review on South Korea's Judicial Precedents on Choice of Law Governing North Korean Literary Works – incl. a discussion on North Korea's Accession to the Berne Convention for the Protection of Literary and Artistic Works -BUP JO (renowned Korean Lawyers Association Journal)
(April 2012)



Panelist

Mayela Celis

Principal Legal Officer of the HCCH

Education

- UNED (Universidad Nacional de Educación a Distancia), Madrid, Spain – Doctor of Laws (expected in 2019/2020)
- NYU (New York University) – Master of Laws (LL.M.) (2003-2004)
- Universidad Panamericana, Mexico, Bachelor of Laws (1996-2001)

Work Experience

- Hague Conference on Private International Law (2005-present). Principal Legal Officer as of January 2015
- Prior to joining the Permanent Bureau, Mayela worked in private practice, mainly focusing on litigation and corporate law in Mexico. She also worked at the Mexican Public Defender's Office in family law matters.

Published Books

- Carried out the main preparatory and drafting work of the updated and expanded 4th edition of the Practical Handbook on the Operation of the Service Convention (2016).
- Mayela has authored a book on Letters of Request in Civil and Commercial Matters (published by the General Council of the Judicial Branch of Jalisco and the Universidad Panamericana in 2003) and has published a range of articles on Private International Law.

Awards

- Chamber of Commerce of Guadalajara award for Bachelor of Law's thesis



Panelist

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Education

- Harvard Law School (LL.M., 2006)
- Judicial Research and Training Institute of the Supreme Court of Korea (1998)
- Graduate School of Law, Seoul National University (1997)
- College of Law, Seoul National University (LL.B., 1994)

Work Experience

- Kim & Chang (2016-Present)
- Senior Research Judge, Supreme Court of Korea (2014-2016)
- Presiding Judge, Changwon District Court (2013-2014)
- Professor, Judicial Research and Training Institute of the Supreme Court of Korea (2011-2013)
- Judge, Seoul High Court (International Transaction Division) (2010-2011)
- Judge, Seoul Southern District Court (Securities Division) (2009-2010)
- Judge, Bucheon Branch of Incheon District Court (2008-2009)
- Director of International Affairs, National Court Administration, Supreme Court of Korea (2006-2008)
- Judge, Cheonan Branch of Daejeon District Court (2002-2006)
- Judge, Seoul Administrative Court (2000)

Published Books

- 국제사법 개정방안 연구(연구보고서, 공저), 법무부 국제법무과(2014. 2.)
- 행정재판실무편람 I & II, (공저), 서울행정법원 (2000-2001)



Panelist

Abdullah MURAT

Head Department of Directorate General for International Law and Foreign Affairs within Ministry of Justice (Turkey)

Education

- Phd Student in Commercial Law since 2015
- English Language Training in Berkeley, California, 2011
- Post-graduate degree in Political Science in 2010
- Undergraduate degree in the Faculty of Law in 1998

Work Experience

- Assistant Inspector in the Social Security Institution in 2000
- Judge (civil and criminal cases) 2002-2008
- Judge-Rapporteur in the Foreign Affairs Department of Directorate General for Prisons and Detention Houses 2008-2013
- Head Department in the Directorate General for Civil Law Affairs (mainly responsible for the Court Expert EU Project) 2013-2015
- Head Department in the Directorate General for International Law and Foreign Affairs (main responsibilities - extradition and international legal assistance in the criminal and civil cases) 2015-

Academic Studies

- Protection of the private rights of prisoners in the context of the Article 8 of ECHR (unpublished postgraduate thesis)
- Informing Diplomatic Posts About The Deprivation of The Liberty of Foreigners (International Law Bulletin-May 2016)



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SESSION 3.

Presentation

Use of Videoconferencing to Obtain Evidence Under the Hague Evidence Convention

Byung Hie Oh

Presiding Judge of Daegu District Court (Korea)

Use of Videoconferencing to Obtain Evidence Under the Hague Evidence Convention

July 5, 2017

오병희, Presiding Judge in the Daegu District Court

I. Introduction

The rapid development of transportation and communication means in the modern times gave boost to international trade and human exchanges, and subsequently the number of legal disputes with foreign elements is growing. In court proceedings to resolve such disputes, it is often necessary to serve process overseas or take evidence from a witness or expert outside the jurisdiction. Against this backdrop, the need to seek international judicial assistance in civil and commercial matters is increasing accordingly.

Recently, with the development of information and communication technology, a growing number of countries are adopting ICT in their judicial procedures. These technologies are something new that the traditional judicial procedures were not designed for, and introducing them may cause a potential conflict with the existing judicial procedures. Accommodating these technologies poses new opportunities and challenges to the legal community, as the use of these technologies may require creation of new practical or procedural legal concepts or at least modification of the existing procedures. This holds true for the Hague Evidence Convention, a prominent cooperation instrument for the taking of evidence abroad in civil or commercial matters, and use of videoconferencing to obtain evidence lies at the center of attention among the opportunities and challenges posed by the use of ICT.

II. Obtaining Evidence by Videoconferencing under the Hague

Evidence Convention

1. Compliance with the Hague Evidence Convention

There is a view that the Hague Convention must be bypassed or amended if videoconferencing is to be used to take evidence under the framework. The main argument for this view is that the Hague Convention premises the taking of evidence to be carried out through a letter of request, and videoconferencing was not feasible at the time when the Convention was established. Since then the provisions of the Convention has remained the same, and thus the framework of the Hague Convention does not anticipate evidence taking by videoconferencing.

It seems clear that the Convention did not anticipate the use of videoconferencing as a means of evidence taking at the time it was drafted, given that there is no stipulation about it and that technologies available in the 1970s were not advanced enough. However, if interpreted appropriately, provisions in the Convention can still support videoconferencing in courtroom as a means of evidence taking, for both methods of evidence-taking set forth in the Convention: the indirect method through a Letter of Request, and the direct method by a Commissioner.

To elaborate, in the case of the indirect method, videoconferencing will be mainly used to allow presence of the parties concerned from the Requesting State at the proceedings, as to be discussed later. If the articles 7 and 8 can be so interpreted that presence of the parties concerned can be achieved through videoconferencing, the entire Chapter 1 of the Convention, which set forth the indirect method, can be applied to evidence taking by videoconferencing. The direct method as mentioned above refers to a case where an examiner commissioned by the Requesting State takes evidence first-hand in another country. This is a situation where videoconferencing can be used in the most typical way, such as questioning a witness remotely through video transmission, and thus the provisions in Chapter 2 of the Hague Convention can be easily applied to evidence taking by videoconferencing. Therefore, it can be deduced that evidence-taking by videoconferencing is compliant with the Hague Convention without

amendment or bypassing. This view is supported by all Contracting States of the Hague Convention.

However, the fact that videoconferencing can be used to take evidence under the Convention does not mean that it is the best framework to adequately deal with all the issues that may arise during remote evidence taking. Tricky interpretation issues will arise inevitably from the gaps that were not anticipated by the Convention at the time of establishment. The most fundamental issue arises from the assumption of presence in the courtroom when the physical presence is elsewhere. A case in point is a situation when assistance from the central authority is unavailable when a witness must be questioned remotely in another country via videoconferencing.

2. Methods of Evidence Taking by Videoconferencing

The methods of evidence taking through videoconferencing can be broadly divided into two, as prescribed in the Hague Convention: an indirect method through the execution of a Letter of Request pursuant to Chapter 1 of the Convention, and a direct method of Chapter 2 by a diplomatic officer or others so commissioned.

In the case of the indirect method, a country requests the taking of evidence to another country pursuant to provisions in Chapter 1. The country receiving such a request then takes evidence according to the request, and shares a real-time video feed to the Requesting State, so people from that end can also participate in the proceedings. In this case, the country executing the Letter of Request will lead the proceedings on behalf of the Requesting State, because the court and the concerned parties in the Requesting State cannot preside over the proceedings because of physical distance and can participate only by receiving real-time video transmission. The request can be further divided into two different categories pursuant to Article 9 of the Hague Convention: (1) to use an ordinary method and (2) a special method or procedure, as defined in paragraph 2. The distinction between the two is based on whether the

written request states to use the procedures and methods of the Requesting State. To make a request to use an ordinary method, the country executing the request is supposed to have evidence taking via videoconferencing as part of its regular judicial procedures. Although videoconferencing is gaining grounds in courtrooms worldwide, it may not be part of regular judicial procedures in civil matters in many countries. Therefore, videoconferencing should be specified as a special method or procedure to follow in a letter of request.

Hereinafter this method will be called the “Letter of Request method.”

In the second method, a diplomatic officer or a commissioner appointed by a court or other competent authority of the State of Origin takes evidence directly from a witness present at the State of Execution via real-time video transmission. This is different from the indirect method in that the State of Origin leads the proceedings.

To take a closer look, this method can be further subdivided into two modes of implementation. First, a designated agent may be a judge or someone based in the State of Origin, who will take evidence from a witness in a remote location. Second, a diplomat or consular officer dispatched to the executing country may question a witness face-to-face, while the whole proceeding is transmitted on a real-time basis to the judges and parties concerned in the State of Origin. In the former case, if the commissioner leaves the State of Origin to question witness firsthand and transmit the investigation real-time back to the home country, it should be categorized as the second mode of implementation. Of those, the most proper mode of remote questioning is the first mode. However, the Article 16 and 17 of the Hague Convention, which provide for the the taking of evidence by a diplomatic officer or a consular agent, and by an authorized commissioner, respectively, are worded the same. According to the clauses, a commissioner has the same status as a diplomatic officer or consular agent taking evidence on a national of the executing country or a third country. It is stipulated also that a commissioner may take evidence “in the territory of” the executing country in aide of proceedings commenced in the

courts of “another” state, which means that the first mode is not set forth in the Convention. However, this is understandable, as mentioned previously, given that the Hague Convention did not envisage the use of videoconferencing at the time of drafting. Also, the location where the evidence is being taken is the territory of the executing state, but conceptually it is also an extension of the court of the State of Origin, because the questioning takes place real-time without limitations of physical boundaries. Because of this duality, stipulations in Article 17 can be construed to include the first mode.

The main difference between the two methods is whether the Requesting State (State of Origin) or the requested country (the State of Execution) is in charge of the procedures. In the case of the Letter of Request method, the Requesting State will take charge, whereas in the case of the Commissioner method, the State of Execution will be in charge of evidence taking. Also, the governing law of the procedures will be the laws of the Requesting State, and the laws of the State of Execution, respectively, for the former and the latter.

Hereinafter the second method will be referred to as the “Commissioner method.”

3. Procedures

A. Letter of Request Method

In the case of the Letter of Request method, the evidence taking may be carried out in accordance with provisions governing the regular Letters of Request procedures in Chapter 1 of the Convention. To recall the procedures, the judicial authorities of the Requesting State may send a letter of request to the central authority of the Requested State pursuant to Article 3. The letter needs to specify videoconferencing as a special method or procedure to follow, as previously described. The letter must have an English or French translation if written in another language. (The Republic of Korea reserved acceptance of French translation, so any letters of request sent to it must be in or translated into English only.) If the central

authority of the Requested State has any objections to the letter, it should notify the Requesting State's authorities. If there is no ground for refusal set forth in Article 12, the Requested State will take evidence pursuant to its law. If there is a request to follow a special procedure or method, such as videoconferencing, it should be respected unless such request is against the law of the Requested State or cannot be accommodated because of practical or procedural difficulties. The investigation should be enforced with the use of coercion if necessary, as permissible by the law of the Requested Country. Finally, the execution of a Letter of Request should be documented, which should be sent to the requesting authority as evidence, as is the case for all evidence taking initiated by such letter.

In the case of the Letter of Request method, as previously mentioned, judges or parties concerned in the Requesting State may remotely participate in the proceedings that take place in the Requested State via videoconferencing. Articles 7 and 8 of the Convention will be applied here, which will be further elaborated below.

B. Commissioner Method

A diplomatic or consular officer is authorized to take evidence from its own nationals without using force to assist in the proceedings initiated by its courts. Direct questioning by a diplomatic or consular officer of its own nationals or others who speak the language of the State of Origin can be more efficient than the taking of evidence conducted by a foreign judicial authority and mediated by a translator or interpreter. With regard to this, the Hague Convention provides that "a Contracting State may declare that evidence may be taken by a diplomatic officer or consular agent if permission to that effect is given" South Korea did not make such declaration to that effect upon joining the Convention.

In the case of evidence taking by a diplomatic or consular officer, specific procedures are not provided by the Hague Convention and it therefore should follow the Act on International Judicial Mutual Assistance in Civil Matters. Under the Act, a request of assistance initiated by South Korea to another country should be sent from the presiding judge of the

court with jurisdiction to the ambassador, minister or consul in the State of Execution. The presiding judge of the court should ask the head of Administrative Office of the Court to send out a letter of request. Then the head of Administrative Office of the Court will contact the Minister of Foreign Affairs to send a letter of request to a court or other public authority in another country through diplomatic channels. In addition to this, the Convention also allows a diplomatic or consular officer to take evidence from the nationals of the host country or a third country without using force, by obtaining a prior permission from the competent authority of the host country. However, South Korea declared that it will exclude the application of this clause, which means its diplomats cannot take evidence under the clause.

A commissioner is usually appointed by the judicial authority of the State of Origin, and this person is also allowed to take evidence without using force by obtaining prior authorization from the competent authority of the executing country, although the Hague Convention does not set forth specific procedures for this. As mentioned above, South Korea has declared to exclude the application of this provision, so there is no room for the application of the Act on International Judicial Mutual Assistance in Civil Matters with regard to a commissioner. Still, the Act specifies that a request for judicial assistance should be made to ambassadors, ministers or consuls in another country, and does not anticipate such request being made to an appointed commissioner.

In the case of the Commissioner method, the taking of evidence by a diplomat or consular officer of the State of Origin requires no assistance from the authorities of the host country, which is an advantage over the Letter of Request method. However, unlike service of process which is frequently conducted by a consular office, there is very few cases in South Korea where the taking of evidence is done by diplomatic or consul officers even on its own nationals, for a reason that they are not familiar with the judicial procedures of evidence taking. As mentioned above, evidence taking by videoconferencing can be implemented in the most proper form through the Commissioner method. South Korea, upon joining the Convention,

declared an exception of application of Articles 16 and 17, and the Commissioner method is allowed only when the taking of evidence is conducted on Korean nationals by a diplomatic or consul officer. Given the situation, it may be necessary for South Korea to start encouraging taking of evidence by diplomats.

5. Consideration of Individual Issues

A. The Root Cause

The use of videoconferencing in obtaining evidence is certainly a feat of modern ICT, but because of its newness, it has a potential to conflict with the existing legal system or have a few elements that do not fit well. Because session participants will be present in two different jurisdictions, there will be two legal systems to consider: the rules and laws of the court with jurisdiction and those of the executing country. This has led to complicated issues that were difficult to resolve in some cases, and as mentioned previously, gave rise to a view supporting amendment or bypassing of the Convention, on the grounds that it is incapable of resolving such issues. However, most of these issues can be resolved within the framework of the Hague Convention simply by widening of application or deduction of the existing legal concepts. A simple solution will be to take evidence using videoconferencing in the same way as traditional evidence-taking. After this, there are not many practical issues left. Still, taking of evidence by videoconferencing assumes physical presence in the courtroom when the person is actually in a remote jurisdiction. Because of this fundamental difference between virtual and actual presence, difficult issues arise in cases where an assumption of presence is not enough to replace physical presence – e.g. when a disorderly conduct must be detained.

B. The Issue of Violation of Sovereignty

The notion of sovereignty does not have an explicit overriding definition in the Theory of the State or in international law theories, but

according to the territorial principle, which is universally accepted in international law, a sovereign state has sovereignty within its territories and thus enjoys a full legislative jurisdiction over people and events within its border. According to the principle, a country cannot exercise sovereignty outside its territory. This concept of sovereignty may collide with the authority of foreign courts that may have a jurisdiction over individual cases, and raise judicial conflicts. In common law countries, especially in the United States, service of process or taking of evidence are traditionally responsibilities of the litigants, not public authorities. Such activities are not considered an exercise of public authority. As a result, these countries are hesitant to support the view that attorneys who take evidence abroad without force are violating sovereignty of the country. On the other hand, in continental law countries, such service and evidence taking are regarded as part of court proceedings and an exercise of the jurisdiction of the court, which is a public institution. Service of process or taking of evidence on its nationals by a foreign court or litigants is thus considered an official act, and any such act conducted out of the official channel for international judicial assistance is considered a violation of its sovereignty. This sovereignty issue can adversely affect the effectiveness of such acts, and even lead to a criminal conviction as in Switzerland. In recent years, however, Germany and France, two leading continental law nations, are taking a softened view on the issue of sovereignty infringement based on the traditional notion of jurisdiction.

The violation of sovereignty, as mentioned above, can be a critical issue in the case of evidence taking by videoconferencing. The reason is as follows: when videoconferencing is used for evidence-taking, the parties concerned or judges who are physically present in the courtroom conceptually attend and participate in the proceedings that take place in the executing country via real-time video transmission. If they examine or question a witness during the proceedings, it will automatically constitute an exercise of jurisdiction within the territory of the executing country, and thus a violation of its sovereignty. Also, video transmission technologies can encourage wider application of domestic regulations on taking evidence in

civil matters to other jurisdictions. It will become easier for a U.S. based attorney to take a deposition from a witness in South Korea as part of discovery process, or a court in Korea to remotely examine a witness in another country pursuant to its Civil Procedure Act, without following the method prescribed in the Hague Convention. This situation could lead to a more heated controversy over sovereignty infringement.

C. The Issue of the Right of Confrontation

Another issue with taking of evidence by videoconferencing is whether it violates the right to confront witness or right to due process of the litigant, because the litigant or the judge can examine or question a witness only via real-time video transmission without facing them. Also with regard to judicial procedures, there is a question whether such is against *Unmittelbarkeit*, or the “directness principle.”

To address the issue of the confrontation first, the right to confrontation is granted to the accused in a criminal court by the U.S. constitution. South Korea does not have any constitutional clause that requires physical presence of a party to a civil proceeding in courtroom. The issue of the right to confrontation, therefore, does not violate the constitution in South Korea. At the same time, the above discussions about the right to confrontation and due process assume that virtual trials in the U.S. may cause disadvantages to the defendant as the intentions and emotions of the defendant may be misconstrued and it is more difficult to receive assistance from the defense counsel. However, within the existing framework of international judicial assistance in civil and commercial matters, a litigant in the Requesting State does not have an opportunity to face the witness at all. Under the current regime, if the witness is located in another country, the executing authority or a diplomatic officer of the State of Origin, whether through a letter of request or a commissioner, conducts a witness questioning. Not only does it take too much time and expense to send the evidence taken back to the State of Origin, but also more crucially the litigant does not have an opportunity to confront the witness at all. They will receive the result only in writing. On the other

hand, if videoconferencing is used in international judicial assistance procedures, the litigant can listen to the testimony as it is given, instead of reading a written report of it, even if it is still not quite the same as facing the witness in court. It is needless to say that videoconferencing is superior to the existing methods of international judicial assistance in terms of communication of the parties concerned, actuality of proceedings and the cost of litigation. In this regard, use of videoconferencing to obtain evidence actually guarantees the right of the litigants to confrontation, and thus evidence taking by videoconferencing is not against the Confrontational Clause.

Secondly, the directness principle under the Civil Procedure Act calls for the judge of the court where the suit is filed to preside over defenses and the taking of evidence. The Korean Civil Procedure Act prescribes that an exception to the directness principle can be made under the Article 296, which allows the taking of evidence in a foreign territory through international judicial assistance. Taking of evidence by videoconferencing is a form of mediacy (*Mittelbarkeit*), which underlies the above provisions, and therefore cannot be considered a violation of the directness principle.

D. The Issue of Virtual Presence

Article 7 and Article 8 of the Hague Convention govern the presence of litigants and judicial personnel at the location where evidence is being taken. The issue is whether the clauses apply to the evidence taking via videoconferencing. In such cases, litigants can still observe taking of evidence as it happens as well as participate in the process by asking questions upon permission, which means that the merits of having a physical presence is maintained for virtual presence, and the actions allowed to litigants are also the same. Therefore, the above provisions on the presence may also apply to the case of evidence taking by videoconferencing.

On the other hand, Article 56.1 of the Court Organization Act of the Republic of Korea stipulates that "the trial shall be conducted in the court" and the Korean Civil Procedure Act also has certain rules based on the assumption that the persons involved in the litigation actually attend the

court. Therefore, it is a matter of whether attendance achieved through video transmission can be considered the attendance required by law. This issue is also related to whether the location where attendance is achieved, or the examination is taking place, can be regarded as a court of competent jurisdiction. As real-time video transmission is not restricted by physical distance, the location of evidence taking is by concept an extension of a court of law of the Requesting State. By emphasizing this aspect, the location of the evidence taking can be considered a conceptual court. In this regard, Article 3 of the “Act on Special Cases Concerning Remote Video Trials” stipulates that “Remote video trial shall be deemed a trial in which the parties to the trial attend the same court,” and Article 327.2 of the recently revised Civil Procedure Act of South Korea provides that taking of evidence by video transmission or other relay devices will be considered a witness examination where the witness is present at the court, which solves the above issues legally.

Another related issue is when evidence is being taken via videoconferencing in another country, whether the proceedings must take place in the courtroom of the country. As discussed previously, the location of the witness will be assumed as the court of jurisdiction. Whether the witness is actually in a court or not will not affect this assumption. Therefore, a witness does not have to be in a courtroom of the country. Evidence taking can take place at any place with video transmission equipment. However, it would be preferable to conduct the proceedings at a courtroom with electronic equipment necessary for video transmission, in view of dignity and maintenance of order of the court.

In addition, the above problem is also related to the disclosure of evidence taking in accordance with the principle of a public trial. When a witness is to be examined at a hearing, it has to be done at a public court. However, taking of evidence by videoconferencing is simply an investigation conducted by the court of jurisdiction, and thus it is not necessary to open the court where the witness is present if the court at the other end is open. Furthermore, a bigger question can be raised about whether to allow online access by the public to the real-time video feed of testimony. This

issue should be more fully discussed in the future if the concept of virtual court is realized.

E. The Governing Law

In the case of the Letter of Request method, the law of the Requested State will apply, pursuant to Article 9.1 of the Hague Convention. The Requested State may take evidence following the same domestic procedures for domestic evidence taking. In the case of the Commissioner method or taking of evidence by a special method or procedure under Article 9.2, the proceedings may be governed by the special method or procedures insofar as it does not violate the law of the Requested State.

Article 10 of the Convention prescribes that a Letter of Request must be executed by using an appropriate level of force. Therefore, any failure by a witness to fulfill an obligation can be punishable by the law of the Requested State. Examples of such punishment under the Civil Procedure Act of Korea include fines for non-attendance, detention, and penalty against a refusal to take an oath. In the case of evidence taking by videoconferencing, the law of the Requesting State will apply, assuming that videoconferencing has been requested as a special procedure or method, but this may not always be the case. If the Requesting State requested taking of evidence to the Requested State following a special method or procedure, but the request simply states to transmit video of such proceedings real-time, the actual taking of evidence will be governed by the law of the Requested State. If the Requesting State provided more specific procedures and methods of evidence taking in its request, the law of the Requesting State will apply accordingly.

In the case of the Commissioner method, the law of State of Origin is applied to the extent that it is not prohibited by the law of the executing country (Article 21.4). However, under the Commissioner method, use of force is not allowed. If a witness does not appear or refuses to testify, attendance cannot be enforced with sanctions. If the commissioner is a diplomat or consular officer and taking of evidence takes place in their host

country with a real-time video transmission to the home country, they can follow the law of the home country. If the commissioner is in a courtroom and conducts examination on a witness in another country via real-time videoconferencing, the proceedings can be governed by the law of the State of Origin, just like in the case of a usual domestic evidence taking.

F. The Issue Related to Witness Questioning

(1) The Rights and Obligations of a Witness

Article 11 of the Hague Convention provides for the right to refuse to testify and obligations of a witness. In principle, any privilege to refuse to testify will follow the law of the executing country. If the witness has a privilege or duty to refuse to give evidence under the law of the Requesting State, and the privilege or duty has been specified in the Letter of Request or has been otherwise confirmed by the requesting authority at the instance of the requested authority, he or she may exercise the privilege or perform the duty under the law of the Requesting State. This provides for the principle of “best interest of the witness”, under which the right to refuse to give evidence is protected widely. Such privileges include the right to refuse to testify and the inability to give testimony under the Korean Civil Procedure Law. The actual lawfulness of a refusal will be determined by the court of the Requested State, not the Requesting State.

(2) The Issue of Taking of Oath

In taking of evidence by video transmission, the method and procedure of taking a witness oath also need to be discussed.

In the case of the Letter of Request method, taking of evidence by videoconferencing is considered a special method or procedure requested by the Requesting State. If the Letter of Request simply mentions the use of videoconferencing for taking evidence, the taking of oath will be governed by the law of the Requested Country. On the other hand, if the Letter of Request includes more specific methods or procedures to follow, the administration of the oath and the specific manner of the oath are determined as described in the letter, unless it is against the law of the

Requested State.

To elaborate on this point, for example, the Korean Civil Procedure Act provides that the presiding judge should have a witness read aloud the written oath containing the obligation to tell the truth and a warning against false statement, and then put his or her name and seal or sign. When a witness examination is requested from abroad, the same procedures can be followed. However, if South Korea has requested an examination of witness to another country and the above procedures are specified as a special procedure or method to follow, it is desirable to attach the written oath to the Letter of Request. Also, if the presiding judge of the court in the executing country permits, the written oath may be transmitted from South Korea real-time to the witness on the screen to read aloud. In this case, however, the witness cannot put his or her name or sign or seal. This issue may be resolved by considering it as a case where the witness is “unable to put his/her name and sea or sign thereto,” as prescribed in Article 321.3 of the Civil Procedure Act of Korea. Accordingly, the judge can have the participating junior administrative officer of the court or other court officials act on his/her behalf to put his/her name and seal or sign.

As for the Commissioner method, Article 21 of the Hague Convention provides for the presiding authority of the oath and the governing law. However, there is seemingly no legal ground for a case where a Korean consul acts as a commissioner and has a Korean national take the oath in his or her host country. Therefore, it is necessary to establish a legal basis for a consul to act as the presiding authority in taking an oath and punishing perjury.

(3) The Issue of Perjury

One of the surest means of securing the truth of testimony is sanctions against perjury. In the international judicial assistance for civil and commercial matters, the issues raised in connection with perjury are: (1) Whether false testimony given in a foreign country can constitute perjury in the court of jurisdiction; and (2) which country can punish the witness for perjury. In the case of evidence taking by videoconferencing in particular,

the judicial authorities of the court of jurisdiction and the executing country may clash in real time. To elaborate, the former issue relates to whether the penal code for perjury requires the witness to take oath in court and in front of the judge. The latter issue is related to the offshore exercise of criminal jurisdiction. These issues will be examined below based on the method of evidence taking.

In the Letter of Request method, any sanctions against a witness for a failure to fulfill an obligation will be determined by the law of the Requested Country, in accordance with the purpose of Article 10 of the Hague Convention. Therefore, it follows that *corpus delicti* and penalties for perjury will be also subject to the law of the Requested Country. However, in this case, the Requested State conducts taking of evidence without the full context of the litigation and thus it is difficult to find out whether a testimony is false. Even when perjury is constituted, the authority does not have enough incentive to pursue prosecution, trial and conviction of the witness. Therefore, it seems clear that the role of perjury as an encouragement of true testimony will be much weaker in this case. Also, whether the establishment of perjury in the Requested Country and that in the Requesting Country are separate matters. A perjury may be established in one, both or none of the countries. If a witness is found guilty of perjury in the Requesting State, the country can pursue punishment of the witness accordingly. However, in this case, it is difficult to actually punish the witness because of the physical distance. In the case where perjury is established in both countries, it is unclear which country can exercise their criminal jurisdiction, as there is no established international law or precedents to apply to this particular situation. However, in a more general case of conflicting jurisdictions, the territoriality principle prevails. According to this principle, the country where the witness is present will exercise criminal jurisdiction, and if this is waived, the other country can pursue prosecution.

As an example, in South Korea, perjury can be also established when an oath is taken via videoconferencing, because as previously discussed, such oath may be considered valid as the one taken within the

court and in front of the judge, according to the provisions about taking of oath in Civil Procedure Act.

In the Commissioner method, punishment for perjury in the State of Execution will be difficult, because the evidence taking is not enforceable and is governed by the law of the State of Origin, except for the cases where the State of Execution provides assistance under Article 18. In this regard, taking the case where a witness made a false statement remotely to the court in South Korea, if the witness is a Korean national, the act is punishable under Article 3 of the Criminal Act, setting aside the feasibility of such punishment. If the witness is an alien, however, the person is not punishable by the penal code of South Korea, because Article 5 of the Criminal Act, which provides for crimes by aliens outside Korea, does not include perjury. Therefore, in the case where evidence is taken from an alien outside Korea and the governing law is that of South Korea, the part of the oath where the witness accepts punishment on a charge of perjury can be taken out.

G. The Issue of Contempt of Court Proceedings

Another issue of taking of evidence by videoconferencing is how to detain those who disturb order or commit contempt of court proceedings. This issue arises from the fact that the witnesses or agents involved in the proceedings are outside the courtroom. It is one of those fundamental issues arising from replacing the required physical presence with a conceptual one.

In the case of the Letter of Request method, this is not a serious issue, because the presiding authority of the Requested State can detain contempt of court proceedings. However, in the case of the Commissioner method, it is difficult to impose sanctions on the witness in a remote location, because the evidence taking cannot be enforced by the executing country. In this case, the Hague Convention is interpreted so that any disturbance should be treated in the same way as in the ordinary taking of evidence without video transmission. In particular, “The Taking of Evidence by Video-Link under the Hague Evidence Convention,” which is published by the Permanent Bureau of the Hague Convention in December 2008,

states that “[The executing court] can simply sever the video-link, just as it could ask for the physical removal of disruptive persons,” and that “it is likely to be sufficient.” However, the true effectiveness of this solution is questionable because it is the litigants and the court who are in need of witness testimony, while a witness often has little interest or stake in the proceedings. Severing video-link, therefore, cannot be an enough threat to the witness.

H. The Extent of Involvement of the Parties Concerned in the Taking of Evidence

Article 7 of the Hague Evidence Conventions requires the parties concerned and their representatives to be notified of the date and place of evidence taking, if the Requesting State so desires. This notice is given only when the requesting authority indicates the intention of such presence in the Letter of Request. If such a request for attendance is made, the parties concerned shall have the absolute right to take part in the execution of the request. Even if that is the case, the right of attendance to the evidence taking does not automatically grant an entitlement that is not generally granted to citizens of the Requested State. Article 8 of the Hague Convention on the presence of judicial personnel allows a Contracting State to declare that members of the judicial personnel of the requesting authority may be present at the execution of a Letter of Request, provided that prior authorization is given by the competent authority. South Korea declared that judges and court employees of the Requesting State may be present at the execution of a Letter of Request, upon prior authorization of the Administrative Office of the Court of South Korea.

The question is the extent of participation by the parties concerned, who are attending the proceedings through the above procedure, particularly whether they should be allowed to question the witness. In an ordinary judicial assistance case by a Letter of Request without the use of videoconferencing, if the view of the continental law countries on the sovereignty infringement is to be followed, allowing a witness to be questioned by the parties present will be the same as the jurisdiction of the

Requesting State being exercised within the Requested State, which is a violation of its sovereignty. This view, therefore, does not support questioning of witness by the parties concerned. However, since the execution of the request is governed by the law of the Requested State, the country may allow the parties present to participate in the proceedings. In such a case, the parties concerned and their representatives should be separately considered from judges or court employees. Given the extent of possible violation of sovereignty, the Requested State may allow questioning by the parties concerned or their representatives in a manner prescribed by its law, but in the case of judges and court employees, the permission should be given more conservatively, if at all, and the scope of questioning should be also limited to supplementary questioning.

In the case of evidence taking by videoconferencing, it is necessary to separately consider the Letter of Request method and the Commissioner method. In case of the Letter of Request method, the above discussions can apply. In the case of the Commissioner method, however, different considerations must be given, although the argument for a violation of sovereignty still holds true and it is not completely invalid to say that the parties concerned of the State of Origin should not be permitted to participate in the proceedings at all. In the case of the Commissioner method, the State of Origin leads the taking of evidence, and a judge is already allowed to directly question a witness within the State of Execution, which is even more infringing to the sovereignty of the country than the questioning of witness by the parties concerned in the case of the Letter of Request method. Therefore, from the viewpoint of sovereignty infringement, in the case of the Commissioner method, questioning by the parties concerned can be permitted by videoconferencing, provided that the procedures respect the power of the presiding authority.

I. The Issue of Cooperation among the Contracting States

As mentioned previously, taking of evidence by videoconferencing takes virtual presence as a physical, actual one. This means that there is a fundamental issue when physical, actual presence is absolutely necessary,

i.e. when a concept cannot replace physical presence.

The most representative example is the case of the Commissioner method in which the Commissioner is in the State of Origin and questions a witness in another country via videoconferencing. In case of the Commissioner method, the country of execution does not get involved in the proceedings once it grants the necessary prior authorization. When the Commissioner is in the State of Origin, unlike in the case where the Commissioner is in the executing country with the witness, there is a possibility that the Commissioner does not have anyone sitting next to the witness to assist with the proceedings, unless assistance is given by the executing country pursuant to Article 18, or a representative of the authority is present at the taking of evidence pursuant to Article 19. With regard to this, the Practitioner Handbook on the Operation of the Evidence Convention, recently published by the Permanent Bureau of the Hague Convention, also states that the Commissioner is in charge of making preparations at both sides of evidence taking by videoconferencing. As discussed previously, the Hague Convention did not envisage the use of videoconferencing at the time of establishment, but most potential issues can be governed through proper interpretation and wider application. However, this issue remains unresolved since all the provisions of the Hague Convention assume that there is someone who can assist with the procedures at the taking of evidence.

In conclusion, aside from the possibility of amending the Hague Evidence Convention, the above issue should be resolved among the competent authorities of the Contracting States by establishing cooperative practices, even though the Convention does not provide explicit grounds for such cooperation. This is also in line with the purpose of the Convention, which is to facilitate international judicial cooperation. This solution is also valid in light of the recent efforts to establish a closer cooperative system of the competent authorities of the member states to younger frameworks, such as the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters or the European Union regulations on the taking of evidence.

J. Technological Issues

(1) The Issue of Compatibility

Video transmission or videoconferencing equipment can be divided into two broad categories: high-end, purpose-built equipment with a high resolution camera and input and output devices for video and audio; and a simple, personal system consisting of a personal computer with an internet connection and a web camera. Purpose-built equipment guarantees stable data transmission and high quality image, but they are usually developed by private companies, which use proprietary software and devices. A set of equipment and software may not be compatible with another. On the other hand, a personal system is low-cost, can be used at any place with an internet connection, and is easily available with a download of a commercial program.

The videoconferencing equipment used by courts of a country may not be compatible with the equipment of other countries, especially when it is purpose-built. In the Letter of Request method, the taking of evidence by video transmission constitutes a special method or procedure, as discussed before, and incompatibility of videoconferencing equipment could be a ground for refusal pursuant to Article 9.2 of the Convention, which states “The procedure may be rejected by reason of its internal practice and procedure or by reason of practical difficulties.” However, the reason of ‘internal practice and procedure’ or ‘practical difficulty’ cannot be simply an inconvenience or difficulty, but should be interpreted to mean that the execution is impossible. Even if the videoconferencing systems of the two countries are not compatible with each other, video transmission can still be achieved by using a personal system with an internet connection. Therefore, except for the case where even the internet is not connected, the issue of incompatibility does not constitute impossibility of execution. This active interpretation is also in line with the purpose of the Hague Convention, which intends to facilitate judicial assistance among the Contracting States.

Under the Commissioner method, the State of Origin will supervise the whole process of evidence taking, and the procuring and installation of

equipment for videoconferencing is thus also led by the state. Therefore, the likelihood of incompatibility is smaller than in the case of the Letter of Request method.

(2) The Issue of Resolution of Transmitted Video

During the process of witness examination, a witness may be asked to confirm the authenticity of a document and presented with a copy of such document. In such a case, however, the resolution of the transmitted image may be low and it may be difficult for the witness to clearly identify the document.

This issue is likely to be resolved soon as the resolution of transmitted image is improving with the development of technologies. To respond to this issue until then, a clear copy of the original document may be mailed in advance, or a copy may be sent during the proceedings via facsimile. The civil procedural law of Japan also requires that any document or certificate to be presented during remote testimony must be transferred to the remote location via video camera in the courtroom or by a facsimile. However, rather than using such a method, creating an image file of a document by scanning it and then transmitting the file to the remote location via the internet or other communication line will be simpler, and the image quality transferred will be also clearer.

Another issue related to image quality concerns the discussions about the Confrontation Clause, which is described above. One of the arguments against the use of videoconferencing is that it cannot accurately convey the demeanor of the witness, such as the facial expressions or gestures. Furthermore, clear picture quality and stable speed of transmission can be achieved by the use of dedicated equipment, software and communication line, but admittedly in some cases such as when a witness is in a less developed country with poor ICT infrastructure, the only available means of videoconferencing could be low-speed internet via a telephone line, a commercial software such as a messenger program and a low-quality web camera. Under such circumstances, it is difficult to obtain satisfactory image resolution and transmission speed, and the detailed facial expression

of the witness may not be conveyed. However, even in such a case, videoconferencing is still superior to the traditional Letter of Request method, in light of confrontation achieved between the parties concerned and witness. Therefore, this issue does not provide enough grounds to abandon the use of videoconferencing.

K. Reimbursement of Expenses

In the case of the Letter of Request method, the costs of execution are not subject to reimbursement in general, but the Requested State may request reimbursement of any extra costs incurred by the use of a specialist, interpreter services or special procedures (Article 14 of the Hague Convention). Since taking of evidence by videoconferencing will be based on a special procedure or method as discussed before, the Requested Country is likely to charge the Requesting State of the expenses of videoconferencing. Any use of interpreter service will be also added to the cost. In contrast, Article 14.3 of the Hague Convention provides that the taking of evidence is the responsibility of the Requested State, and if the Requested State is unable to execute the taking of evidence, it may appoint a commissioner upon agreement by the Requesting State and later request reimbursement of expenses. This provision is for the common law countries where a judge cannot execute a Letter of Request and must appoint a commissioner to take evidence.

In the case of the Commissioner method, the Hague Convention does not provide any cost-related provisions, because in this case, the State of Execution does not involve in the proceedings, and any costs incurred can be handled by the State of Origin according to its own law.

III. Conclusion

Taking of evidence by videoconferencing allows real-time visual access to evidence in remote location, which can dramatically less time- and money-consuming. This advantage is particularly strong in cross-border

judicial assistance cases. Of course, there is a certain limit to introducing latest technologies to the judicial procedures immediately only to save time and money: Employment of advanced technologies should be carefully tempered so as not to infringe upon the principles of justice and due process. Even from this viewpoint, evidence taking by videoconferencing can be considered greatly beneficial to international judicial assistance, with manageable side effects.

Under the Hague Convention, evidence taking through videoconferencing can be achieved in the most proper form through the Commissioner method. However, South Korea declared exception of application for this method. The declaration is understandable in that the Commissioner method is part of the common law system and thus is new to the judicial system of Korea, as well as to the judges who should act as commissioners. However, the declaration seems inadequate in light of the fact that South Korea is not an exception to the global trend of introducing ICT into judicial procedures, and videoconferencing is already introduced to evidence taking in domestic civil procedures. Also, South Korea is a global leader in terms of electronic judicial procedures, including online lawsuit filing. Article 33 of the Hague Evidence Convention allows each Contracting State to withdraw a reservation at any time. South Korea is advised to give serious considerations to a possible withdrawal of its reservation of the Commissioner method, so that taking of evidence by videoconferencing can be used more freely in cross-border cases.

헤이그 증거협약에서의 영상신문에 의한 증거조사

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I. 서론

국제민사사법공조는 현대에 이르러 교통, 통신수단의 비약적인 발달로 국제적인 거래와 인적교류가 활발하여짐에 따라涉外적 요소를 지니는 법적 분쟁이 빈발하게 되고, 이를 해결하기 위한 소송절차 등에서 법정지 외의 국가에 있는 당사자에게 소장 등의 소송서류를 송달하거나 증인신문 등의 증거조사를 할 필요가 많아짐에 따라 그 필요성도 점차 커지고 있다.

최근 정보통신기술의 발달에 따라 각국의 사법절차에서 정보통신기술의 이용이 점증하고 있는데, 이와 같은 정보통신기술은 이전에 없던 새로운 것으로서 기존의 전통적인 사법절차가 예정하고 있지 않던 것이다. 그러므로 정보통신기술을 새로이 사법절차에 도입, 수용하는 것은 기존의 법관념 및 절차와의 충돌을 초래할 가능성이 있고, 이를 조화적으로 수용하기 위해서는 새로운 실체적, 절차적 법개념을 창출하거나, 또는 적어도 기존의 법절차를 수정할 필요가 생긴다는 점에서 새로운 기회이자 도전이 되고 있다. 이와 같은 측면은 국제민사사법공조의 대표적인 국제규범이라 할 헤이그 증거협약(Hague Evidence Convention)에서도 마찬가지이고, 영상전송(videoconferencing)에 의한 증거조사는 그와 같은 새로운 기회와 도전 중의 하나라 할 수 있다.

II. 헤이그 증거협약에서의 영상전송에 의한 증거조사

1. 헤이그 증거협약에서의 적합성

헤이그 증거협약에 기하여 영상전송에 의한 증거조사를 실시하기 위해서는 헤이그 증거협약을 우회(bypass)하거나 개정하여야 한다는 견해가 있었다. 이 견해는 헤이그 증거협약이 촉탁서의 집행에 의한 증거조사를 전제로 하고 있고, 헤이그 증거협약이 마련된 때에는 영상전송기술이 실현될 수 없었는데, 그 이후로도 헤이그

증거협약의 체계는 변함이 없었으므로 헤이그 증거협약은 그 체계상 영상전송에 의한 증거조사를 예정하고 있지 않다는 점을 주된 논거로 든다.

헤이그 증거협약의 문언상 영상전송에 의한 증거조사에 대하여 명문의 규정이 없고, 헤이그 증거협약이 성립되었던 1970년의 정보통신기술 수준에 비추어 볼 때, 그 당시 헤이그 증거협약이 영상전송에 의한 증거조사를 상정하지 않았었다는 점은 분명해 보인다. 그렇지만 헤이그 증거협약상의 증거조사 방식들, 즉 축탁서의 집행에 의한 간접실시방식과 수임인 등에 의한 직접실시방식 모두의 경우에 있어서 헤이그 증거협약이 그 문언의 적절한 해석을 통해 영상전송에 의한 증거조사의 근거가 될 수 있음을 도출할 수 있다.

구체적으로 보면, 위와 같은 간접실시방식에서는 후술하는 바와 같이 축탁국의 당사자 등이 원격지에서 참여하는 형태가 될 것이므로, 헤이그 증거협약 제7조, 제8조의 소송관계인과 법관의 출석규정에 영상전송에 의한 출석이 포함된다고 해석하면, 헤이그 증거협약 제1장의 간접실시방식에 대한 규정이 영상전송에 의한 증거조사에 대하여도 적용될 수 있게 된다. 또한, 위와 같은 직접실시방식은 수임인 등의 증거조사자가 외국에 있는 증거를 직접 조사하는 형태로서, 법정지에서 외국에 있는 증인을 영상으로 직접 신문하는 것과 같이 영상전송에 의한 증거조사가 예정하고 있는 이상적인 증거조사 형태가 가장 온전히 구현될 수 있는 구조이므로, 헤이그 증거협약 제2장의 규정은 영상전송에 의한 증거조사에 무리 없이 적용될 수 있다고 생각된다. 그러므로 헤이그 증거협약을 개정하거나 우회하지 않아도 영상전송에 의한 증거조사는 헤이그 증거협약의 체계와 부합한다고 할 것이고, 이와 같은 견해에 대하여 헤이그 증거협약 체결국들 모두가 찬성하고 있다.

다만, 위와 같이 헤이그 증거협약의 운영에 있어서 영상전송에 의한 증거조사가 실시될 수 있다는 점 그 자체로써 헤이그 증거협약이 증거조사 시에 발생하는 모든 문제들에 대해 충분히 대처할 최상의 틀을 제공한다는 것을 의미하는 것은 아니다. 헤이그 증거협약이 그 시대적 한계로 인하여 미처 예정하지 못했던 점에서 불가피하게 해석상 대처가 곤란한 문제들이 발생한다. 이는 근본적으로 집행지에서의 증인 등의 실재를 법정지에서의 증인의 실재로 관념적으로 의제하는 것에 따른 문제이고, 그 대표적인 것이 법정지에서 외국에 있는 증인에 대하여 영상신문을 하는 경우에 그 증인이 있는 국가의 중앙당국 등에 의한 도움을 받을 수 없는 경우이다.

2. 영상전송에 의한 증거조사의 형태

영상전송에 의한 증거조사의 실시 형태는 헤이그 증거협약이 규정하는 방식, 즉

제1장의 촉탁서의 집행에 의한 방식과 제2장의 외교관 등에 의한 직접 조사방식의 두 가지로 크게 나누어 볼 수 있다.

첫째로는, 제1장에 규정된 촉탁서의 집행에 의한 증거조사의 방식에 따라 촉탁국이 수탁국에 증거조사의 촉탁을 하면 수탁국에서 그 촉탁에 따라 증거조사를 실시하되, 촉탁국으로 그 증거조사 실시의 영장을 실시간으로 전송하여 촉탁국에서도 이에 참여할 수 있도록 하는 형태이다. 위와 같은 촉탁서 방식은 수탁국이 증거조사 실시의 주체가 되어 촉탁국을 대신하여 증거조사를 실시하는 형태이므로, 촉탁국의 법원 및 소송관계인으로서는 증거조사 절차를 주재할 수 없어 이에 실시간 영상전송으로 참여할 여지밖에 없기 때문이다. 그리고 위 형태는 다시 헤이그 증거협약 제9조의 구분에 따라 제9조 제1항의 통상의 촉탁서에 의한 실시와 제2항의 특별한 방식 또는 절차(a special method or procedure)에 따른 실시로 개념상으로 구별해 볼 수 있다. 양자의 구별은 형식상으로 촉탁서에 촉탁국의 절차와 방식을 사용하여 증거조사를 실시하여 줄 것을 기재하는가의 차이에 있다고 할 것인데, 특히 전자의 경우에는 수탁국법이 영상전송에 의한 증거조사를 통상적인 절차로서 마련해 두고 있어야 한다는 것이 전제가 된다. 그렇지만 영상전송에 의한 증거조사는 전세계적으로 일반화되는 추세이기는 하지만 민사소송에서 아직 통상적인 절차는 아닐 수 있으므로, 촉탁서에 준수할 특별한 방식 또는 절차로 명기하는 것이 바람직할 것이다.

이하에서는 이와 같은 첫 번째 방식을 “촉탁서 방식”이라고 한다.

둘째로는, 제2장에 따라 증거조사 실시 요청국(the State of Origin)¹⁾의 법원 등 권한 있는 당국에 의하여 선임된 수임인이나 외교관 등이 집행국(the State of Execution)에 있는 증인 등에 대하여 실시간 영상전송을 통하여 직접 증거조사를 실시하는 형태이다. 이는 요청국이 주체가 되어 증거조사를 실시한다는 점에서 간접실시방식의 경우와 구별된다.

구체적으로 보면, 이 형태도 그 실시의 태양상 두 가지로 다시 구분될 수 있다. 그 중 하나는 요청국의 법관 등이 수임인으로서 요청국 내에서 집행국에 있는 증인 등에 대하여 직접 실시간 영상전송을 통하여 증거조사를 실시하는 형태이다. 다른 하나는 외교관, 영사관원이 주재국(집행국)에서 집행국에 있는 증인 등에 대하여 직접 증거조사를 실시하되, 그 증거조사 현장을 실시간으로 요청국에 영상전송을 함으로써 요청국의 법관 및 소송관계인이 이에 참여하는 형태이다. 전자의 경우에도 수임인이 요청국 내에 있지 않고, 집행국으로 직접 가서 집행국에 있는 증인 등에

1) 여기서 촉탁국 대신 요청국, 집행국이라고 한 것은 이와 같은 두 번째 방식은 촉탁에 의한 것이 아니어서 촉탁국(requesting state), 수탁국(requested state)라는 용어가 부적절하므로 그 대신 다른 용어를 사용한 것이다.

대하여 증거조사를 하면서 이를 요청국으로 실시간 영상전송을 한다면 후자의 범주에 속하게 될 것이다. 이들 중 영상전송에 의한 증거조사의 가장 이상적인 형태는 당연히 전자라고 할 것이다. 그런데 헤이그 증거협약은 수임인에 의한 증거조사를 정한 제17조를 외교관, 영사관원의 주재국 또는 제3국 국민에 대한 증거조사를 정한 제16조와 동일한 구조로 규정하고 있어 수임인을 집행국 또는 제3국 국민에 대한 증거조사를 하는 외교관 또는 영사관원과 같은 지위에 두고 있고, 그 문언상으로도 수임인은 그를 선임한 법정지국이 아닌 “다른 국가의 영역 안”에서 증거조사를 수행하도록 하고 있어 전자의 형태는 상정하고 있지 않다. 그러나 이는 전술한 바와 같이 헤이그 증거협약의 성안 당시 영상전송에 의한 증거조사를 예정하지 않았었다는 점에서 이해할 수 있고, 전자의 경우에 영상전송에 의한 증거조사가 공간의 제약 없이 실시간으로 실시되는 까닭에 증거조사가 이루어지는 장소는 공간적으로 집행국의 영토이면서 관념적으로는 요청국 법정의 연장선상에 있는 이중성이 있으므로, 비록 물리적으로는 수임인이 법정지국에 있으나 관념적으로는 증거조사지에 있다고 볼 수 있어 그 해석상 제17조의 증거조사 방식에 전자가 포함된다고 볼 것이다.

위 두 가지 형태의 가장 큰 차이점은 증거조사 실시의 주체가 촉탁국(요청국) 또는 수탁국(집행국) 중 어디인가라 할 수 있는데, 촉탁서 방식의 경우는 수탁국이, 수임인 방식의 경우는 요청국이 증거조사 실시의 주체가 될 것이다. 또한, 증거조사 실시의 준거법으로는, 촉탁서 방식의 경우 원칙적으로 수탁국법이 될 것이고, 수임인 방식의 경우 요청국법이 된다.

이하에서는 이와 같은 두 번째 방식을 “수임인 방식”이라고 부른다.

3. 절차

가. 촉탁서 방식

촉탁서 방식의 경우 헤이그 증거협약 제1장의 규정에 의하여 통상의 촉탁서의 실시에 의한 증거조사 방식에 준하여 실시하면 된다. 대략적으로 보면, 촉탁국의 사법당국은 수탁국의 중앙당국에 제3조의 규정에 의한 촉탁서를 송부하는데, 그 촉탁서에는 전술한 바와 같이 준수할 특별한 방식 또는 절차로서 영상전송에 의한 증거조사를 명시하고, 영어 또는 불어로 된 번역문을 첨부해야 한다(우리나라는 불어에 대하여 유보를 하였으므로 영어로만 된 번역문을 첨부하여야 한다). 수탁국의 중앙당국은 위와 같은 촉탁에 이의사유가 있는 경우 이를 촉탁당국에 통지한다. 수탁국의 집행당국은 제12조의 거절사유가 없으면 원칙적으로 수탁국법에 따라 증거조사를

실시하면 되나, 위와 같이 특별한 절차 또는 방식을 준수하여 달라는 요청이 있는 경우 그것이 집행국의 국내법에 저촉되거나, 국내의 관행·절차 또는 현실적인 어려움 때문에 이행될 수 없는 경우가 아닌 한 위 준수 요청에 따라 실시하고, 그 실시에는 수탁국법이 정하는 정도의 적절한 강제력을 사용한다. 그리고 촉탁서 방식에 의한 영상전송에 의한 증거조사의 경우도 촉탁서의 집행을 입증하는 서류를 촉탁당국에 송부하여야 함은 물론이다.

촉탁서 방식의 경우 진술한 바와 같이 촉탁국의 당사자 등 소송관계인과 법원은 영상전송에 의하여 수탁국에서 실시되는 증거조사에 참여할 수 있는데, 여기에는 제7조와 제8조의 출석 규정을 준용할 것이고, 이에 대하여는 후술한다.

나. 수임인 방식

외교관 또는 영사관원은 자국의 법원에서 개시된 소송절차를 돕기 위하여 주재국에서 자국민에 대하여 강제력 없이 증거조사를 시행할 수 있다. 외교관 또는 영사관원에게 직접 증거조사를 실시하도록 하는 방법은 외국에 있는 자국민 또는 자국어를 해독할 수 있는 자에 대하여 번역이나 통역이 필요하지 않다는 점에서 번역이나 통역이 필요한 외국의 사법당국에 대한 촉탁절차보다 능률적이다. 이에 대하여 헤이그 증거협약은 체결국이 외교관 등이 허가를 얻은 경우에 한하여 증거조사가 가능하다고 선언할 수 있다고 규정하고 있으나, 우리나라는 가입 시 위와 같은 선언을 하지 않았다.

외교관 또는 영사관원에 의한 증거조사의 경우 우리나라에서의 구체적인 절차는 헤이그 증거협약이 구체적인 촉탁 절차를 규정하지 않고 있으므로 국제민사사법공조법을 따라야 할 것인데, 외국으로 촉탁하는 경우에는 수소법원의 재판장이 증거조사지국에 주재하는 대사·공사 또는 영사에 대하여 촉탁하되, 위 수소법원의 법원장이 법원행정처장에게 촉탁서 등을 송부할 것을 요청하여야 하고, 법원행정처장은 외무부장관에게 외교상의 경로를 통하여 외국의 관할법원 기타 공무소로 송부할 것을 의뢰한다. 여기에서 더 나아가 외교관이나 영사관원은 주재국의 권한 있는 당국의 사전허가를 얻어 주재국 국민 또는 제3국 국민에 대하여 강제력 없이 증거조사를 할 수 있으나, 이에 대하여 우리나라는 적용배제 선언을 하였으므로, 우리나라는 이를 이용할 수 없게 되었다.

수임인의 경우 통상 요청국의 사법당국이 선임하는데, 수임인은 집행국의 권한 있는 당국으로부터 사전허가를 얻어 강제력 없이 증거조사를 할 수 있는바, 그 절차와 관련하여 헤이그 증거협약은 명시적인 규정을 두고 있지 않다. 그런데 앞서 본 바와 같이 우리나라는 수임인 규정의 적용을 배제하는 선언을 하였으므로 수임

인과 관련하여 국제민사사법공조법을 적용할 여지가 없게 되었지만, 국제민사사법 공조법 역시도 외국 주재 대사, 공사, 영사에 대하여만 증거조사 촉탁을 하도록 되어 있어 수임인에 대하여는 예정하고 있지 않은 것으로 보인다.

위와 같은 수임인 방식 중 외교관, 영사관원에 의한 증거조사는 촉탁서 방식에 비하여 주재국 당국의 개입 없이 간편하게 실시할 수 있는 등의 장점이 있으나, 현재 활발하게 실시되고 있는 영사송달의 경우와는 달리 외교관 등이 법원의 증거조사절차에 익숙하지 않다는 등의 이유로 실제로 시행되는 예가 거의 없다. 그렇지만 전술한 바와 같이 영상전송에 의한 증거조사가 제대로 구현될 수 있는 것은 수임인 방식을 통해서인데, 우리나라는 헤이그 증거협약 가입 시 제16조, 17조에 대하여 적용배제 선언을 함으로써 수임인 방식 중 유일하게 외교관, 영사관원에 의한 자국민에 대한 증거조사만 허용되고 있는 상태이므로, 지금까지의 관행과 달리 외교관 등에 의한 증거조사의 활용을 제고하는 방안도 고려해 보아야 할 것이다.

5. 구체적인 문제에 대한 고찰

가. 문제 발생의 원인

영상전송에 의한 증거조사는 현대 정보통신기술 발전의 총아로서 현행 법제도에 적용이 될 경우 그 생소함 때문에 기존의 법체계와 충돌하거나, 잘 맞지 않는 부분이 적지 않게 생길 수 있다. 이와 같은 문제는 영상전송에 의한 증거조사의 참여자들이 두 개의 사법권 내에 각각 있게 되므로, 하나가 아닌 두 개의 법체계가 서로 얽히게 됨으로써 법정지법과 집행지법이 교차하게 되는 것에 주로 기인한다. 이와 같은 특성 때문에 경우에 따라서는 해결하기 어려운 복잡한 문제들이 발생하게 되고, 전술한 바와 같이 이를 헤이그 증거협약의 틀 내에서 해결할 수 없으므로 이를 우회하거나 개정하여야 한다는 견해도 대두된 것이다. 그러나 위와 같은 문제들은 기존의 법 개념을 일부 변용하거나 유추함으로써 헤이그 증거협약의 틀 내에서 거의 대부분 해결될 수 있는데, 그 유력한 해법은 영상전송에 의하지 아니한 증거조사와 동일한 방법으로 영상전송에 의한 증거조사를 실시하는 것이고, 이로써 영상전송에 의한 증거조사의 실체에 있어 문제가 될 것은 많지 않다. 그렇지만 일반적으로 영상전송에 의한 증거조사는 물리적으로는 법정지에 있지만 관념적으로는 집행지에 출석하는 것처럼 의제하는 형태이므로, 물리적인 실재를 관념적인 것으로 대체하기 어려운 경우, 예를 들어 법정소란행위에 대한 감치가 필요한 경우 등에는 위와 같은 근본적인 차이 때문에 해결이 쉽지 않은 부분이 분명히 존재한다고 생각된다.

나. 주권침해의 문제

주권(sovereignty)이라는 개념은 국가이론이나 국제법 이론에 있어서 명확하게 일의적으로 정의되지는 않고 있지만, 국제법상 보편적으로 승인된 원리로는, 속지주의(territorial principle)와 관련하여 국가가 영토주권의 보유자로서 자국영토 내의 사람과 사건에 대해 완전한 입법관할권을 향유한다는 것이다. 이에 따라서 한 국가는 원칙적으로 자국의 영토 외에서 주권을 행사할 수 없게 되는데, 이와 같은 주권 개념은 개개의 사건에 대하여 관할권을 가지게 되는 타국 법원의 권한과의 충돌 여지를 만들고 사법마찰을 일으키게 된다. 영미법계의 국가들, 특히 미국에서는 소장과 같은 재판상 문서의 송달과 증거 수집을 전통적으로 당사자의 책임하에 두고 있기 때문에 이와 같은 당사자의 재판과 관련된 행위는 보통 공적인 권한의 행사로 여겨지지 않고 있고, 그 결과 소송당사자의 변호사가 강제력의 행사 없이 외국에서 증거 수집을 하는 것이 그 국가의 주권을 침해한다는데 대하여 소극적으로 보고 있다. 그 반면에 대륙법계 국가에서는 위와 같은 송달 및 증거 수집이 재판상 행위로써 국가기관인 법원의 재판권 행사로 인식되고 있으므로, 외국의 법원 또는 소송당사자에 의한 자국민에 대한 송달 또는 증거조사는 당연히 공적인 행위(official act)로 여겨지고, 그 결과 위와 같은 행위가 국가 간 사법공조의 경로를 거치지 않게 되면 주권침해의 문제를 야기하게 된다. 그리고 이와 같은 주권침해의 문제는 당사자가 한 당해 소송행위의 효력에도 영향을 끼칠 수 있고, 더 나아가 스위스의 경우처럼 형사처벌로까지 연결되기도 한다. 다만, 최근에 이르러 대륙법계 국가의 중심에 있는 독일과 프랑스에서도 위와 같은 전통적인 재판권 관념에 따른 주권침해를 강조하는 것이 완화되는 경향이다.

영상전송에 의한 증거조사의 경우는 위와 같은 주권침해가 중요한 문제로 대두될 수 있다. 왜냐하면, 영상전송에 의한 증거조사는 그 성격상 물리적으로는 법정지국에 있는 소송관계인과 법관 등이 실시간 영상전송을 통하여 관념적으로 집행국의 증거조사 실시에 출석함으로써 이에 참여하게 되고, 그 참여과정에서 법정지국의 소송관계인이나 법관 등이 증인신문이나 질문을 행하게 되면 이로써 실질적으로 법정지국의 재판권을 집행국 내에서 행사하는 것이 되어 바로 집행지국의 주권이 침해될 수 있기 때문이다. 그리고 영상전송기술은 미국의 변호사가 증거개시절차(discovery)의 일환으로써 우리나라 내에 있는 증인에 대하여 영상전송에 의하여 증언녹취(deposition)를 하는 것과 같은 사적인 증거조사, 또는 우리나라의 법원이 헤이그 증거협약상의 경로를 거치지 아니하고 외국에 있는 증인에 대하여 직접 우리나라 민사소송법상의 절차에 의하여 영상신문을 하는 경우와 같은 국내 민사증거

절차법의 역외적 적용을 더욱 쉽게 할 수 있기 때문에 이에 따른 주권침해의 논란을 가열시킬 수 있다.

다. 대면권(confrontation right) 등의 보장 문제

영상신문의 경우는 소송관계인이나 법관이 물리적으로 법정에서 출석하지 아니한 증인 등을 실시간 영상으로만 대면하여 신문하기 때문에 이와 같은 영상신문이 소송관계인의 대면권이나 적법절차에 기한 권리를 침해하고, 아울러 법원과 관련하여서는 민사소송법상의 직접주의에 반하지 않는가 하는 문제가 있을 수 있다.

먼저 당사자 등의 대면권에 관하여 보면, 대면권은 미국 헌법상 형사절차의 피고인에게 인정되는 권리이고, 우리나라의 헌법에는 이와 같이 민사소송관계인이 반드시 법정에서 출석하여야 한다는 규정이 없으므로, 대면권에 관한 우리나라 헌법상의 문제는 없는 것으로 보인다. 한편, 영상전송을 이용한 재판에서의 대면권 및 적법절차상의 권리에 대한 위와 같은 논의는 미국에서 영상재판에 의하여 초래되는 피고인에 대한 불이익, 즉 재판과정에서 피고인의 의사와 감정이 정확히 전달되지 않고 왜곡될 수 있고, 변호인으로부터 실질적인 조력을 받기가 어려워진다는 점 등과 관련하여 주로 거론되는 문제이다. 그런데 기존의 국제민사사법공조에 있어서는 증인이 외국에 소재하고 있는 경우에 촉탁서 방식에 의하든 외교관, 영사관원에 의하든 수탁국의 집행당국이나 외교관 등이 증인에 대하여 증거조사를 실시하고, 그 실시의 결과를 촉탁국에 전달하는 것으로서 거기에 소요되는 시간과 비용이 과다할 뿐만 아니라, 결정적으로는 촉탁국의 소송관계인으로서 증인을 대면할 기회가 없이 다만 그 신문의 결과를 서면으로 확인하는 것에 그치게 된다. 그 반면에 국제민사사법공조에서 영상신문을 실시하게 된다면, 소송관계인으로서 위와 같은 단순한 증거조사결과가 기재된 서면뿐만 아니라, 비록 실제로 법정에서 출석한 증인을 직접 대면하는 정도에는 미치지 못한다고 하더라도 생생한 증언을 청취할 수 있게 된다. 그러므로 소송관계인의 의사전달이나 실질적인 변론의 실시, 소송경제라는 측면에서 영상신문이 기존의 사법공조 방식보다 우월함은 말할 필요도 없다. 이와 같은 측면에서 보면, 영상전송에 의한 증거조사에 의하여 오히려 소송관계인의 대면권 등이 더욱 확보된다고 할 것이고, 따라서 영상전송에 의한 증거조사는 위와 같은 대면권 등의 권리에 반하지 않는다고 할 것이다.

한편, 민사소송법상 직접주의는 수소법원의 법관이 직접 변론 및 증거조사를 시행하는 것인데, 우리나라 민사소송법은 직접주의의 예외로서 민사소송법 제296조를 두어 사법공조의 방법으로 하는 외국에서의 증거조사를 규정하고 있으므로, 영상전송에 의한 증거조사는 위 규정의 연장선상에 있는 간접심리주의 방식에 속하는

것이어서 직접주의에 반한다고 볼 수 없다.

라. 가상 출석(virtual presence)의 문제

헤이그 증거협약 제7조, 제8조는 각각 소송당사자와 법관 등의 증거조사 실시장소에 출석에 대하여 규정하고 있다. 그런데 이와 같은 소송관계인의 출석 규정이 영상전송을 통한 증거조사에도 적용되는지 문제된다. 이에 관하여 보면, 영상전송에 의한 증거조사의 경우에도 소송관계인이 실시간으로 증거조사 실시를 참관하면서 허용되는 경우 질문을 함으로써 증거조사에 참여할 수 있는 등으로 물리적으로 증거조사의 실시장소에 현재하는 것과 같은 활동과 장점들이 그대로 가능하다고 할 것이므로, 위와 같은 출석에 관한 조항은 영상전송에 의한 증거조사의 경우에도 적용될 수 있다고 할 것이다.

한편, 우리나라 법원조직법 제56조 제1항은 “공판은 법정에서 이를 행한다”라고 규정하고 있고, 우리나라 민사소송법도 소송관계인이 실제로 법정에 출석할 것을 전제로 한 규정들을 두고 있다. 그러므로 영상재판에 의한 증거조사의 경우에 이루어지는 소송관계인의 영상전송을 통한 출석이 위와 같이 법상 요청되는 출석으로 볼 수 있는지가 문제되고, 이 문제는 영상전송에 의한 증거조사에서 소송관계인이 출석하거나, 증인신문이 실시되는 장소를 재판장의 소송지휘권이 미치는 법정으로 볼 수 있는가와도 관련된다. 생각하건대, 실시간 영상전송이라는 것이 공간의 제약이 없어 증거조사 실시 장소가 관념적으로 요청국 법정의 연장선상에 있게 된다는 측면을 강조하면, 증인신문 실시 장소를 관념적으로 법정으로 볼 수 있다고 할 것이다. 이와 관련하여 종래의 “원격영상재판에 관한 특례법” 제3조는 “원격영상재판은 재판관계인이 동일한 법정에 출석하여 진행하는 재판으로 본다”라고 규정하고, 최근 개정된 민사소송법 제327조의2에서는 “비디오 등 중계장치에 의한 증인신문은 증인이 법정에 출석하여 이루어진 증인신문으로 본다”고 규정하여 위와 같은 문제를 입법적으로 해결하였다.

한편, 위 문제와 관련하여 영상전송에 의한 증거조사가 이루어질 때, 외국에 있는 증인이 반드시 해당 국가의 법정에서 증인신문을 받아야 하는지의 문제가 있다. 앞서 본 바와 같이 영상신문에서 증인이 있는 장소는 법정지의 법정으로 의제되는 것이므로, 증인이 실제로 있는 장소가 법정이든 아니든 간에 위와 같은 의제에 영향이 있는 것은 아니라 할 것이다. 그러므로 위와 같이 증인이 있는 장소가 반드시 상대국의 법정일 필요는 없고, 영상전송설비가 갖추어진 곳은 어디든 가능하다고 하겠으나, 법정의 존엄과 질서유지 측면에서 가급적이면 영상전송설비가 갖추어진 전자법정 등의 법정에서 증인신문을 실시하는 것이 바람직하다고 할 것이다.

그리고 위 문제는 공개재판의 원칙에 따른 증인신문의 공개 여부와도 관련이 있는데, 변론기일에서 증인 등을 신문하는 경우에는 공개된 법정에서 행할 필요가 있으나, 영상전송에 의한 증인 등의 신문은 법정지의 수소법원에서 행하는 증거조사이기 때문에 수소법원의 법정이 공개되어 있다면 증인 등이 출석하는 법원 등의 장소에서의 공개까지 요구되지는 않는다고 생각된다. 더 나아가 위와 같이 실시간 전송되는 증인신문 영상을 법정 외의 일반인이 인터넷 등으로 접속하여 볼 수 있도록 할 수 있는지도 문제될 수 있는바, 향후 가상법정(virtual court)이 실현될 경우에 위 문제는 충분히 논의되어야 할 성질의 것이라고 여겨진다.

마. 증거조사 실시의 준거법

촉탁서 방식의 경우 헤이그 증거협약 제9조 제1항에 따라 원칙적으로 수탁국의 법이 적용된다. 그러므로 수탁국은 마치 자국의 소송절차에서 증거조사를 진행하는 것처럼 증거조사를 실시하면 된다. 그리고 제9조 제2항의 촉탁국이 요청한 특별한 방식 또는 절차에 의한 증거조사의 경우, 수탁국법에 저촉되지 않는 한도 내에서 촉탁국법이 정한 방식과 절차에 의할 수 있다.

한편, 제10조에서 수탁국은 국내법과 상응하는 정도로 촉탁서를 집행함에 있어 적절한 강제력을 사용하도록 하고 있으므로, 증인이 의무를 위반하였을 경우에 대한 제재도 수탁국법에 따라 정해진다. 우리나라 민사소송법상 위와 같은 제재의 예로는 증인의 불출석에 대한 과태료 부과, 증인의 구인, 선서거부에 대한 제재 등이라 할 것이다. 영상전송에 의한 증거조사의 경우는 그것이 촉탁국이 요청한 특별한 방식 또는 절차에 의한 것임을 전제로 촉탁국법이 적용될 것이지만, 그 구체적인 내용에 있어서는 경우에 따라 다를 수 있다고 생각된다. 즉, 특별한 방식 또는 절차로서 촉탁국이 수탁국에 증거조사를 촉탁하면서 단순히 증거조사의 실시를 실시간 영상으로 전송하여 달라고만 요청한 경우에는 증거조사 실시 자체에는 수탁국법이 적용될 것이지만, 위와 같은 요청과 더불어 촉탁국이 증거조사 실시의 구체적인 절차와 방식까지 명시하여 촉탁한 경우에는 그와 같은 명시에 따라 촉탁국법이 적용될 것이다.

수임인 방식의 경우는 증거조사가 실시되는 국가의 법에 의하여 금지되지 않는 한도 내에서 법정지법이 적용된다(제21조 제4항). 다만, 수임인 방식의 경우 증거조사 실시에 강제력을 사용할 수 없으므로, 증인이 출석하지 않거나 증언을 거부하는 등의 경우에 제재를 가함으로써 출석을 강제할 수는 없다. 그러므로 영상전송에 의한 증거조사의 경우 수임인 방식 중 외교관, 영사관원이 주재국 내에서 증거조사를 시행하되 그 실시 영상을 법정지국에 전송하는 경우에는 외교관 등이 자국의 법에

따라 증거조사를 시행하면 되고, 수임인이 법정지에 있으면서 외국에 있는 증인 등에 대하여 실시간 영상전송으로 증거조사를 시행하는 경우도 그 수임인이 법정지법을 적용하여 마치 자국 내에서 통상의 증거조사절차를 시행하는 것처럼 증거조사를 시행하면 될 것이다.

바. 증인신문과 관련된 문제

(1) 증인의 권리와 의무

헤이그 증거협약 제11조는 증거제출 거부권과 의무에 대하여 규정하고 있는데, 이에 의하면 원칙적으로 집행국의 법에 의하여 증거제출 거부의 특권이 인정되고, 촉탁국법에 의한 증거제출 거부의 특권이나 의무가 있는 경우에는 그 특권이나 의무가 촉탁서에 명시되거나, 수탁당국의 발의에 따라 촉탁당국이 그 특권이나 의무를 확인하여 준 경우에 위와 같은 촉탁국법에 의한 특권이나 의무를 행사할 수 있다. 이는 ‘증인의 최혜원칙’을 규정한 것으로서 증거제출 거부권을 두텁게 보장하는 역할을 하는데, 위와 같은 특권에는 우리나라 민사소송법상의 증언거부권과 증언무능력도 포함된다. 이와 같은 증언거부의 적법 여부는 촉탁국이 아닌 수탁국의 수소법원이 결정한다.

(2) 증인의 선서와 관련된 문제

영상전송에 의한 증거조사에 있어서 증인의 선서 방식과 절차를 어떻게 할 것인가가 문제가 된다.

촉탁서 방식에서는 영상전송에 의한 증거조사가 촉탁국이 요청한 특별한 방식 또는 절차에 해당되는데, 단순히 촉탁서에 증거조사의 실시를 영상전송하여 달라는 것만 명시한 경우에는 수탁국법에 따라 선서의 주재자, 선서의 방식 등이 결정된다. 그 반면에 영상전송 외에 구체적인 절차와 방식까지 촉탁서에 명시한 경우에는 수탁국법에 저촉되지 않는 한 그와 같이 기재된 바에 따라 선서의 주재자와 선서의 구체적 방식 등이 결정된다.

이와 관련하여 구체적으로 우리나라 민사소송법의 예를 들어보면, 우리나라 민사소송법은 증인의 사실진술의무와 위증의 경고가 담긴 선서서를 재판장이 증인으로 하여금 읽도록 하고, 증인이 그 선서서에 기명날인 또는 서명하도록 하고 있다. 그러므로 외국에서 우리나라로 증인신문을 촉탁한 경우는 큰 문제가 없다. 그러나 우리나라가 외국으로 증인신문을 촉탁하면서 특별한 방식 또는 절차로서 위와 같은 절차를 명시한 경우에는, 촉탁서에 선서서를 같이 첨부하여 송부하는 것이 바람직하다. 그렇지만 수탁국 법원의 재판장이 허용한다면 우리나라에서 화상카메라 등을 통하여 선서서를 증인에게 보여 주어 읽도록 하는 것도 가능할 것이다. 다만, 이 경

우 증인이 선서서에 기명·날인 또는 서명하지 못하는 문제가 생기는데, 민사소송법 제321조 제3항을 유추적용하여 “증인이 기명날인 또는 서명하지 못하는 경우”에 해당하는 것으로 보고, 우리나라에 있는 법원사무관 등이 그 선서서에 기명날인 등을 대신할 수 있다고 생각한다.

수임인 방식에 있어서는 헤이그 증거협약 제21조가 선서의 주재자와 준거법 등에 대하여 구체적으로 규정하고 있으므로 이에 따르면 될 것이다. 다만, 수임인 방식 중에서 우리나라의 영사가 주재국에서 우리 국민에 대하여 선서를 받을 수 있는 현행법상의 근거는 없는 것으로 보이므로, 영사의 선서 주재와 위증에 대한 처벌에 관하여 법적인 근거를 마련할 필요가 있다고 할 것이다.

(3) 위증 문제

증언의 진실성을 담보할 수 있는 가장 확실한 수단 중의 하나는 위증에 대한 제재이다. 국제민사사법공조에서 위증과 관련하여 제기되는 문제는, 첫째로 외국에서 행하여진 허위 증언이 법정지국에서 위증죄의 요건을 충족할 수 있는지, 둘째로 실제로 위증에 대하여 어느 국가가 처벌을 할 수 있을 것인지의 문제이다. 특히 영상전송에 의한 증거조사의 경우는 법정지와 증거조사지의 사법권이 실시간으로 극명하게 교차될 수 있으므로, 전통적인 증거조사방식보다 더 어려운 문제를 초래할 수 있다. 구체적으로 보면, 전자의 문제는 위증에 대한 처벌 법규가 증인이 법정 내 및 법관 앞에서 선서하여야 한다는 요건을 필요로 하고 있는지와 관련이 있고, 후자의 문제는 형사 사법권의 역외적 행사와 관련이 있다. 이에 대해서는 증거조사의 방식별로 나누어 보기로 한다.

촉탁서 방식에서는 전술한 바와 같이 헤이그 증거협약 제10조의 취지에 따라 증인이 의무를 위반하였을 경우에 대한 제재도 수탁국법에 따라 정하게 된다. 그러므로 위증죄의 구성요건 및 처벌도 수탁국법에 따를 것이다. 그렇지만 이 경우 수탁국법에서 위증죄가 성립된다고 하더라도, 수탁국으로서는 증인신문만을 실시할 뿐이므로 증언이 허위인지 가려내기 어렵고, 위증죄의 성립이 인정된다고 하더라도 수탁국이 그 증인에 대하여 수사 및 재판절차를 진행하여 처벌할 유인도 크지 않다고 할 것이므로, 위와 같은 증언의 진실성 담보수단으로서의 위증죄의 역할이 크게 줄어들다는 점은 분명해 보인다. 한편, 위와 같이 수탁국에서의 위증죄 성립 여부와 촉탁국에서의 위증죄 성립 여부는 별개의 문제라 할 것이므로, 수탁국과 촉탁국 모두에서 위증죄가 성립할 수도 있고, 어느 한 국가에서만 위증죄가 성립할 수도 있으며, 양국 모두 위증죄가 성립되지 않을 수도 있다. 그 중에서 촉탁국에서 위증죄가 성립하는 경우에는 촉탁국에서 그 증인에 대하여 처벌할 수도 있을 것이지만, 증인이 외국에 소재하는 이상 그 실효성을 거두기가 어렵다는 난점이 있다. 양국

모두에서 위증죄가 성립하는 경우에 어느 국가가 형벌권을 행사할 수 있는지는 그러한 상황에 대하여 아직 확립된 국제법상의 원칙이 없기 때문에 불분명하다. 그렇지만 사법권이 경합하는 경우에는 영토권 원칙(territoriality principle)이 지배적이므로, 이에 따르면 증인 소재지 국가가 형벌권을 행사할 것이고, 다른 국가는 증인 소재지국이 형벌권을 행사하지 않는 경우에 이를 행사할 것이다.

우리나라의 경우를 예로 들면, 우리나라 형법상 위증죄의 성립요건과 관련하여 앞서 본 바와 같이 우리나라 민사소송법의 선서에 관한 규정에 비추어 볼 때 영상신문의 경우도 그 선서가 법정 내 및 법관 앞에서 한 것으로서 유효하다고 볼 수도 있다.

수임인 방식의 경우는 제18조에 의한 집행국의 원조가 있는 경우를 제외하고는 그 증거조사에 강제력을 수반하지 않고 요청국법이 적용되므로, 집행국에서의 위증에 대한 처벌은 어렵다고 할 것이다. 이와 관련하여, 우리나라에서 외국에 있는 증인에 대하여 영상신문을 할 때 증인이 허위진술을 하였을 경우를 예로 들면, 위 증인이 한국인인 경우 처벌의 실효성은 별론으로 하고 형법 제3조에 의하여 처벌할 수 있고, 외국인인 경우에는 외국인의 국외범을 규정한 형법 제5조가 위증죄를 대 상범죄에서 제외하고 있기 때문에 우리나라의 형법으로 위 증인을 처벌할 수 없게 된다. 위와 같이 외국에 있는 외국인에 대한 증인신문에 대하여 우리나라 법을 적용하는 경우에는 증인의 선서에서 허위진술시 위증의 벌을 받기로 맹세한다는 부분이 불필요하다고 볼 수 있다.

사. 법정모욕의 문제

영상전송에 의한 증거조사에 있어서 법정모독(contempt of court proceedings)과 같은 법정질서위반자에 대한 제재를 어떻게 할 수 있는가가 문제 된다. 이는 절차에 참여하는 증인이나 대리인 등 관계인들이 증거조사를 실시하는 법원의 영역 밖에 있기 때문에 생기는 문제로서, 전술한 바와 같이 물리적으로 요구되는 실재를 관념적인 것으로 대체함으로써 생기는 근본적인 문제 중의 하나이다.

위와 같은 법정모욕에 대한 제재는 촉탁서 방식의 경우 수탁국의 집행당국이 이를 행하면 되므로 큰 문제가 없다. 그러나 수임인 방식의 경우 증거조사에서 강제력을 행사할 수 없기 때문에 집행국에 있는 증인 등에 대하여 제재를 가하기 어렵다는 문제가 있다. 이에 대한 헤이그 증거협약의 해석은 위와 같은 경우에는 영상전송 없이 하는 통상의 증거조사 실시와 똑같이 처리하면 될 것이라고 한다. 특히 헤이그 국제사법회의 사무국(Permanent Bureau)이 2008. 12. 발간한 “The Taking of Evidence by Video-Link under the Hague Evidence Convention”에

서는 “법정질서위반자의 경우에는 감치나 형벌의 부과에 대응하여 영상전송을 끊어버리는 것으로 위와 같은 제재를 충분히 대신할 수 있다”고 하나, 그것이 근본적으로 실효성이 있는지에 대해서는 의문이 든다. 왜냐하면 영상신문이 필요한 쪽은 요청국의 소송관계인 및 법원일뿐이지, 증인은 증언 실시와 관련하여 자기에게 별다른 이익이나 이해관계가 없는 경우가 많으므로 위와 같은 영상전송을 끊어버리는 것이 증인에 대한 충분한 제재가 될 수 없기 때문이다.

아. 증거조사 시 소송관계인의 참여 정도

헤이그 증거협약 제7조는 촉탁 당국이 희망하는 경우에는 관계당사자와 대리인에게 증거조사 진행 일시 및 장소를 통지하도록 하고 있다. 이러한 통지는 자동적인 것이 아니라 촉탁 당국이 촉탁서에 위와 같은 출석의 의사를 표시하여야 하는 것이다. 위와 같은 출석 요청이 있었을 경우 당사자 등 소송관계인은 촉탁서의 실시 참여할 절대적 권리를 가지게 되는데, 그렇다고 하더라도 이와 같은 증거조사 실시의 출석권 자체가 수탁국법이 자국의 소송관계인에게 일반적으로 부여하지 않는 권리를 출석한 촉탁국 소송관계인에게 부여하는 것은 아니다. 법관의 출석에 대해서는 헤이그 증거협약 제8조에서 각 체약국이 권한 있는 당국의 사전승인을 조건으로 그 출석을 허용한다는 선언을 할 수 있도록 하고 있고, 우리나라는 법원행정처의 사전승인을 받아 촉탁국의 법관 및 법원직원이 촉탁서의 집행에 출석할 수 있다고 선언하였다.

위와 같이 출석한 당사자 등 소송관계인의 절차 참여 정도, 특히 출석한 촉탁국의 소송관계인이 증인에 대하여 신문할 수 있는지에 대하여 본다. 영상전송에 의한 증거조사가 아닌 통상의 촉탁서 방식에서, 대륙법계의 주권침해에 대한 견해를 따르다면, 출석한 소송관계인의 신문을 허용할 경우에는 이를 통하여 촉탁국의 재판권이 수탁국에서 직접 행사되는 것과 같이 되고, 그로 인하여 수탁국의 주권이 침해되는 결과가 초래되므로, 소송관계인의 신문에 대하여 부정적으로 보아야 할 것이다. 다만, 촉탁의 실시는 수탁국의 법을 따라야 하므로 수탁국이 증거조사를 실시하면서 출석한 소송관계인에게 참여를 허용할 수도 있는데, 그 경우에는 당사자 및 그 대리인과 법관 및 법원직원을 달리 생각할 필요가 있다고 여겨진다. 즉, 주권침해의 정도를 감안하여 볼 때, 수탁국이 촉탁국의 당사자와 그 대리인에 대하여 수탁국법에 정하여진 방식에 따라 신문을 허가할 수도 있다고 할 것이나, 법관 및 법원직원의 경우는 그 허가에 신중을 기해야 할 것이고, 허가를 하더라도 보충적인 신문의 정도에 그치는 것이 타당하다고 생각된다.

영상전송에 의한 증거조사에 있어서는 촉탁서 방식과 수임인 방식을 나누어 생각

할 필요가 있는데, 촉탁서 방식의 경우 위와 같이 영상전송에 의하지 않은 경우에 준하여 보면 될 것이다. 수임인 방식에서도 위와 같은 주권침해의 관점에서 출석한 촉탁국 소송관계인의 신문 등 참여가 원칙적으로 허용되지 않는다고 볼 여지가 없는 것은 아니지만, 수임인 방식의 경우에는 달리 생각할 필요가 있다. 수임인 방식은 그 자체로서 요청국이 직접 증거조사의 주체로서 실시하는 것이고, 촉탁서 방식에서 수탁국 내의 증거조사 실시에 촉탁국의 소송관계인이 증인신문으로 참여하는 정도에 비하여 오히려 주권침해의 정도가 더 큰 요청국 법관의 집행국 내 증인에 대한 직접 신문까지 허용하는 것이므로, 주권침해의 관점에서 보더라도 영상전송에 의한 증거조사 중 수임인 방식에 있어서는 출석한 소송관계인의 신문은 허용되되, 다만 절차 주재자의 소송지휘권에 따라야 한다고 봄이 타당하다고 생각한다.

자. 계약국들 당국 간의 협조 문제

영상전송에 의한 증거조사는 전술한 바와 같이 관념적인 실재를 물리적, 현실적인 실재로 의제하는 방식을 취하고 있으므로, 물리적이고도 현실적인 실재가 반드시 필요한 경우, 즉 관념적인 것으로 물리적인 실재가 대체될 수 없는 경우에는 근본적인 문제가 발생한다.

가장 대표적인 것이 수임인 방식 중 수임인이 요청국에 있으면서 외국에 있는 증인 등에 대하여 영상전송으로 신문하는 경우에서 발생한다. 즉, 수임인 방식의 경우는 집행국의 사전승인을 받아서 하는 것인데, 집행국의 당국은 위와 같은 사전허가를 부여한 이후에는 증거조사에 원칙적으로 개입하지 않는다. 그러므로 위와 같이 수임인이 요청국에 있는 경우에는 외교관 등이 집행국에서 하는 증거조사의 경우와 달리 제18조에 의한 집행국의 원조나 제19조에 의한 집행국 당국 대표의 출석이 없는 한 증인 소재지에 절차 진행을 도울 수 있는 사람이 없을 수 있게 된다. 이와 같은 관점에서 헤이그 국제사법회의 상설사무국이 최근 발간한 “Practical Handbook on the Operation of the Evidence Convention”에서도 수임인이 요청국과 집행국 양쪽에서 영상전송에 의한 증거조사의 준비를 다 하여야 한다고 하고 있다. 앞서 보았듯이 헤이그 증거협약은 그 성안 당시 영상전송에 의한 증거조사를 상정하지 않았지만, 관련 규정의 적절한 해석, 적용을 통하여 영상전송에 의한 증거조사와 관련된 거의 모든 부분을 규율할 수 있었다. 그러나 현행 헤이그 증거협약의 모든 규정들은 증거조사지에 절차를 도울 협력자가 존재한다는 것을 전제하고 있기 때문에 위와 같은 문제에 대하여는 맹점이 있다고 생각한다.

결론적으로, 헤이그 증거협약의 개정은 별론으로 하고, 위 문제는 헤이그 증거협약이 계약국 상호간의 사법공조를 증진시킨다는 목적을 가지고 제정된 것인 만큼

명시적인 규정이 없더라도 체약국들의 권한 있는 당국 사이에 상호 절차에 협력하는 관행을 정립해 나가야 해결될 성질의 것이라고 생각된다. 이와 같은 태도는 헤이그 증거협약의 제정 이후에 성립된 한호조약이나 유럽연합 증거조사규정 등에서 체약국들의 권한 있는 당국들 사이에 이전보다 긴밀한 협조체제를 구축하려고 노력하고 있는 점에 비추어 보아도 타당하다.

차. 기술적인 문제

(1) 호환성 문제

영상전송 또는 화상회의에 쓰일 수 있는 장비는 고해상도의 카메라와 영상 및 음성 입출력장치 등을 갖춘 고가의 전용장비와 인터넷에 연결된 개인용 컴퓨터(PC) 및 웹카메라 등으로 구성된 개인용 시스템으로 나누어 볼 수 있다. 위와 같은 전용장비는 끊임 없는 데이터 전송속도와 선명한 화질을 얻을 수 있지만, 보통 사기업에 의하여 개발되기 때문에 고유한 장치와 프로그램을 사용하게 되어 다른 화상회의장비와 호환이 안 될 수도 있다. 그 반면에 후자의 개인용 시스템은 저렴하고, 인터넷 연결이 가능한 곳이라면 어디든 사용가능하며, 상용 프로그램 등을 설치하면 쉽게 이용이 가능하다.

각국의 법원이 사용하는 위와 같은 화상회의장비는 특히 전용장비인 경우에 다른 나라의 화상회의장비와 규격이 달라 호환이 안 될 수 있다. 이와 관련하여 보면, 앞서 본 바와 같이 촉탁서 방식에서 영상전송에 의한 증거조사는 특별한 방식 또는 절차에 해당하는데, 위와 같은 화상회의장비가 호환되지 않는 것은 헤이그 증거협약 제9조 제2항의 “국내의 관행, 절차 또는 현실적인 어려움을 이유로(by reason of its internal practice and procedure or by reason of practical difficulties)”한 사유에 해당하여 촉탁서 집행이 거부될 수 있다. 그러나 위와 같은 국내의 관행, 절차 또는 현실적인 어려움 때문에 이행될 수 없다고 함은 단순히 불편하다거나 어렵다는 것에 그치지 않고 그 이행이 불가능하여야 함을 의미한다. 그러므로 양국의 화상회의장비가 호환이 제대로 되지 않더라도, 상호 인터넷 연결만 가능하다면 개인용 시스템을 사용하여 영상전송을 할 수 있게 되므로, 아예 인터넷조차 연결되지 않는 경우를 제외하고는 위와 같은 호환성 문제만으로는 촉탁서의 집행이 불가능한 정도에 해당되지 않는다고 생각된다. 이와 같은 적극적인 해석이 체약국 간의 사법공조를 제고하려는 헤이그 증거협약의 제정취지에도 맞는다고 생각한다.

수임인 방식의 경우는 요청국이 증거조사의 주체가 되어 이를 실시하게 되므로, 원칙적으로 외국에 있는 증인 등에 대하여 영상전송에 의한 증거조사를 실시할 때 필요한 모든 장비와 그 설치 등에 대하여는 요청국(수임인)이 주관하게 된다. 그

러므로 수임인 방식에서는 위와 같은 호환성의 문제가 일어날 가능성이 축락서 방식보다 적다고 할 것이다.

(2) 전송되는 영상의 해상도 문제

증인신문 과정에서 문서의 진정성립 인정을 위하여 증인에게 문서 원본 등을 제시할 경우에 전송되는 영상의 해상도가 낮아 문서의 동일성을 명확히 파악하기 어려운 문제가 있을 수 있다. 현재 기술의 발달로 전송되는 영상의 해상도가 높아지고 있어 이러한 문제는 향후 대부분 해결될 것으로 보이지만, 위와 같은 문제가 있을 경우를 대비하여 문서 원본을 정확히 복사한 것을 사전에 우송하거나, 증인신문 과정에서 즉시 모사전송을 하는 방법을 취할 수 있을 것이고, 일본 민사소송법도 영상신문에서 서증을 제시하는 경우 수소법원 쪽의 화상카메라를 이용하든지 팩시밀리를 사용하여 그 서증의 사본을 송부하도록 하고 있다. 그러나 그러한 방법보다는 컴퓨터에 연결된 스캐너를 이용하여 그림 파일을 만든 뒤 접속되어 있는 인터넷 등의 정보통신망을 통하여 이를 즉시 상대방으로 전송하는 방법이 더 간편하고 선명한 화질을 보장할 수 있다고 생각된다.

한편, 전술한 대면권에 대한 논의 중 영상신문에 대하여 비판적인 견해는 영상신문으로는 증인의 표정이나 손동작 등의 신체 언어적 행위(demeanor)를 제대로 전달·파악할 수 없다는 점을 주요한 논거로 든다. 이와 관련하여 보면, 영상신문에서 전용장비 및 프로그램과 전용회선을 사용하는 경우 선명한 화질과 빠른 속도를 얻을 수 있지만, 정보통신기반이 미약한 저개발국과 영상신문을 실시하여야 할 필요가 있는 경우와 같이 때에 따라서는 전화선 등을 이용한 저속의 인터넷을 사용하고, 메신저프로그램과 같은 상용프로그램에 저해상도의 웹카메라(webcamera)를 사용하여 영상신문을 할 필요가 있을 수 있다. 그와 같은 경우에는 만족할 만한 해상도와 속도의 영상을 얻기 힘들기 때문에 증인의 자세한 표정 등을 전달하기는 어렵다. 그러나 위와 같은 수준의 영상신문이라 하더라도 전통적인 축락서 방식의 증거조사보다는 소송관계인의 증인 대면이라는 측면에서 여전히 우월하므로, 위와 같은 문제가 있음을 이유로 영상신문을 포기할 정도는 아니라고 할 것이다.

카. 비용 상환

축락서 방식의 경우 축락서의 집행으로 인한 비용은 일반적으로 상환 대상이 되지 아니하나, 수탁국은 전문가 및 통역인의 보수, 특별한 절차를 사용함으로써 발생한 비용에 대하여는 축락국에 그 상환을 청구할 수 있다(헤이그 증거협약 제14조).

앞서 본 바와 같이 영상전송에 의한 증거조사는 대개 특별한 절차 또는 방식에 의할 것이므로, 수탁국은 축락국에 그 비용을 청구할 것이다. 그리고 통역인이 사용

되는 경우에는 그 비용도 추가될 것이다. 한편, 헤이그 증거협약 제14조 제3문은 수탁국법이 당사자에게 스스로 증거를 확보할 의무를 부과하고 있고, 수탁 당국이 독자적으로 촉탁서를 집행할 수 없는 경우에 수탁 당국이 촉탁 당국의 동의를 받아 집행자를 선임하고, 촉탁국에 대해 그에 대한 비용 상환을 청구하도록 하고 있는데, 이는 영미법계 국가 특히 영국에서 영미법계 국가로부터의 촉탁서를 법관이 집행할 수 없고, 그 대신 수임인을 지정하여 집행하도록 되어 있는 것에 대처하기 위한 규정이다.

수임인 방식의 경우 원칙적으로 수탁국이 관여하지 않고, 그로 인하여 발생하는 비용은 촉탁국이 자국법에 따라 처리하면 되는 사항이므로, 헤이그 증거협약은 수임인 방식과 관련하여 비용에 관한 규정을 두지 않았다.

III. 결어

영상전송에 의한 증거조사는 원격지에 있는 증거에 대하여 실시간으로 지켜보면서 증거조사를 할 수 있기 때문에 증거조사에 드는 시간과 비용을 획기적으로 줄일 수 있고, 이와 같은 장점은 특히 국제민사사법공조에 있어서 잘 발휘된다. 물론 위와 같은 시간과 비용의 절감을 위하여 빠르게 발전하고 있는 기술을 사법절차에 바로 도입하는 것에는 일정한 제한이 있는데, 그것은 첨단기술을 도입함으로써 사법절차에서의 정의와 적법절차의 원리가 침해되지 않도록 세심한 주의를 기울여야 하는 것이라 생각한다. 이러한 측면에서 보더라도, 영상전송에 의한 증거조사는 국제민사사법공조에서 그 효용이 큰 반면, 그 부작용은 많지 않아 보인다.

헤이그 증거협약에서 영상전송에 의한 증거조사가 가장 잘 구현될 수 있는 것은 바로 수임인제도를 통해서라 할 것인데, 우리나라는 이에 대하여 전면적인 배제 선언을 하였다. 물론, 이와 같은 배제 선언을 하기까지는 수임인제도 자체가 영미법상의 것으로서 우리에게서 생소하고 수임인으로 지정될 법관들도 이에 익숙하지 않다는 등의 고려를 충분히 한 것이라고 생각된다. 그렇지만 우리나라 역시 정보통신기술을 사법절차에 도입하는 전 세계적 흐름을 따르고 있고, 이에 따라 최근 민사소송절차에 영상 증인신문을 도입하였으며, 전자소송 등의 사법정보화에서 세계 최고 수준을 보이고 있으므로, 위와 같은 선택은 아쉽게 느껴진다. 헤이그 증거협약 제33조는 각 계약국은 언제든지 자국이 한 유보를 철회할 수 있도록 하고 있으므로, 향후 위와 같은 수임인 제도에 대한 배제 선언을 철회함으로써 영상전송에 의한 증거조사를 활성화할 수 있도록 진지한 고려를 해야 한다고 생각한다.



HCCH Asia Pacific Week 2017

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Four Seasons Hotel Seoul*



SESSION 3.

Discussion

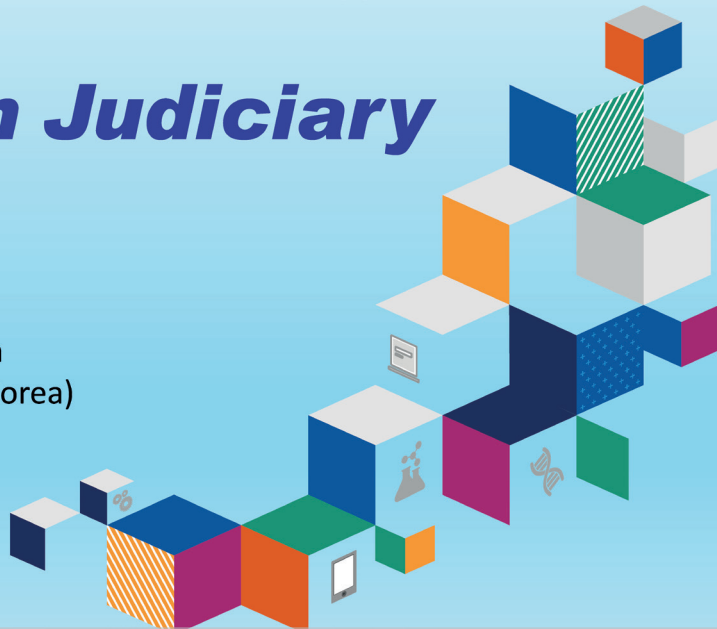
Young Gi KIM

Judge / Director of Judicial Policy of National Court Administration (Korea)

HccH Asia Pacific Week 2017 (3-6 July 2017)

Movements towards the future *with* **Hague Evidence Convention *in*** ***Korean Judiciary***

Judge Young Gi KIM
(National Court Administration
under the Supreme Court of Korea)



Act on International Judicial Mutual Assistance in Civil Matters

▶ Enact - March 8, 1993

- Entrust the competent court or other public office of foreign country with judicial cooperation (§ 5.1)
- entrustment to a Korean ambassador, minister and consul if the witness is in a country under Vienna Convention on Consular Relations (§ 5.2.1.)

▶ Under this law - the only means to take evidence abroad : the comity of nations

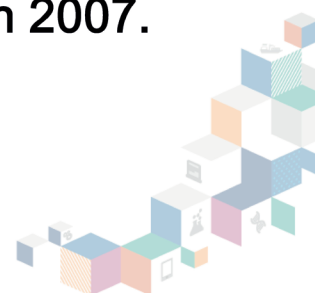
➡ limitation : too vulnerable !





Treaty on Judicial Assistance in Civil and Commercial Matters between the Republic of Korea and Australia

- agreed in Sept. 17, 1997, took effect in Jan. 16, 2000
- Explicitly permits taking evidence by video-links
 - ⇒ an Australian judge heard testimony of a plaintiff in Korea via video-links in 2007.
- limitation : bilateral agreement !



Accession to Hague Evidence Convention in Dec. 14, 2009

	Letter of Request	Diplomatic officer of consular agent		Commissioner
		Korean citizen	foreigners	
Who to take?	Foreign judge	Korean diplomatic officer	same as the left	Korean Judge
Where to take?	Foreign court	Korean embassy, foreign courts, etc.	same as the left	Korean courts + foreign courts /Korean embassy
How to participate ?	Follow-up or supplementary questions with permission of the foreign authority	same as the left	same as the left	Taking evidence directly
H.E.C.	§ 7, 8, 9	§ 15	§ 16	§ 17
Reservation			√	√



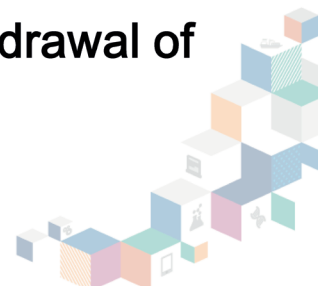
Revision of civil procedure act in March 29, 2016

- **New provisions - explicitly allowing examining witness abroad via video-links !**
(§ 327-2, 339-3, 340)
- **Nov. 16, 2016**
Judge - Seoul Central District Court
Witness – an inmate in Jeju island
- **System and law allow interpreter to participate in the witness examination**



Other efforts to improve high-tech trial in Korea

- **Special commission for IP Hub Court (June 29, 2015)**
 - High level Advisory group for Korean Judiciary
 - suggested to improve the inter-national E-litigation system incl. taking evidence via video- links
 - on the premise of considering withdrawal of H.E.C. § 17 in whole or in part





Now, where to go ?

- Complete withdrawal of H.E.C. §17 ?
- Partial withdrawal of H.E.C. §17 ?
 - at least allowing to take evidence via video-links?



Advantages of those changes ⇒ 3 i

- Increase the possibility of getting fairer decision based on abundant evidence
- Increase Access to Justice in Korean court
- Increase the credibility of Korean Judiciary





2 Questions

▶ To Judge OH

- How can we overcome the difficulty of punishing the perjury while taking evidence by video-links?
- How can we increase the credibility of testimony even with those difficulties?

▶ To Ms. Celis

- Do you think it is possible to partially withdraw the H.E.C. §17, allowing only the way to take evidence via video-links by commissioner?
- If possible, what do you think is the difficulty or disadvantage of those partial withdrawal?



*“Let's go to future altogether
with Hague Evidence Convention”*

Thank You !

- Judge Young Gi KIM



SESSION 3.

Discussion

Mayela Celis

Principal Legal Officer of the HCCH



International Litigation & Information Technology: Taking Evidence by Video-links

HCCH Asia Pacific Week, July 2017

Mayela Celis, Principal Legal Officer, HCCH

This presentation will be divided into two parts:

- I. Evidence Convention
- II. Taking of Evidence by Video-link

Part I

Evidence

Convention

*Hague Convention of 18 March 1970
on the Taking of Evidence Abroad in
Civil or Commercial Matters*

Purpose



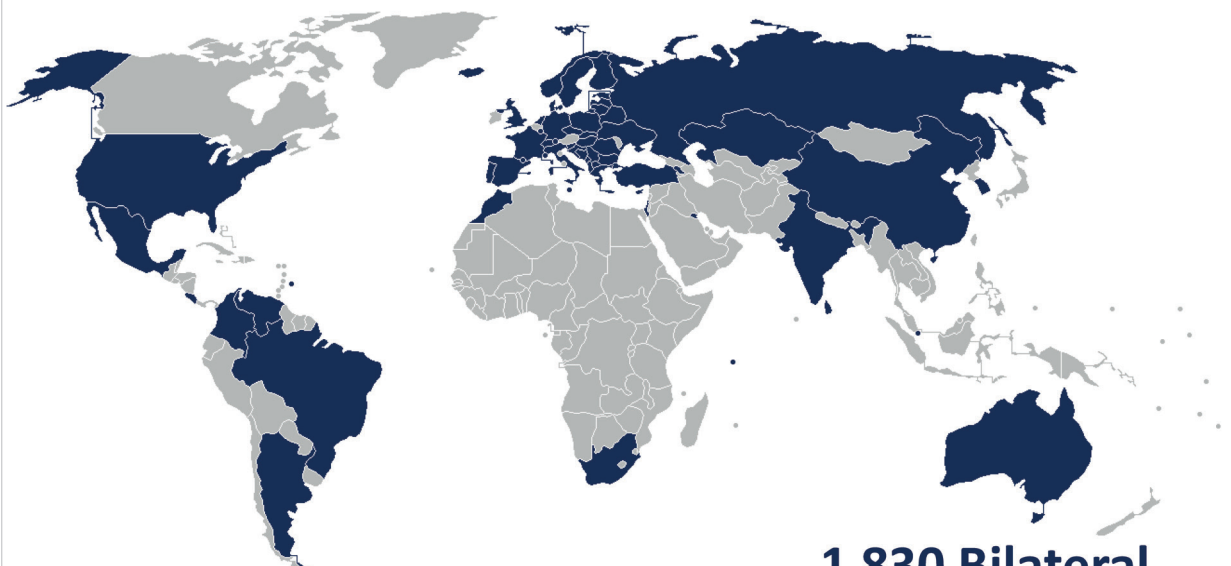
- To **improve** the existing system of Letters of Request
- To **enlarge** the methods for obtaining evidence abroad
- To provide effective means to overcome differences between legal systems with respect to taking evidence – a **“bridge”** between various legal traditions



Global Coverage



61 Contracting States



1 Convention...

instead of

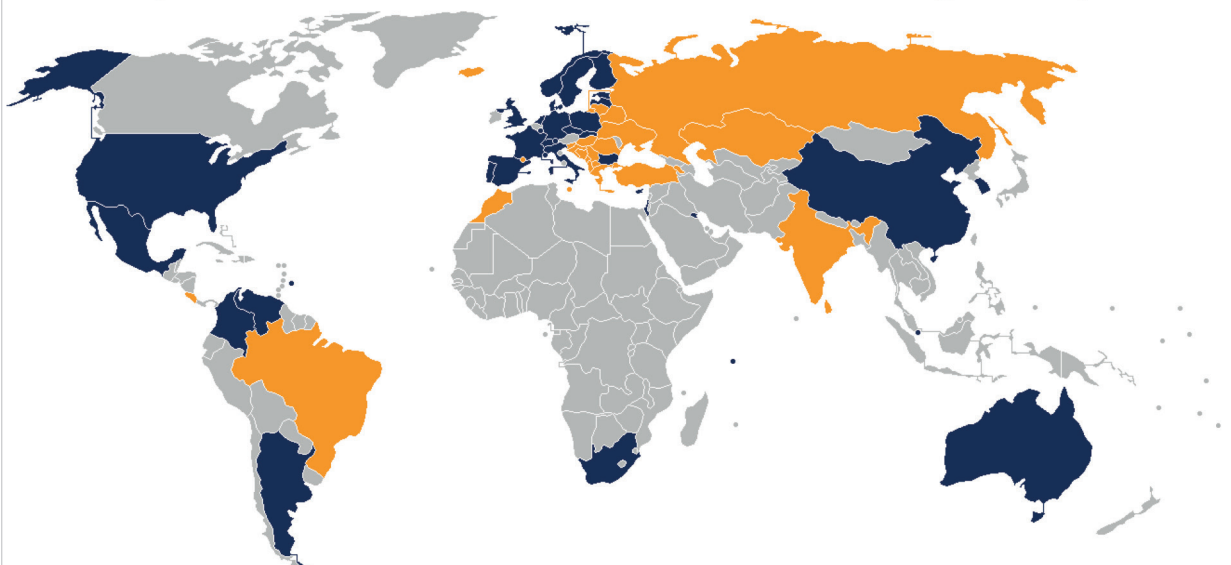
**1 830 Bilateral
Agreements!**

NB: Boundaries on this map are based upon those used by the UN Cartographic Section. The number of States reflects the Parties as recorded by the Depositary (NL MFA). Neither should be taken to imply official endorsement or acceptance.

Continuing Interest



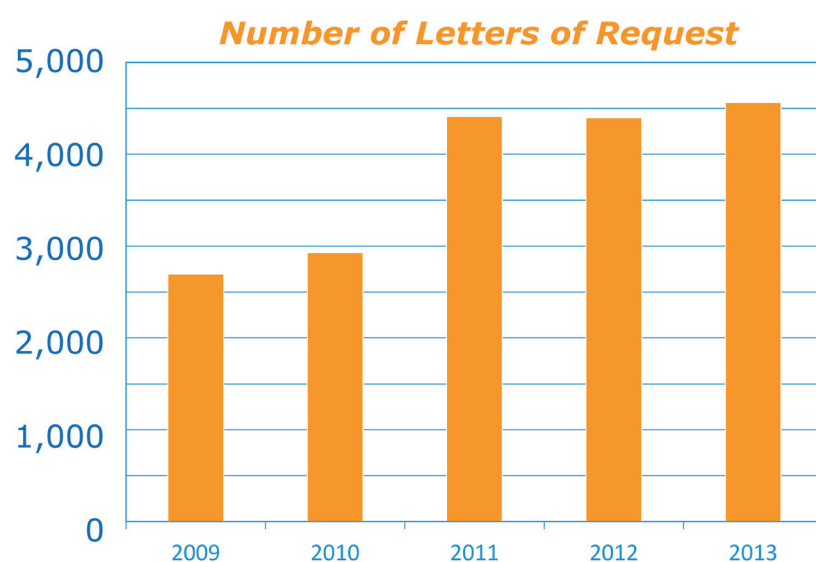
26 new Contracting States since 2000
(Over 40% of the total number of Contracting States)



(Andorra, Kazakhstan, Costa Rica, Brazil, Armenia, Montenegro, Morocco, Malta, Albania, Serbia, Korea, Croatia, FYR of Macedonia, Iceland, Bosnia-Herzegovina, India, Greece, Turkey, Hungary, Romania, Belarus, Russian Federation, Ukraine, Slovenia, Sri Lanka, Lithuania)

NB: Boundaries on this map are based upon those used by the UN Cartographic Section. The number of States reflects the Parties as recorded by the Depositary (NL MFA). Neither should be taken to imply official endorsement or acceptance.

The Convention in Action



55% of Letters of Request executed in under 4 months

The above figures are taken from statistical information received in 2014 from 42 Contracting States to the Evidence Convention

Evidence abroad *with* the Convention



1. Letter of Request
Chapter I of the Convention

Central Authorities

**2. Use of diplomatic officers,
consular agents and commissioners**
Chapter II of the Convention

*(A Contracting State may exclude the
operation of Chapter II in whole or in part)*

3. The derogatory channels

Part II

Taking of Evidence by Video-link under the Evidence Convention

Technology and the Evidence Convention: *Experts' Group on the Use of Video-Links*



- **Original Proposal:** Evidence Special Commission – May 2014

Approval: Council on General Affairs and Policy – March 2015

- **Experts' Group: Meeting – December 2015**

Approval: Council on General Affairs and Policy – March 2016

*"The Council welcomed the report of the Experts' Group and endorsed the formation of a small sub-group, suitable for developing and **drafting a Guide to Good Practice, including detailed country profiles**, and, to the extent thought appropriate by the sub-group, soft law instruments such as model rules and model practice notes (for courts), as well as model legislative guides for submission to the Experts' Group."*



Technology and the Evidence Convention: *Experts' Group on the Use of Video-Links*



- **Subgroup: Formation and continuation of work 2016-2017**

Approval: Council on General Affairs and Policy – March 2016

- **Country Profiles (responses so far received from (21 States))**

Questionnaire circulated to Members/Contracting States – February 2017

- | | | | |
|--------------------------|-----------|----------------|----------------------------|
| • Belarus | • Estonia | • Mexico | • Sweden |
| • Brazil | • Finland | • Norway | • United States of America |
| • Bosnia and Herzegovina | • Hungary | • Poland | • Venezuela |
| • Croatia | • Israel | • Portugal | |
| • Cyprus | • Latvia | • Slovenia | |
| • Czech Republic | • Malta | • South Africa | |



Technology and the Evidence Convention: *Experts' Group on the Use of Video-Links*



Country Profiles: what did we ask?

- **Technical and Security Aspects:** The use of licensed software, minimum standards or mechanisms, the use of commercial providers such as Skype, requirements re hearing room
- **Legal questions:** Rules applicable, restrictions, legal obstacles, direct and indirect taking of evidence, legal safeguards
- **Practical considerations:** Time required to schedule a video-link, arrangement of interpretation, reporting and recording, costs, identification of all relevant actors

Technology and the Evidence Convention: *Experts' Group on the Use of Video-Links*



- *Guide to Good Practice on the Use of Video-Link Technology under the Evidence Convention*

Drafting and research ongoing – will report to Council 2018

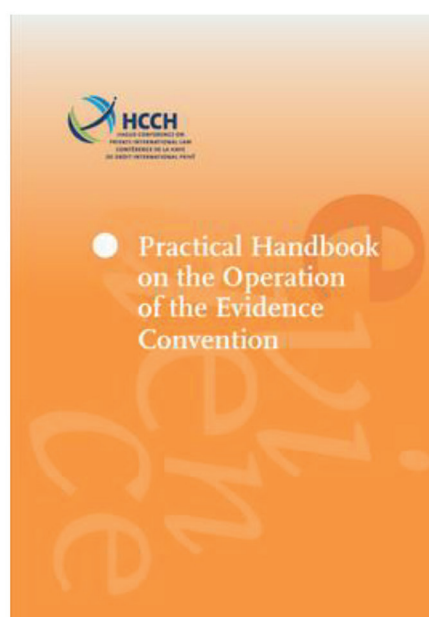
Controversial points

- *Indirect ≠ direct taking of evidence.*
- *Indirect taking of evidence: basic idea of the Convention*
- *Modern technologies: Persons involved in the giving and taking of evidence may be located in different jurisdictions.*
- *Direct taking of evidence: No express provision in the Convention but it may be allowed under both Chapters, in particular Articles 9(2) (Chapter I), 17 (Chapter II) and derogatory channels.*

Publications




- *Upcoming Guide to Good Practice*
- The Practical Handbook (3rd Edition, 2016) offers **detailed explanations on the general operation** of the Conventions and provides **analysis of the major issues** that arise in practice
- **THE authoritative guide**, regularly consulted by government authorities, courts and practitioners
- **Available in English and French**



Evidence Section www.hcch.net










Français Other languages

[MEMBERS & PARTIES](#) [INSTRUMENTS](#) [PROJECTS](#) [GOVERNANCE](#) [PUBLICATIONS & STUDIES](#)

	<ul style="list-style-type: none">Report1978 Special CommissionReport
• Questionnaires and Responses	• All questionnaires relating to the Evidence Convention, and responses
• Seminars	<ul style="list-style-type: none">Service of Process and Taking of Evidence Abroad: The Impact of "Electronic Means" on the Operation of the Hague Conventions (Washington, D.C. 2 November 2015)APEC Workshop on the Ease of Doing Business through Hague Conventions (Beijing 12 August 2014)
• Taking of evidence by video-link	<ul style="list-style-type: none">Country Profile<ul style="list-style-type: none">ResponsesReport of the Experts' Group on the Use of Video-link and Other Modern Technologies in the Taking of Evidence Abroad (2-4 December 2015, The Hague, the Netherlands) (Preliminary Document No 8 of December 2015 for the attention of the Council of March 2016 on General Affairs and Policy of the Conference) <p>See also:</p> <ul style="list-style-type: none">Annex 6 of the Practical Handbook on the Operation of the Evidence Convention (January 2016)The Taking of evidence by video-link under the Hague Evidence Convention (Preliminary Document No 6 of December 2008 for the attention of the Special Commission of February 2009 on the practical operation of the Hague Evidence Convention)
• Bibliography	

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HCCH Asia Pacific Week 2017

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Four Seasons Hotel Seoul*

SESSION 3.

Discussion

Aera HAN

Attorney at Kim & Chang (Korea)

Discussions - A Case of Evidence-Taking by Video Link under the Treaty on Judicial Assistance in Civil and Commercial Matters between the Republic of Korea and Australia, and Implications for The Hague Evidence Convention

HAN Aera
Lawyer, Kim & Chang, LLC

The presentation paper submitted by Presiding Judge Oh Byung-hee suggests that video conferencing can be used to take evidence under the provisions of Chapter 1 and 2 of the Hague Evidence Convention without amendment, and concludes that a more effective way of using video conference is the Commissioner method, in which the Requesting Country's court acts as a commissioner to directly question a witness in another country, rather than the Letter of Request method. In today's world, where video communication using mobile phones and web cameras is possible anywhere, allowing the judges who would make final judgment and litigators from the State of Origin to participate in witness examination is likely to make a greater contribution to the discovery of truth and delivery of justice than tasking a foreign court with the same.

In 2007, while working as the Director of International Affairs at the National Court Administration in South Korea, the discussant was able to experience cross-border taking of evidence by video link first-hand, and became aware of various issues that could arise in the process. This discussion will introduce the above case and ask the presenter about the solutions to the questions that were raised in the witness examination process.

The 2003 bilateral Treaty between the Republic of Korea and Australia on Judicial Assistance in Civil and Commercial Matters have provisions on the taking of evidence that are mostly similar to those of the Hague Evidence Convention, including those on the use of a letter of request or a commissioner, but it also has a separate set of provisions on taking of evidence by video link.¹⁾ The reasons for the addition were: (1) the treaty

1) Article 24: Taking of Evidence by Video Link

1. A court of a Contracting Party, with prior authorization of the Central Authority of the

was signed relatively recently; (2) there is no technical barrier in taking evidence by video link between the two countries, thanks to the fact that both Australia and South Korea has solid IT infrastructure; and (3) there is strong mutual trust between the two countries with regard to each other's

other Contracting Party, may take testimony from a person who is in the territory of the other Contracting Party by video link.

2. A request for prior authorization shall be made by a Central Authority of the Contracting Party where the court is situated to a Central Authority of the other Contracting Party.

3. A request for prior authorization of a Central Authority shall include the following information

(a) the title, address and other contact details of the requesting court including telephone number, facsimile number and e-mail address if any;

(b) the names and addresses of the parties to the proceedings and their representatives, if any;

(c) the name, address, and other contact details of the person to be examined including telephone number, facsimile number and e-mail address if any;

(d) the nature of the proceedings, and where appropriate, the amount in dispute;

(e) a statement of the subject matter about which the person is to be examined in chief.

4. (a) The Central Authority of the requested Contracting Party shall, before deciding whether to give the authorization, contact directly or through a court the person to give testimony to confirm that he or she voluntarily agrees to give testimony by video link.

(b) The Central Authority of the requested Contracting Party shall, after giving the authorization, inform the person of the time and place to appear for giving testimony.

5. Where testimony is taken by video link under Paragraph 1:

(a) no measures of compulsion shall be applied to make the person appear or give testimony;

(b) a judge of the court taking the testimony shall have power to administer an oath or take an affirmation unless the person objects to it;

(c) the law of the requested Contracting Party shall apply to the taking of testimony by video link. However, the taking of testimony may be conducted in the manner permitted by the law of the requesting Contracting Party, unless such manner is incompatible with the law of the requested Contracting Party;

(d) a person requested to give testimony may invoke the privileges and duties to refuse to give testimony under Article 21.

6. (a) The Central Authority of the requested Contracting Party may refuse to give the prior authorization when it considers the taking of evidence by video link in a particular case would be contrary to its public policy or prejudicial to its sovereignty or security.

(b) The requested Contracting Party may not refuse to give prior authorization solely on the ground that, under its internal law, it claims exclusive jurisdiction over the subject matter of the action or that its internal law would not permit the action upon which the application is based.

(c) If the Central Authority of the requested Contracting Party refuses to give the prior authorization, the Central Authority shall immediately inform the Central Authority of the requesting Contracting Party of the reason or reasons for its refusal.

judicial system.

For several years after the treaty entered into force, there was no case of evidence-taking by video link between the two countries. Then in 2007, the National Court Administration of Korea received the first request from the Attorney General's Department of Australia, which is the Central Authority of Australia for this matter, for prior authorization to take evidence via video link from Korea. A brief description of the case is as follows: Mr. X, a South Korean national, illegally entered and stayed in Australia for some time, during which he applied for permanent residence. The application was denied and he was sentenced to imprisonment for misrepresentation and assault in the process. After he served his sentence, the Department of Immigration and Multicultural Affairs of Australia ordered his deportation. However, Mr. X refused to leave the country, saying that the examination of his application for permanent residence was not completed, and filed various suits and motions. The Australian government detained X at the Immigration Detention Center (and in gaol for a while) until the end of all the proceedings. He was finally deported to Korea in 2003 when all of his appeals were dismissed. Coming back to Korea, Mr. X appointed an Australian attorney to file a tort claim for damages for long-term unlawful detention by the Australian government. In this suit, Mr. X's attorney called Mr. X as a witness, and asked to question the witness via video link, as he had been expelled from Australia to South Korea and was not allowed back. The Federal Court of Australia approved the witness application as it was, and set the date of witness examination as August 28, 2007. The court later realized that it needed prior authorization from the Central Authority of South Korea in order to examine a witness in Korea by video-link, and contacted the National Court Administration of South Korea, the Central Authority for this matter, through the Australian Attorney General's Department for prior authorization in a hurry.

A Letter of Request was faxed to International Affairs Division of the National Court Administration of Korea on August 13, 2007 by the Attorney General's Department of Australia, but it was not until a week later on August 20, 2007, that the letter was delivered to the discussant, as the fax attendant was on summer vacation. The letter was also missing some of the particulars specified in the Treaty (the nature of the proceedings and

the amount in dispute, and the description of main points to be examined) and was not an original copy, so the discussant made a phone call to the number specified in the faxed copy. The contact person at the Australian Attorney General's Department gave a detailed account of the nature and the course of the case, and asked for prompt authorization, given that the date of examination was in a week. However, it was questionable whether it was appropriate to authorize the first-ever evidence taking via video link without an original copy of the letter of request, and the missing information needed to be provided in more detail. Above all, the witness had to be contacted to confirm that he was willing to give testimony voluntarily according to the Treaty. It would take a considerable amount of time to complete all the procedures. Having been explained this situation, the Australian side agreed that it is necessary to send the original copy and confirm the witness's voluntary consent, and that it will take for some time. The Australian official then informed the Federal Court of Australia of the position of the Korean Central Authority, and as a result the date of examination was postponed for a few months. Australia then sent the original letter of request, and the two sides started talking about the procedures of the witness examination in earnest.

First of all, the Australian side wanted the examination to be executed in accordance with the Australian procedural law. The treaty states: "the law of the requested Contracting Party shall apply to the taking of testimony by video link. However, the taking of testimony may be conducted in the manner permitted by the law of the requesting Contracting Party" (Article 24.5 (C)), so there was no issue in executing the procedure according to Australian law. In addition, it did not make sense that the Australian court, where the case is pending, apply the unfamiliar civil procedures of another country in taking of evidence. Moreover, there is no system in Korea where a party can testify as a witness in his or her own case anyway (There is a system called the examination of the parties, but they are not subject to punishment of perjury), so it was considered appropriate to conduct the examination in accordance with Australian civil procedures.

Next, the discussant offered to provide a courtroom or other place with equipment for video transmission, but the Australian side said that there is no need for the Korean judiciary to provide any special equipment or a

place for witness examination, and that everything will be prepared by the plaintiff (witness). If it were a usual witness examination, it might have been necessary to take evidence in a neutral place not linked to neither plaintiff nor defendant, but since in this case the witness was a plaintiff, the discussant found that there was no concern about the plaintiff (witness) making all the arrangements. The discussant again offered to send a member of the International Affairs Division to check whether all the procedures were properly carried out during the session, and to provide assistance as necessary, and the Australian side readily accepted the offer.

While these discussions were under way, an official of the International Affairs Division contacted X to confirm if he had voluntary intention to testify, to which X naturally agreed. In order to eliminate any possibility of objection to evidence taking by video link in the future, X's consent was put in writing in both Korean and English, and his signature was obtained.²⁾

In the above case, there were no elements that would be against South Korea's public policy, or against its sovereignty or national security. After receiving X's signature, the discussant finally signed the prior authorization³⁾ and emailed the PDF file first, and sent the original copy again by mail. In the contents of the authorization, the sentence, "Once the witness notifies the time and place to appear, the witness will be informed of the time and place." was not necessary in this case, as the witness was also the plaintiff. However, since Article 24.4 of the Treaty stipulates "The Central Authority of the requested Contracting Party shall, after giving the authorization, inform the person of the time and place to appear for giving testimony," the part was included accordingly. Although it felt rather like a

2) I, regarding the case of Mr. X v Commonwealth of Australia, has been informed by the Central Authority of the Republic of Korea that the Central Authority of the Commonwealth of Australia requested a prior authorisation for the Taking of Evidence via video-link, and hereby confirm that I voluntarily agree to give testimony by video-link.

3) The Office of Court Administration contacted Mr. X on the date of . . . , 2007, to confirm that he voluntarily agrees to give testimony by video link, and received the attached confirmation in writing from the person. Given the confirmation of Mr. X as above and the circumstances and nature of the case, the Office of Court Administration of the Republic of Korea grants prior authorization for evidence-taking from Mr. X by video link, pursuant to Article 24 of the Treaty on Judicial Assistance in Civil and Commercial Matters between the Republic of Korea and Australia. Once Mr. X notifies the exact time and date to appear to give testimony, the Office of Court Administration will inform the witness of this.

mere formality, X was informed again of the time and place.

The witness examination took place without trouble on the date postponed by the Australian Court. The place was provided by Mr. X's acquaintance, and a staff of the International Office was dispatched to check that the proceedings were in order. The video transmission equipment used was a PC with video chat feature. Mr. X voluntarily swore and testified, and the procedure was completed safely.

After completing the very first witness examination via video link by working in close cooperation with the Australian Central Authority, the views of this discussant are as follows, much of which was already discussed in the presenter's presentation.

First, taking of evidence by video link is much more intrusive than that by a commissioner, but it is also simple, which leads to a possibility that judicial cooperation process may be completely omitted. In order for a commissioner to take evidence, the person should travel overseas, which is time and money consuming. On the other hand, taking of evidence by video link can be done at any time as long as the judge and the witness in different countries have their own PC with video chat feature. Witness can be examined even when the plaintiffs, defendants and their legal counsels are all in different countries. Due to such convenience, it may proceed without due process. The possibility that the witness examination via video link may infringe the sovereignty of the country where the witness is located might be overlooked, and that country may never know that such examination took place within its territory. However, if evidence was taken without proper international judicial assistance, and the testimony taken affected the final judgment, there is a possibility that the recognition or enforcement of the judgment may be denied later. Therefore, special attention should be paid to following due process from the outset.

Second, given the purpose of evidence taking by video link, it is preferable to follow the procedure of the requesting country as a principle. As mentioned above, the treaty presupposes that the presiding officer of witness examination is the court of the Requesting Country, and accordingly, it is reasonable for the court to apply the same civil

procedures that govern the overall litigation to the taking of evidence. Only if doing so infringes the right of the witness, then appropriate restrictions can be applied. The presenter said that under The Hague Evidence Convention the law of the State of Origin should apply to the taking of evidence by a Commissioner, and this discussant agrees to his view.

Third, there is a need to build trust and closer cooperation between the Central Authorities of the Requesting Country and the Requested Country. As noted above, even if it is more desirable to conduct examination in accordance with the law of the Requesting Country, there may be cases where the Central Authority of the Requested Country needs to provide assistance, such as arranging a place or preparing equipment for video link. Even if the person who called a witness prepares the place and necessary equipment, the Central Authority of the Requested Country needs to verify that the equipment and place are appropriate, and that the witness is testifying in a neutral and free environment. The court of the Requesting Country can see only what is shown on the screen, and in an extreme scenario, someone out of the frame might be pointing a gun to the head of a witness to force him or her to give statements as directed. All these matters cannot be set in advance by the law, and in each case, the Central Authorities of the Requesting and Requested Countries should closely communicate with each other by phone, email and other means to make decisions then and there. Only when the Central Authorities can communicate smoothly and swiftly, evidence taking by video-link will show its true value.

Finally, there is the issue of perjury and punishment for it. According to the Treaty, taking of evidence by video link can only be done if the witness agrees voluntarily, and the witness also needs to consent to taking oath as well. However, once the witness agrees and takes oath before giving testimony that turns out to be a false statement, how to punish the witness is an issue. If a witness is to be questioned, everything should be done to make the testimony as truthful as it can be. If false statements cannot be punished for perjury, the truthfulness of the testimony may be undermined to a considerable degree. The question raised here is, if a court in the Requesting Country receives an oath from a witness in accordance with its own law and has completed questioning by means of video link, and then

the witness is found to have lied later, whether there are grounds for which the Requested Country's court cannot punish the witness for perjury. If the court of the Requesting Country had the witness take oath upon voluntary consent following due process and with prior authorization, does it not constitute perjury punishable by the Requested Country, just as when the court of the Requested Country conducted witness examination according to a letter of request?

On a final note, I would like to take this opportunity to thank the Federal Court and the Central Authority of Australia. The case above was filed by a Korean national against the Australian Federal Government for tort damages. However, the people of the Attorney General's Department did everything they can to ensure that witness examination be executed in the way Mr. X wanted, without being influenced by the nature of the case. It is a testament to the trust and cooperation between the Central Authorities of the two countries that in the lawsuit filed by a Korean national against the Australian Government, the Australian Court requested judicial assistance according to the wish of the said Korean national, and the first international witness examination by video-link took place in South Korea accordingly. Hopefully this trust and cooperation will further spread to the rest of the world.

지정토론문 - 한국.호주 민사사법공조조약 하에서의 영상신문에 의한 증거조사 사례 및 헤이그 증거조사협약에의 시사점

한애라
변호사, 김.장 법률사무소

오병희 부장판사의 발표문은 헤이그 증거조사협약을 개정하지 않더라도 제1장, 제2장의 조항에 의하여 영상신문에 의한 증거조사를 시행하는 것이 가능하다는 해석론을 전개하면서, 그 중에서도 보다 이상적인 방식은 촉탁서 방식보다는 촉탁국 법원이 직접 수탁국에 있는 증인에 대하여 증인신문을 실시하는 수임인 방식이라고 보고 있다. 사실 세계 어디에서나 휴대전화와 웹캠을 이용한 영상대화가 가능해진 오늘날, 수탁국 법원에 증인신문을 맡기기보다는 실제로 최종 판단을 하는 촉탁국 법원과 소송관계인들이 직접 증인신문에 참여할 수 있도록 하는 것이, 증인신문을 통한 진실의 발견과 정의의 실현에 더 큰 기여를 할 수 있을 것이다.

그런데 토론자는 2007년에 한국의 중앙당국인 법원행정처에서 국제심의회관으로 사법공조 업무를 담당하면서 영상신문에 의한 증거조사를 직접 체험할 수 있었고, 이 때 영상신문의 위력과 아울러 그 과정에서 발생할 수 있는 여러 문제점도 인식하게 되었다. 이에 위 사례를 소개하고, 위 증인신문 과정에서 가졌던 여러 의문에 대한 해결 방안도 발표자에게 묻고자 한다.

2003년에 체결된 양자조약인 한.호 민사사법 공조조약은 증거조사에 관하여 촉탁서 방식, 수임인 방식 등 헤이그 증거조사협약과 거의 유사한 조항들을 두고 있으나, 이와 별도로 영상전송에 의한 증거조사 조항을 따로 두고 있다.¹⁾ 영상전송에 의한 증거

1) 제 24 조 영상전송에 의한 증거조사

1. 일방체약국의 법원은 타방체약국의 중앙당국의 사전허가를 얻어 영상전송에 의하여 타방체약국의 영역안에 있는 자로부터 증언을 취득할 수 있다.

2. 사전허가 요청은 법원이 소재한 일방체약국의 중앙당국이 타방체약국의 중앙당국에 대하여 한다.

3. 중앙당국의 사전허가 요청은 다음의 정보를 포함한다.

가. 촉탁법원의 명칭·주소 그리고 전화번호·팩스번호 및 전자우편주소를 포함하여 기타의 연락처가 있는 경우 그 연락처

나. 소송당사자의 성명·주소 그리고 대리인이 있는 경우 그 대리인의 성명·주소

다. 신문받을 자의 성명·주소 그리고 전화번호·팩스번호 및 전자우편주소를 포함하여 기타의 연락처가 있는 경우 그 연락처

라. 소송절차의 성격 및 적절한 경우 소송물가액

마. 신문받을 자가 신문받을 주요 사항에 대한 설명

4. 가. 수탁체약국의 중앙당국은 사전허가의 부여 여부를 결정하기 전에 직접 또는 법원을 통하여 증언할 자를 접촉하여 영상전송에 의한 증언에 자발적으로 동의하는지를 확인한다.

나. 수탁체약국의 중앙당국은 사전허가의 부여후에 증언할 자에게 증언을 위하여 출석할 일시와 장소를 통지하여야 한다.

조사 조항이 추가된 이유는, 위 조약이 비교적 최근에 체결되었고, 호주와 한국 모두 IT 강국이어서 영상전송에 의한 증거조사를 시행하는 데 아무런 기술적 문제가 없으며, 양국 사법제도에 대한 상호 신뢰도 깊었기 때문이다.

조약 발효 후 수년 동안은 양국 간에 영상전송에 의한 증거조사가 이루어진 바 없었다. 그러다가 법원행정처는 2007년에 호주 중앙당국인 호주 법무부로부터 영상전송에 의한 증거조사의 사전허가 요청을 최초로 받게 되었다. 위 사건을 간단히 설명하면 다음과 같다. Mr. X는 한국 국적자로서 호주에 밀입국하여 불법체류하다가 영주권을 신청하였으나 거부되고 그 과정에서 허위진술, 폭행 등으로 징역형을 선고받아 복역하였으며, 복역이 끝나자 Department of Immigration and Multicultural Affairs로부터 강제출국명령을 받았다. 그러나 Mr. X는 영주권 심사가 끝나지 않았다는 이유로 출국을 거부하면서 각종 소 제기, 구제신청 등을 하였고, 호주 정부는 Mr. X의 각종 구제신청 등이 최종적으로 종결될 때까지 수년간 Mr. X를 Immigration Detention Centre 등(중간에는 Gaol에도 수감되었다)에 수용하였다. Mr. X의 모든 구제신청 등이 기각되자 호주 정부는 2003년 마침내 Mr. X를 한국으로 추방하였다. Mr. X는 한국으로 추방된 후 호주 변호사를 선임하여 호주 정부를 상대로 장기간의 불법구금을 주장하면서 손해배상청구의 소를 제기하였다. 위 소송에서 Mr. X의 소송대리인은 Mr. X 본인을 증인으로 신청하면서, Mr. X가 호주에서 추방되어 한국에 있는 상태라 호주로 입국할 수 없다는 이유로 영상전송에 의한 증인신문을 요청하였다. 호주 연방법원은 이러한 방식의 증인신청을 채택하고 증인신문기일을 2007. 8. 28.로 지정하였으나, 영상전송 방식에 의한 증인신문을 실시하기 위해서는 한국 중앙당국의 사전허가가 필요하다는 사실을 뒤늦게 깨닫고, 급히 호주 중앙당국인 호주 법무부를 통해 한국 중앙당국인 법원행정처에 사전허가를 요청하였다.

5. 증인이 제1항에 따라 영상전송에 의하여 취득되는 경우,

가. 증인할 자에게 출석 또는 증언을 하도록 하기 위하여 강제력이 사용되지 아니한다.

나. 증언을 취득하는 법원의 판사는 증인할 자가 이의하지 아니하는 경우 선서를 시키거나 서약을 받을 권한이 있다.

다. 영상전송에 의한 증언취득에 있어서는 수탁체약국의 법이 적용된다. 그러나, 증언취득은 촉탁체약국의 법에 의하여 허용되는 방식으로 실시될 수 있다. 다만, 그러한 방식이 수탁체약국의 법에 저촉되는 경우에는 그러하지 아니한다.

라. 증언을 하도록 요구받은 자는 제21조에 따라 증언을 거부할 특권과 의무를 원용할 수 있다.

6. 가. 수탁체약국의 중앙당국은 특정사건에서 영상전송에 의한 증거조사가 자국의 공서양속에 반하거나 자국의 주권 또는 안보에 위해가 된다고 판단하는 경우 사전허가의 부여를 거절할 수 있다.

나. 수탁체약국의 중앙당국은 국내법상 자국이 소송물에 대하여 전속관할권을 가지고 있다고 주장하거나 신청의 근거가 되는 소가 자국의 국내법상 허용되지 아니한다는 이유만으로 사전허가의 부여를 거절할 수 없다.

다. 수탁체약국의 중앙당국이 사전허가의 부여를 거절하는 경우, 그 중앙당국은 촉탁체약국의 중앙당국에 거절의 사유를 지체없이 통지한다.

호주 법무부 담당자는 법원행정처에 사전허가 요청서를 2007. 8. 13. Fax로 보냈고, 국제심의관실의 Fax 수발 담당자가 여름휴가여서 토론자가 이를 받아본 것은 2007. 8. 20.이었다. 위 사전허가 요청서는 조약에서 규정한 사항들 중 일부(소송절차의 성격 및 소송가액, 신문받을 주요 사항에 대한 설명)를 누락하고 있었고, 원본이 아니었기 때문에, 토론자는 자세한 내용을 확인하기 위하여 Fax에 표시된 담당자 연락처로 전화하였다. 호주 법무부 담당자는 사건의 성격과 경위에 관한 자세한 설명을 해 주면서, 증인신문기일이 1주일 후이니 신속하게 사전허가를 해 달라고 요청하였다. 그러나 요청서 원본도 받지 않은 상태에서 최초의 영상전송 방식 증인신문에 대한 사전허가를 하는 것이 적절한지도 의문이고, 일부 사항 누락도 보충되어야 할 뿐만 아니라, 무엇보다도 조약에 따라 증인의 자발적인 증언 의사를 확인받을 필요가 있었다. 그리고 모든 절차를 밟는 데에는 상당한 시간이 걸릴 것으로 예상되었다. 이러한 사정을 설명하자, 호주 담당자는 원본 요청서의 송부, 증인의 자발적인 의사 확인 등 절차가 필요하고 상당한 기간이 걸릴 것이라는 데 동의하고 한국 중앙당국의 입장을 호주 연방법원에 알려, 호주 연방법원이 증인신문기일을 수개월 후로 변경하였다. 그 후 호주 담당자는 원본 요청서를 송부하였고, 토론자는 호주 담당자와 세부적인 증인신문 절차에 관하여 본격적으로 논의하였다.

우선, 호주 측에서는 증인신문이 호주 소송절차법에 따라 시행되기를 원하였다. 조약은 “영상전송에 의한 증언취득에 있어서는 수탁체약국의 법이 적용된다. 그러나, 증언취득은 촉탁체약국의 법에 의하여 허용되는 방식으로 실시될 수 있다.”라고 규정하고 있어서(24조 5항 다호), 호주 소송절차법에 따라 증인신문을 하는 것에 아무 문제가 없었다. 또한 사건 계속 중인 호주 법원이 생소한 한국 민사소송법에 따라 증인신문을 한다는 것 자체가 어색하기도 하였다. 특히 한국에는 당사자 본인이 자기의 사건에서 증인으로 증언하는 제도 자체가 없어서(당사자 본인신문제도가 있으나 위증죄로 처벌되지는 않는다), 호주 민사소송법에 따라 증인신문을 시행하는 것이 적절하다고 판단되었다.

다음으로, 토론자는 한국 법원 등 영상전송 장소와 설비를 제공해줄 수 있다고 제안하였으나, 호주 측에서는 한국 사법부가 특별한 영상전송 장비나 증인신문 장소를 제공해줄 필요가 없고, 그러한 장비나 증인신문 장소는 원고(증인) 측에서 모두 준비할 것이라고 하였다. 만약 일반적인 증인신문이라면 증인이 원피고 누구와도 관계없는 중립적인 장소에서 신문받는 것이 필요할 수 있겠으나, 이 사건에서는 증인이 곧 원고이므로 그러한 우려가 전혀 없어, 토론자 또한 원고(증인)가 장비와 장소를 준비하는 데에 아무 문제가 없다고 판단하였다. 토론자는 다시, 영상전송 증인신문 시 모든 절차가 정상적으로 진행되는지 여부를 확인하고 도움이 필요한 경우 이를 제공할 수 있도록 증인신문 장소에 국제심 직원을 보내겠다고 제안하였고, 호주 측은 이를 흔쾌히 수락하였다.

이러한 논의가 진행되는 한편으로, 국제실 직원은 호주 측이 제공한 Mr. X의 연락처로 연락하여 증인신문에 응할 자발적인 의사가 있는지를 확인하였고, Mr. X는 당연히 동의하였다. 향후 영상전송에 의한 증인신문 절차에 대하여 이의가 제기될 소지를 없애기 위하여, Mr. X의 동의서는 영어와 한국어로 작성하여 Mr. X의 서명을 받았다.²⁾

위 사건에서 한국의 공서양속에 반하거나 주권 또는 안보에 위해가 될 요소는 없었으므로, 토론자는 Mr. X의 동의서를 받은 후 최종적으로 사전허가서³⁾에 서명하여 그 PDF 파일을 먼저 이메일로 보내는 한편 다시 원본을 우편으로도 송부하였다. 사전허가서의 내용 중 '증인이 출석할 일시와 장소를 통지해 주면 이를 다시 증인에게 통지하겠다'는 부분은 증인이 곧 원고인 이 사건에서는 사실 필요 없는 것이었으나, 일단 제24조 제4항 나호에 '수탁국 중앙당국은 사전허가의 부여 후에 증언할 자에게 증언을 위하여 출석할 일시와 장소를 통지하여야 한다.'고 규정되어 있는 이상 이 내용을 포함시켰고, 실제로 다소 형식적이라고 느끼기는 하였지만 Mr. X에게 이를 다시 통지하였다.

증인신문은 호주 법원이 연기한 그 날짜에 정상적으로 진행되었다. 증인신문 장소는 Mr. X의 지인이 마련해준 곳이었고, 국제실 직원도 파견되어 절차의 정상적인 진행을 확인하였다. 영상전송 장비는 화상채팅이 가능한 PC를 이용하였고, Mr. X는 자발적으로 선서하고 증언하여, 무사히 절차가 마무리되었다.

호주 중앙당국과 긴밀하게 협조하여 무사히 첫 영상전송에 의한 증인신문을 마친 후, 토론자가 가지게 된 감상은 다음과 같고, 그 상당 부분이 발표자의 발표문에서 논의된 바와 같다(당시에 간단히 메모해 놓았고, 이 토론문을 쓰면서 좀 더 발전시켰다).

첫째, 영상전송 방식에 의한 증인신문은 수임인에 의한 증인신문보다도 훨씬 intrusive한 반면 간편하고, 이에 따라 사법공조 자체가 생략될 우려가 있다는 것이다. 수임인에 의한 증인신문을 하려면 수임인이 타국까지 이동하여야 하므로 상당한 비용과 시간이 드는 반면, 영상전송 방식에 의한 증인신문은 서로 다른 나라에 있는

2) I, regarding the case of Mr. X v Commonwealth of Australia, has been informed by the Central Authority of the Republic of Korea that the Central Authority of the Commonwealth of Australia requested a prior authorisation for the Taking of Evidence via video-link, and hereby confirm that I voluntarily agree to give testimony by video-link.

3) 법원행정처는 2007. . . Mr. X와 접촉하여 영상전송에 의한 증언에 자발적으로 동의함을 확인한 후, 첨부와 같이 본인이 작성한 확인서를 교부받았습니다. Mr. X의 위와 같은 동의 및 사안의 성격 등 제반 사정을 고려하여, 대한민국 법원행정처는 이 서한으로써, 대한민국과 호주 간의 민사사법공조조약 제24조에 기하여 Mr. X에 대한 영상전송에 의한 증거조사의 사전허가를 부여합니다. Mr. X가 증언을 위해 출석할 정확한 일시와 장소가 확정되는 대로 이를 통지하여 주시면 법원행정처는 이를 증인에게 다시 통지하도록 하겠습니다.

판사와 증인이 각기 화상채팅이 가능한 PC 한 대씩만 가지고 있으면 언제라도 가능하다. 심지어는 원고, 피고와 그 대리인들이 전부 각기 다른 나라에 있더라도 증인신문이 가능하다. 이렇게 간편하기 때문에, 영상전송 방식의 증인신문이 증인이 소재하는 타국의 주권을 침해할 소지가 있다는 것 자체를 간과한 채 절차가 진행될 수 있고, 증인 소재지국 또한 증인신문이 행해졌다는 사실 자체를 모르고 지나갈 수 있다. 그러나 사법공조 필요성을 간과한 채 증인신문이 진행되어 그 증언이 판결의 결론에 영향을 미쳤다면 향후 판결의 승인, 집행이 거부될 여지도 있을 것이므로, 처음부터 국제적인 적법절차를 밟는 데 특별한 주의를 기울여야 한다는 것이다.

둘째, 영상전송 방식에 의한 증인신문의 취지상, 한.호 민사사법 공조조약의 규정과는 달리 촉탁국 소송절차에 의하는 것을 원칙으로 하는 것이 더 바람직하다는 것이다. 앞서 언급한 것처럼, 조약은 증인신문의 주재자를 촉탁국 법원으로 상정하고 있고, 이에 따라 당연히 촉탁국 법원으로서는 그 소송절차 전반에 적용되는 촉탁국 민사소송법을 영상전송에 의한 증인신문에도 적용하는 것이 합리적이며, 그로 인하여 증인의 권리가 침해될 경우에만 적절히 제한을 가하면 될 것이다. 발표자는 헤이그 증거조사 협약 상의 수입인 방식에 의한 증인신문 시 촉탁국 방식이 적용되는 것이 원칙이라고 보았는데, 토론자 또한 이에 동의한다.

셋째, 다른 방식보다도 더욱 촉탁국과 수탁국 중앙당국 간의 신뢰와 긴밀한 협력이 필요하다는 것이다. 앞서 지적한 바와 같이 촉탁국의 소송절차법에 따라 증인신문을 하는 것이 더 바람직하다 하더라도, 수탁국 중앙당국이 증인신문 장소를 제공하거나 영상전송 장비를 지원하는 등 조력하여야 할 경우가 있을 것이다. 그리고 설령 증인을 신청한 당사자가 장비와 장소를 마련하였다 하더라도, 수탁국 중앙당국이 그 장비와 장소가 적정한지, 증인이 독립적이고 자유로운 환경에서 증언하고 있는 것인지 확인할 필요가 있다. 촉탁국 법원으로서는 스크린에 비춰지는 장면만을 볼 수 있는데, 극단적으로는 그 스크린의 사각지대에서 누군가가 증인의 머리에 총을 겨누면서 미리 정해진 답변만을 하도록 무언의 협박을 하는 중일 수도 있다. 이러한 모든 사항들은 미리 법으로 정해놓을 수 없고, 결국 개개의 사안마다 촉탁국과 수탁국 중앙당국이 전화, 이메일 등을 통해 즉각적으로 의사교환을 하여 정해야 하는 것이다. 그리고 중앙당국 간의 원활하고 신속한 의사교환이 가능한 경우에 영상전송에 의한 증인신문의 진가가 제대로 발휘될 것이다.

마지막으로, 위증의 문제 및 그에 대한 처벌의 문제가 있다. 한.호 민사사법 공조조약에 의하면 영상전송에 의한 증인신문은 어디까지나 증인이 자발적으로 동의해야만 가능하고, 선서 또한 증인이 동의하는 경우에만 가능하다. 그러나 일단 증인이 선서에 동의하여 선서하고 증언하였는데 그것이 허위진술이라면 그를 어떻게 처벌할 수 있는지가 문제된다. 이왕 증인신문을 하는 마당에는 되도록 진실한 증언을 얻어야 할 것

인데, 허위진술에 대하여 위증죄로 제재할 수 없다면 그 증언의 진실성이 상당 정도 저감될 것이다. 여기에서 드는 의문은, 촉탁국 법원이 촉탁국 법에 따라 증인으로부터 선서를 받고 영상전송에 의한 증인신문을 마친 경우, 증인이 위증하였음이 사후적으로 밝혀졌다면 과연 수탁국이 그 증인을 위증죄로 처벌할 수 없는가이다. 적법한 절차를 거쳐 사전허가에 따라 촉탁국 법원이 증인의 자발적인 선서를 받고 증인신문하였다면 이는 수탁국 법원이 촉탁서 방식에 의하여 직접 증인신문을 실시한 경우와 마찬가지로 위증죄의 처벌대상인 증언에 해당한다고 보아야 하지 않을까?

그리고 이 자리를 빌어 호주 연방법원과 중앙당국에도 감사를 표하고 싶다. 위 사건은 한국 국민이 호주 연방정부를 상대로 불법행위에 기한 손해배상소송을 제기한 것이었으나, 호주 중앙당국인 법무부 직원들은 사건의 성격에 전혀 좌우되지 않은 채 Mr. X가 원하는 방식으로 무사히 증인신문이 이루어질 수 있도록 최선을 다했다. 한국 국민이 호주 연방정부를 상대로 제기한 소송에서 호주 법원이 한국 국민의 신청에 따라 촉탁하여 한국 최초의 국가 간 영상전송 방식에 의한 증인신문이 이루어졌다는 것 자체가 양국 중앙당국의 신뢰와 협조를 표상한다고 하겠으며, 이러한 신뢰와 협조가 전 세계로 확대되기를 희망한다.



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SESSION 4.

Validity of Choice of Court Agreement to Evade an Application of Overriding Mandatory Rules

Moderator

Sang-Jae YU

Chief Professor at Judicial Research & Training Institute (Korea)

Presenter

Masato Dogauchi

Professor at Waseda University (Japan)

Panelist

Yoon Jong Kim

Judge of Judicial Rearch Division in Supreme Court (Korea)

Gyoocho Lee

Tenured Professor at Chung-Ang University (Korea)

Yongping XIAO

Director at Wuhan University (China)

Sarala Subramaniam

Deputy Director of Ministry of Law (Singapore)



Moderator

Sang-Jae YU

Chief Professor at Judicial Research & Training Institute (Korea)

Education

- 1990. Yonsei University(LL.B.)

Work Experience

- 1992. Judge, Suwon District Court
- 1994. Judge, Seoul Central District Court
- 2003. Director of Judicial Research, Supreme Court Library
- 2005. Judge, Seoul High Court
- 2007. Presiding Judge, Kangleung Branch Court of Chuncheon District Court
- 2014. Chief Judge, Pyongtaek Branch Court of Suwon District Court
- 2015. Presiding Judge, Daejeon High Court
- 2017. Chief Professor of Judicial Research and Training Institute
Chief Director of International Judicial Cooperation Center at JRTI



Presenter

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Education

- 1978: B.A., University of Tokyo, Faculty of Law

Work Experience

- 2004- : Professor of Law, Waseda University, Law School, teaching Private International Law, International Civil Procedure and International Trade Law.
- 2004- : Special Counsel for Nagashima Ohno & Tsunematsu.(since 2011, Senior Counsel)
- 1996-2004: Professor of Law, University of Tokyo, Faculty of Law;
- 1991-1996: Associate Professor of Law, University of Tokyo, Faculty of Law;
- (1988-1989): Visiting Scholar, Columbia University, School of Law;
- (1987-1988): Visiting Scholar, University of Michigan, Law School;
- 1984-1991: Associate Professor of Law, University of Tokyo, College of Arts and Sciences;
- 1983-1984: Research Assistant, Meiji University, Faculty of Law;
- 1982(-1984): Ministry of Foreign Affairs, Headquarters of Law of the Sea;
- 1978-1981: Research Assistant, University of Tokyo, Faculty of Law;

Published Books

- "New Japanese Rules on International Jurisdiction: General Observation", Japanese Yearbook of International Law, Vol.54, pp260-277 (2011)
- "Forthcoming Rules on International Jurisdiction", Japanese Journal of Private International Law, No.12, pp.212-224 (2011)
- "Historical Development and Fundamental Principles of Japanese Private International Law" in JUERGEN BASEDOW/ HARALD BAUM/ YUKO NISHITANI eds., JAPANESE AND EUROPEAN PRIVATE INTERNATIONAL LAW IN COMPARATIVE PERSPECTIVE, pp.27-60 (2008, Mohr Siebeck);
- "Explanatory Report on the Hague Convention on Choice of Court Agreements" (with Professor Trevor Hartley) (2007);
- "New Private International Law of Japan: An Overview", Japanese Annual of International Law, No.50, pp.3-14 (2007);
- "Four-Step Analysis of Private International Law", Recueil des cours, Vol. 315 pp.9-140 (2005);



Panelist

Yoon Jong Kim

Judge of Judicial Research Division in Supreme Court (Korea)

Education

- Sep 2011-Dec 2012 LL.M program at London School of Economics and Political Science(LSE)
Dissertation title: The availability and effectiveness of Online Dispute Resolution for the cross-border transaction of E-commerce
- Mar 2001-Feb 2003 Judicial Research and Training Institute(JRTI)
The JRTI is an educational institution created by the Supreme Court of Korea. The two year course is mandatory for newly licensed lawyers in Korea.
- Licensed to lawyer in 2003.
- Mar 1997-Feb 2000 Korea University(KU), School of Law
Master of Law.
Thesis: The protection of consumer in Electronic Commerce- with analysis of Federal Trade Commission in the U.S
- Mar 1992-Feb 1997 Korea University(KU), School of Law
Bachelor of Law

Work Experience

- Feb 2016-present Supreme Court of Korea
Judge, Judicial Research Division. Specializing in International Private Law, Insurance Law and Maritime Law
- Sep 2015-Feb 2016 Seoul Northern District Court
Presiding Judge.
- Sep 2014-Aug 2015 Permanent Bureau of Hcch
Secondee Judge. Participated in Judgments project team
- Aug 2012-Aug 2014 Seoul Western District Court
Presiding Judge.
- Feb 2009-Aug 2011 Seoul Central District Court
Presiding Judge.
- Feb 2006-Feb 2009 Bucheon Branch of Incheon District Court
Junior Judge.
- Feb 2003-Feb 2006 Taegu District Court & Taegu High Court
Preliminary or Junior Judge.

Published Books

- "The availability and effectiveness of Online Dispute Resolution for the cross-border transaction of E-commerce"
Dissertation of LL.M program in 2012



Panelist

Gyoocho Lee

Tenured Professor at Chung-Ang University (Korea)

Education

- Washington University School of Law, St. Louis, MO; USA
Doctor of Juridical Science (Major: Civil Procedure) Spring 1998
- Georgetown University Law Center, Washington, DC
Visiting Researcher August 1995
- University of Washington School of Law, Seattle, WA; USA
Master of Law in Asian Law June 1994
- Yonsei University, Seoul, South Korea
Master of Law (Major: Civil Procedure) February 1992

Work Experience

- | | |
|---|---------------------------|
| • Professor (tenured)
School of Law
Chung-Ang University
Seoul, South Korea | September 2011 - Present |
| • Associate Professor
School of Law
Chung-Ang University
Seoul, South Korea | March 2008 -- August 2011 |
| • Vice Dean for International Affairs and Public Relation and Director of Law Library and of SJD Program

School of Law
Chung-Ang University
Seoul, South Korea | March 2016-February 2018 |
| • Vice Dean for Academic Affairs
School of Law
Chung-Ang University
Seoul, South Korea | April 2012- January 2014 |
| • Visiting Scholar, Washington University School of Law, St. Louis, MO; USA | 2014 |
| • President, The Association of Content Property for Next Generation | 2015-2018 |
| • President, The Association of International Cultural Property Law | 2015-2017 |
| • Vice President for international affairs, Korean Civil Procedure Association | 2012-2016 |
| • Vice President, Korea Association for Informedia Law | 2013-2018 |
| • Vice President, Korean Computer Game Law Association | 2014-2018 |

• Member, PROYECTO MICINN DER 2013-44739-R (Spain)	2015-Present
• Editor, Korean Yearbook of International Law	2013-2017
• Member, AIPPI Standing Committee for Geographical Indications	2016-2018
• Member, Association of Critical Heritage Studies ICH Network Committee	2016-2018
• Arbitrator, Weihai Arbitration Commission (Weihai, China)	2016-2019
• Associate Member, International Academy of Comparative Law	Since 2015

Published Books

1. English Books

- Failures of American Civil Justice in International Perspective (coauthored with James R. Maxeiner & Armin Weber)(August 2011) (Cambridge University Press)

2. Korean Books

- Gyoocho Lee, Patent Law: Cases and Explanations (Jinwon Sa) (4th ed. 2017)
- Gyoocho Lee, Laws to Protect Geographical Marks including Geographical Indications, Korea Institute of Intellectual Property (2016)
- Gyoocho Lee, Trademark Law (Jinwon Sa) (1st ed. 2015)
- Gyoocho Lee, Copyright Law: Cases and Explanations (Jinwon Sa) (6th ed. 2017)

3. English Legal Articles

- Gyoocho Lee, Recognition and Enforcement of Foreign Judgment under the Civil Procedure Act and the Civil Enforcement Act Revised in 2014, Korean Yearbook of International Law, Vol. 2, 309-322 (2014)
- Gyoocho Lee, Keon-Hyung Ahn and Jacques de Werra, Euro-Korean Perspectives on the Use of Arbitration and ADR Mechanisms for Solving Intellectual Property Disputes, Arbitration International, Vol. 30, Issue 1 (2014)

4. English Book Chapters

- Gyoocho Lee, Issues of International Private Law, in Byung-il Kim and Christopher Heath eds, Intellectual Property Law in Korea (2015)
- Gyoocho Lee, Choice of Law, in Sanna Wolk & Kacper Szkalej eds., Employees' Intellectual Property Rights (Kluwer Law International, September 2015).
- Gyoocho Lee, Republic of Korea of Part IIB National Legal Rules in Asia, in Sanna Wolk & Kacper Szkalej eds., Employees' Intellectual Property Rights (Kluwer Law International , September 2015).
- Gyoocho Lee, Legal Issues on FOSS and Other Alternative Licenses in Korea, in Axel Metzger ed, Free and Open Source Software (FOSS) and Other Alternative License Models: A Comparative Analysis (Springer, 2016)

Awards

- Listee, Marquis Who's Who in the World in 2016 (December, 2015)
- Awardee of Chung-Ang University Academic Award (October, 2015)
- Listee, 2000 Outstanding Intellectuals of the 21st Century in 2016 (IBC, 10th ed.) (July, 2016)
- Official Commendation from International Intellectual Property Training Institute for Excellent Teaching of Intellectual Property Law (December, 2016)



Panelist

Yongping XIAO

Director of Wuhan University (China)

Education

- 1988-1993 PHD, Wuhan University, China
- 1984-1988 L.B., Southwest College of Political Science and Law, China

Work Experience

- 2016-present Director, Wuhan University Institute of International Law, China
- 2014, 6-8 Visiting Scholar, Northeast University School of Law, USA
- 2013, 7-8 Visiting Scholar, University of Groningen Faculty of Law, the Netherlands
- 2012-present Cheung Kong Scholars Distinguished Professor, Wuhan University, China
- 2007-2016 Dean, Wuhan University School of Law, China
- 2006, 6-12 Senior Research Scholar, Birmingham University School of Law, UK
- 2005, 7-8 Visiting Scholar, Temple University School of Law, USA
- 2001-2005 Director, International Law Department, Wuhan University, China
- 2000, 7-8 Visiting Scholar, Max-Planck Institute of Foreign and Private International Law, Germany
- 1998-1999 Visiting Scholar, Harvard-Yenching Institute, Harvard University, USA
- 1997-present Professor, Wuhan University School of Law, China

Published Books

- Conflict of Laws in the People's Republic of China, Edward Elgar, UK, 2016
- Sports Disputes Settlement Models, High Education Press, China, 2015
- Private International Law, High Education Press, 3th Edition, China 2014 (editor of the revised edition)
- Legal Learning and Research Methods, Wuhan University Press, China, 2012
- Conflict of Laws from the Perspective of Jurisprudence, High Education Press, China, 2008
- Principle of Private International Law, Law Press, 2nd Edition, China, 2007
- Private International Law, People's Court Press, China, 2004 (with HAN Depei)
- Xiao Yongping on Conflict of Laws, Wuhan University Press, China, 2002
- A Treaties on the Conflict of Laws, Wuhan University Press, China, 1999
- A Course on Chinese Arbitration Law, Wuhan University Press. China 1997
- The Chinese Legislation on the Conflict of Laws, Wuhan University Press, China, 1996

Awards

- 2016 the leading talent in the philosophy and social science of China by the Central Publicity Department
- 2015 Third Class Award for Academic Achievement in Social Science among Chinese Universities, Ministry of Education of PRC

- 2012 Cheung Kong Scholars Distinguished Professor, Ministry of Education of PRC
- 2011 Second Class Award for Academic Achievement in Social Science, Hubei Province, China
- 2010 Member, the "Top-ten Outstanding Young Jurists of China", China Society of Law, China
- 2009 First Class Award for Legal Textbook and Academic Achievement, Ministry of Justice of PRC
- 2009 First Class Award for National Outstanding Teaching Achievement, Ministry of Education of P
- 2006. First Class Award for Teaching and academic Achievements, Ministry of Justice of PRC
- 2003 First Class Award for Teaching and academic Achievements, Ministry of Justice of PRC
- 2003 First Class Award for Academic Achievements in Social Science among Wuhan City, Wuhan, China
- 2001 Special Allowance of State Department of PRC



Panelist

Sarala Subramaniam

Deputy Director of Ministry of Law (Singapore)

Education

- LLB (Hons), National University of Singapore (2005)
- LLM, Harvard Law School (2011)

Work Experience

Sarala began her career as a litigator in Allen and Gledhill and Rajah & Tann. She subsequently joined the International Affairs Division of the Attorney General's Chambers in 2012 and practiced in international economic and human rights law for four years. She has been Deputy Director of the International Legal Division of the Ministry of Law since Jan 2016. Sarala focuses on private international law and specifically the work of the Hague Conference in the Ministry.



HCCH Asia Pacific Week 2017

*3rd(Mon) - 6th(Thu) July 2017
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SESSION 4.

Presentation

The Hague 2005 Choice of Court Convention and a Recent Japanese Court Case

Masato Dogauchi

Professor at Waseda University (Japan)

The Hague 2005 Choice of Court Convention and a Recent Japanese Court Case

6 July 2017

Masato Dogauchi
Professor of Law
Waseda University, Law School

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- I. The Hague Choice of Court Convention
 - 1. The Aim of the Convention
 - 2. Three Dimensions
 - 3. Three Key Provisions
 - 4. Disputed to be covered
 - 5. Status
- II. A Recent Japanese Court Case
 - 1. Facts
 - 2. Decision
 - 3. Comments

I. The Hague Choice of Court Convention

1. The Aim of the Convention

- To make choice of court agreements as effective as possible.
- The hope is that the Convention will do for choice of court agreements what the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958* has done for arbitration agreements.

I. The Hague Choice of Court Convention

2. Three Dimensions

- First, the chosen court must hear the case when proceedings are brought before it;
- Second, any other court before which proceedings are brought must refuse to hear them; and
- Third, the judgment of the chosen court must be recognised and enforced.

I. The Hague Choice of Court Convention

3. Three Key Provisions – 1st

Article 5 *Jurisdiction of the chosen court*

1. The court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State.

2. A court that has jurisdiction under paragraph 1 shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State.

3. ...

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3. Three Key Provisions – 2nd (1)

Article 6 *Obligations of a court not chosen*

A court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies unless -

a) the agreement is null and void under the law of the State of the chosen court;

b) a party lacked the capacity to conclude the agreement under the law of the State of the court seised;...

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3. Three Key Provisions – 2nd (2)

...

c) giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised;

d) for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed; or

e) the chosen court has decided not to hear the case.

3. Three Key Provisions – 3rd (1)

Article 8 Recognition and enforcement

1. ... Recognition or enforcement may be refused only on the grounds specified in this Convention.

2. ..., there shall be no review of the merits of the judgment given by the court of origin. The court addressed shall be bound by the findings of fact on which the court of origin based its jurisdiction, unless the judgment was given by default.

3. A judgment shall be recognised only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin.

4. ...

5. ...

3. Three Key Provisions – 3rd (2)

Article 9 Refusal of recognition or enforcement

Recognition or enforcement may be refused if -

a) the agreement was null and void under the law of the State of the chosen court, unless the chosen court has determined that the agreement is valid;

b) a party lacked the capacity to conclude the agreement under the law of the requested State;

...

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3. Three Key Provisions – 3rd (3)

c) the document which instituted the proceedings or an equivalent document, including the essential elements of the claim,

i) was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant entered an appearance and presented his case without contesting notification in the court of origin, provided that the law of the State of origin permitted notification to be contested; or

ii) was notified to the defendant in the requested State in a manner that is incompatible with fundamental principles of the requested State concerning service of documents; ...

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3. Three Key Provisions – 3rd (4)

d) the judgment was obtained by fraud in connection with a matter of procedure;

e) recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State;

f) the judgment is inconsistent with a judgment given in the requested State in a dispute between the same parties; or

g) the judgment is inconsistent with an earlier judgment given in another State between the same parties on the same cause of action, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested State.

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I. The Hague Choice of Court Convention

4. Disputes to be Covered

- This Convention applies in international cases to exclusive choice of court agreements concluded in civil or commercial matters. (Art.1(1))
 - Definition of "international cases". (Art.1 (2)(3))
 - Definition of "exclusive choice of court agreements". (Art.3)
- Reciprocal declarations on non-exclusive choice of court agreements are possible. (Art. 22)

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I. The Hague Choice of Court Convention

5. Status

- Entry into Force on 1 October 2015
- Number of States bound by this Convention: 29(+EU)
- **Mexico, EU member states and Singapore**
- US signed the Convention but has not yet ratified it.
- Japan, Korea and other Asian countries, except Singapore, have not even signed it.

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II. A Recent Japanese Court Case

1. Facts

Tokyo District Court Interlocutory Judgment on 15 February 2016

In September 2009, Shimano Co., Ltd, a Japanese medium sized company manufacturing pins and other small industrial parts (350 employees), and Apple Inc., a Californian giant IT company, entered into a Master Development Supply Agreement ("MDSA"), according to which Shimano would design and manufacture pins pursuant to an instruction of Apple and Apple would buy them for their products.

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1. Facts (cont'd)

In April 2011, Apple requested Shimano to develop a new type of pin. By July 2012, Shimano completed such development and introduced new mother machines for high-volume production of the new pins. However, Apple ordered Shimano just a few quantity of pins and, accordingly, Shimano carried huge volume of inventory.

In February 2013, Shimano accepted Apple's request to reduce price of the new pin in order for Shimano get ample order from Apple.

1. Facts (cont'd)

In May 2013, Apple requested Shimano to apply the reduced price to the pins which had already been supplied to Apple and still been in stock of Apple. Shimano accepted this request again and paid back the balance of prices to Apple.

However, in 2014, Shimano filed a lawsuit for damages (93 billion dollars) at Tokyo District Court alleging that the conduct of Apple was **abuse of dominant bargaining position under Japanese law**.

1. Facts (cont'd)

Apple asserted that this lawsuit should be dismissed since it was in violation of the exclusive choice of court agreement incorporated in the MDSA.

The exclusive choice of court provision is a part of the following **multi-tiered dispute resolution clause**:

a. In respect of **any dispute between the parties**, when one of the parties sends a written notice to the other, each of them shall nominate one high-level executive and they shall negotiate for reaching an amicable resolution of the dispute.

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1. Facts (cont'd)

- b. In the case where they cannot reach the settlement of the dispute within 60 days from the date of the notice, any one of the parties may file a lawsuit in a State or Federal Court in Santa Clara, California, which has exclusive jurisdiction over the dispute.
- c. This clause shall be applied to all disputes between the parties, **whether they arise out of or in connection with the this MDSA or not**, provided that another written agreement provides for otherwise.

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II. A Recent Japanese Court Case

2. Decision

The Tokyo District Court held that the Apple's assertion was dismissed on the ground that the exclusive choice of court agreement at issue did not comply with the requirement that such agreement should be in connection with a particular legal relationship.*

* Article 3-7, Paragraph 2 of the Code of Civil Procedure of Japan:
"The agreement ... is not valid unless it is made regarding actions that are based on [a particular legal relationship](#), ..."

II. A Recent Japanese Court Case

3. Comments

There are two problems at issue.

a. The application of the requirement that a choice of court agreement shall be made "in connection with a particular legal relationship"

b. Validity of choice of court agreement to evade an application of overriding mandatory rules

II. A Recent Japanese Court Case

3. Comments

- a. The application of the requirement that a choice of court agreement shall be made “in connection with a particular legal relationship”

Article 4, paragraph 1 of the 2005 Hague Convention provides for the same requirement as in the Code of Civil Procedure of Japan:

“‘exclusive choice of court agreement’ means an agreement concluded by two or more parties that meets the requirements of paragraph c) and designates, *for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship*, the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts.”

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II. A Recent Japanese Court Case

3. Comments

How does this requirement apply to the choice of court agreement in the MDSA?

The clause in the MDSA can be applied so widely that it cannot be in compliance with the requirement as a whole.

If the dispute were not in connection with the MDSA, the choice of court agreement on such dispute should be invalid.

(The obligation of 60-day negotiation by high-level executives might be valid even in such a case.)

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II. A Recent Japanese Court Case

3. Comments

However, the dispute in this case apparently arose in connection with the MDSA, which is “a particular legal relationship”.

It seems that the parties should be bound such choice of court agreement, since it does not harm the parties’ foreseeability.

Accordingly, I cannot support the reasoning of Tokyo District Court in this respect.

However, I can support its conclusion on the following reason:

II. A Recent Japanese Court Case

3. Comments

However, the dispute in this case apparently arose in connection with the MDSA, which is “a particular legal relationship”.

It seems that the parties should be bound such choice of court agreement, since it does not harm the parties’ foreseeability.

Accordingly, I cannot support the reasoning of Tokyo District Court in this respect.

However, I can support its conclusion on another ground as follows:

II. A Recent Japanese Court Case

3. Comments

b. Validity of choice of court agreement to evade an application of overriding mandatory rules*

* “overriding mandatory rules” are the rules the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organization, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract.

See, Article 9 of Rome I Regulation of 17 June 2008 on the law applicable to contractual obligations.

Such rules have been applied by Japanese court cases: Provisions to protect workers under labor union law (Tokyo District Court Judgment on 26 April 1965); provisions to protect invention by employees under patent law (Tokyo District Court Judgment on 24 February 2004); provisions to protect market order under competition law (Osaka District Court judgment on 9 November 2004; Toyo District Court judgment on 28 August 2007)

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II. A Recent Japanese Court Case

3. Comments

Article 6, Sub-paragraph c of the 2005 Hague Convention:

A court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies unless –

...

c) giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised;

...

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II. A Recent Japanese Court Case

3. Comments

Any corresponding provision is found in Japanese Code of Civil Procedure.

However, it is a common understanding that the following holding in the Supreme Court judgment on 28 November 1975 is still applicable:

A choice of court agreement cannot be respected in a case where giving effect to the agreement would be “**significantly unreasonable and against the public policy.**”

II. A Recent Japanese Court Case

3. Comments

If application of overriding mandatory rules in a certain case is so important for Japan, Japanese courts should not give effect to a choice of court agreement to exclude jurisdiction of Japanese courts and should sustain jurisdiction over the case.

Accordingly it seems that giving effect to the choice of court agreement in MDSA in this case should be “**significantly unreasonable and against the public policy.**”

II. A Recent Japanese Court Case

3. Comments

If application of overriding mandatory rules in a certain case is so important for Japan, Japanese courts should not give effect to a choice of court agreement to exclude jurisdiction of Japanese courts and should sustain jurisdiction over the case.

Accordingly it seems that giving effect to the choice of court agreement in MDSA in this case should be "**significantly unreasonable and against the public policy.**"

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II. A Recent Japanese Court Case

3. Comments

For reference, [German Federal Supreme Court \(Bundesgerichtshof\) judgment on 5 September 2012](#) held that a choice of court agreement which exclusively designate West Virginia court should not be respected because it would evade the application of a German overriding mandatory rule.

In this case, a German company filed a in a German court against a company whose headquarters in West Virginia which dissolved a sales agent contract with the German company. The German company claimed for remedies under a German overriding mandatory rule which would not be admitted under the law of West Virginia designated as the governing law of the agreement.

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The 2005 Choice of Court Convention

Thank you.

2005년 헤이그 재판관할 합의 협약과 일본의 최근 소송 사례

2017년 7월 6일

도가우치 마사토
와세다대학교
법학전문대학원 교수

목차

- I. 헤이그 재판관할 합의 협약
 - 1. 협약의 목적
 - 2. 기본 규칙 3개
 - 3. 주요 조항 3개
 - 4. 논쟁점
 - 5. 현황
- II. 일본의 최근 소송 사례
 - 1. 배경 설명
 - 2. 판결
 - 3. 의견

I. 헤이그 재판관할 합의 협약

1. 협약의 목적

- 재판관할 합의를 최대한 효율적으로 이행
- **1958년 6월 10일 체결된 외국 중재판정의 승인 및 집행에 관한 뉴욕 협약**을 통해 중재 합의의 기틀이 마련되었듯이, 본 협약을 통해 재판관할 합의의 기틀을 마련하는 것이 목적임

I. 헤이그 재판관할 합의 협약

2. 기본 규칙 3개

- 첫째, 관할법원으로 지정된 법원은 소송이 제기될 시 해당 소송에 대한 심리를 진행하여야 함
- 둘째, 그 외의 법원은 소송이 제기되더라도 심리를 거부하여야 함
- 셋째, 지정 관할법원의 판결은 승인 및 집행되어야 함

I. 헤이그 재판관할 합의 협약

3. 주요 조항 3개 - 첫 번째

제5조 지정 법원의 관할권

1. 배타적 재판관할 합의에 따라 지정된 체약국 법원은 해당 합의가 체약국 법률상 무효인 경우를 제외하고, 해당 합의가 적용되는 분쟁에 대해 판결을 내릴 관할권을 가진다.
2. 제1항에 따라 관할권을 가지는 법원은 해당 분쟁에 대해 다른 체약국 법원이 판결을 내려야 한다는 근거로 관할권 이행을 거부하여서는 아니 된다.
3. ...

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3. 주요 조항 3개 - 두 번째(1)

제6조 비지정 법원의 의무

체약국의 법원 중 지정 법원 이외의 법원은 배타적 재판관할 합의가 적용되는 소송을 유예 또는 거부하여야 한다. 단, 다음의 경우는 예외로 한다.

- a) 해당 합의가 지정 법원 소재 국가 법률상 무효임.
- b) 당사자가 소송이 제기된 법원 소재 국가의 법률에 따라 합의를 체결할 충분한 능력이 없었음.

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3. 주요 조항 3개 - 두 번째(2)

...

c) 합의를 이행함으로써 명백한 부당성이 발생하게 되거나 소송이 제기된 법원 소재 국가의 공공 정책에 명백히 반하게 됨.

d) 당사자들이 제어할 수 없는 예외적인 사유가 있음, 합의가 합리적으로 이행될 수 없음.

e) 지정 법원이 소송에 대해 심리를 진행하지 않기로 결정함.

3. 주요 조항 3개 - 세 번째(1)

제8조 승인 및 집행

1. ... 승인 또는 집행은 본 협약에 명시된 근거에 의하여만 거부될 수 있다.

2. ..., 법원에서 내린 판결에 대한 검토는 할 수 없다. 판결의 승인 또는 집행을 요청 받은 법원은 판결을 내린 법원의 관할권의 근거가 되는 사실확정의 구속을 받는다. 단, 권속판결인 경우는 예외로 한다.

3. 판결은 판결을 내린 법원 소재 국가에서 효력을 가질 시에만 승인되어야 하며, 해당 국가에서 집행 가능할 시에만 집행되어야 한다.

4. ...

5. ...

3. 주요 조항 3개 - 세 번째(2)

제9조 승인 또는 집행의 거부

승인 또는 집행은 다음의 경우 거부할 수 있다.

a) 지정 법원이 해당 합의가 유효하다고 판단하는 경우를 제외하고, 해당 합의가 지정 법원의 국가 법률상 무효였음.

b) 당사자가 판결의 승인 또는 집행을 요청 받은 법원 소재 국가의 법률에 따라 합의를 체결할 충분한 능력이 없었음.

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3. 주요 조항 3개 - 세 번째(3)

c) 손해배상 청구의 본질적 요소들을 포함하여 소송을 시작하는 문서 또는 이에 상응하는 문서가 다음의 경우에 해당함.

i) 피고가 방어에 필요한 시간여유를 두고 방어를 준비할 수 있는 방식으로 이러한 문서를 송달 받지 못함. 단, 판결을 내린 법원 소재 국가의 법에 따라 송달 관련 이의를 제기할 수 있음에도 불구하고 피고가 판결을 내린 법원에 출석하여 이의 제기 없이 진술한 경우에는 해당되지 않음.

ii) 판결의 승인 또는 집행을 요청 받은 법원 소재 국가에서 이러한 문서가 피고에게 송달되었으나, 그 방식이 문서 송달과 관련된 해당 국가의 기본 원칙에 위배됨.

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3. 주요 조항 3개 - 세 번째(4)

d) 내려진 판결이 소송 절차 문제와 관련된 사기로 인한 것임.

e) 판결로 이어진 특정 소송 절차가 판결의 승인 또는 집행을 요청 받은 법원 소재 국가의 절차적 공정성 기본 원칙에 위배되는 등, 승인 또는 집행이 해당 국가의 공공 정책에 명백히 위배됨.

f) 해당 판결이 승인 또는 집행을 요청 받은 법원 소재 국가에서 발생한 동일한 당사자 간 분쟁에 대해 내려진 판결과 일관성이 없음.

g) 해당 판결이 다른 국가에서 동일한 당사자 간 발생한 동일한 소송 원인에 대해 내려진 이전 판결과 일관성이 없음. 단, 이때 이전 판결은 승인 또는 집행을 요청 받은 국가에서 승인되기 위해 필요한 조건을 충족하여야 함.

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I. 헤이그 재판관할 합의 협약

4. 논쟁점

- 본 협약은 국제 소송에서 민사 및 상사에 대해 체결된 배타적 재판관할 합의에 적용된다. (제1조 1항)
 - '국제 소송'의 정의 (제1조 2, 3항)
 - '배타적 재판관할 합의'의 정의 (제3조)
- 비배타적 재판관할 합의에 대한 상호 선언이 가능하다. (제22조)

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I. 헤이그 재판 관할 합의 협약

5. 현황

- 2015년 10월 1일 발효됨
- 협약의 구속을 받는 국가 수: 29개 국(+EU)
- **멕시코, EU 회원국, 싱가포르**
- 미국은 협약 서명은 하였으나 아직 비준은 하지 않음
- 일본, 한국을 비롯한 아시아 국가(싱가포르 제외)는 협약에 서명하지 않음

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II. 일본의 최근 소송 사례

1. 배경 설명

2016년 2월 15일 도쿄지방법원 중간 판결

2009년 9월 일본의 핀 및 기타 공업용 부품 제조 중소기업(직원 350명)인 시마노 주식회사와 미국 캘리포니아주 소재 거대 IT 기업인 애플 주식회사는 개발공급 기본계약('MDSA')을 체결하였다. 본 계약에 따라 시마노는 애플의 지시에 따라 핀을 설계 및 제조하고, 애플은 이 핀을 구매하여 자사 제품에 사용하도록 하였다.

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1. 배경 설명(계속)

2011년 4월 애플은 시마노에 새로운 유형의 핀을 개발할 것을 요청하였다. 2012년 7월 시마노는 개발을 완료하고 새로운 핀의 대량생산을 위한 공작기계를 도입하였다. 그러나 애플은 핀을 소량만 주문하였고, 이에 따라 시마노에는 대량의 재고가 발생하였다.

2013년 2월 시마노는 애플로부터 대량의 주문을 받기 위해 새로운 핀의 단가를 인하해달라는 애플의 요청을 수락하였다.

1. 배경 설명(계속)

2013년 5월 애플은 이미 자사에 공급되어 아직 재고로 남아 있는 핀에도 인하된 가격을 적용해 달라고 시마노에 요청하였다. 시마노는 이 요청도 수락하였고 애플에 차액을 환불해주었다.

그러나 2014년 시마노는 도쿄지방법원에 손해배상청구소송(930억 달러)을 제기하면서 애플의 행위는 일본법에 따라 시장지배적 지위 남용이라 주장하였다.

1. 배경 설명(계속)

애플은 본 소송이 MDSA에 포함된 배타적 재판관할 합의를 위반한 것이라며 소송이 기각되어야 한다고 주장했다.

배타적 재판관할 조항은 다음의 단계적 분쟁해결 조항의 일부이다.

a. 당사자 간 분쟁과 관련하여, 한 당사자가 다른 당사자에게 서면 통지를 보내는 경우, 각 당사자는 고위 임원 1인을 지명하여야 하며 이 임원들은 분쟁의 원만한 해결을 위해 협상하여야 한다.

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1. 배경 설명(계속)

b. 통지일로부터 60일 이내에 분쟁을 해결하지 못하는 경우, 당사자 중 어느 일방이라도 해당 분쟁에 대한 배타적 관할권을 가지는 캘리포니아주 산타클라라 소재 주/연방 법원에 소송을 제기할 수 있다.

c. 별도의 서면 합의에 의하여 다른 절차가 적용되지 아니하는 한, 본 조항은 분쟁이 MDSA에 의하여 또는 MDSA와 관련하여 발생하였는지 여부에 관계없이 당사자 간 모든 분쟁에 적용된다.

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II. 일본의 최근 소송 사례

2. 판결

도쿄지방법원은 논쟁이 되고 있는 배타적 재판관할 합의가 '이러한 합의는 특정 법률관계와 관련되어야 한다'는 요구사항을 충족하지 못하였으므로 애플의 주장을 기각한다고 밝혔다.*

* 일본 민사소송법 제3-7조 2항:

"... 합의는 특정 법률관계에 근거한 소송과 관련하여 체결된 것이 아닌 경우에는 무효이다..."

II. 일본의 최근 소송 사례

3. 의견

두 가지 쟁점

a. 재판관할 합의가 '특정 법률관계와 관련'되어야 한다는 요구사항의 적용

b. 최우선 법률 규정의 적용을 회피하는 재판관할 합의의 유효성

II. 일본의 최근 소송 사례

3. 의견

a. 재판관할 합의가 '특정 법률관계와 관련'되어야 한다는 요구사항의 적용

2005년 헤이그 재판관할 합의 협약의 제3조 1항은 일본
민사소송법과 동일한 요구사항을 적용하고 있다.

“배타적 재판관할 합의’란 둘 이상의 당사자 간 체결되는 합의로서, c)항의
요구사항을 충족하며, 특정 법률관계와 관련하여 발생하였거나 발생할
수 있는 분쟁을 해결하기 위한 목적으로 하나의 체약국의 법원 또는
하나의 체약국의 1개 이상 특정 법원을 지정한다. 이때 기타 법원의
관할권은 제외한다.”

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II. 일본의 최근 소송 사례

3. 의견

이 요구사항이 MSDA의 재판관할 합의에 어떻게
적용되는가?

MSDA의 조항은 매우 광범위하게 적용될 수 있으므로
전체 요구사항을 충족할 수 없다.

분쟁이 MSDA와 관련되지 않은 경우, 이러한 분쟁에 대한
재판관할 합의는 무효하다.

(고위 임원의 60일 협상 의무는 이러한 경우에도 유효할
수 있다.)

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II. 일본의 최근 소송 사례

3. 의견

그러나 이 사건의 분쟁은 **MDSA**와 관련하여 발생한 것으로 보이며, 이는 '특정 법률관계'에 해당한다.

이 경우 재판관할 합의는 당사자의 예측가능성을 침해하지 않으므로 당사자는 이 합의에 구속되어야 하는 것으로 보인다.

이러한 점에서 도쿄지방법원의 의견에 동의하지 않는다.

하지만 다음의 이유로 도쿄지방법원의 판결에는 동의할 수 있다.

II. 일본의 최근 소송 사례

3. 의견

그러나 이 사건의 분쟁은 **MDSA**와 관련하여 발생한 것으로 보이며, 이는 '특정 법률관계'에 해당한다.

이 경우 재판관할 합의는 당사자의 예측가능성을 침해하지 않으므로 당사자는 이 합의에 구속되어야 하는 것으로 보인다.

이러한 점에서 도쿄지방법원의 의견에 동의하지 않는다.

하지만 다음과 같은 다른 근거를 기반으로 도쿄지방법원의 판결에는 동의할 수 있다.

II. 일본의 최근 소송 사례

3. 의견

b. 최우선 법률 규정의 적용을 회피하는 재판관할 합의의 유효성*

* '최우선 법률 규정'이란 한 국가의 정치, 사회, 경제 구조와 같은 공공 이익을 보호하기 위해 반드시 준수하여야 하는 규칙으로, 계약에 적용될 수 있는 기타 법규에 우선하여 해당 규정 범위 내의 모든 상황에 적용될 수 있다.

계약상 의무에 적용될 수 있는 법규에 대한 내용은 로마 I 규정 제9조 참조.

다음과 같이 일본의 여러 재판에서 이러한 규정이 적용됨: 노동조합법에 근거한 근로자 보호 조항(1965년 4월 26일 도쿄지방법원 판결), 특허법에 근거한 직원의 발명 보호 조항(2004년 2월 24일 도쿄지방법원 판결), 경쟁법에 근거한 시장질서 보호 조항(2004년 11월 9일 오사카지방법원 판결, 2007년 8월 28일 도쿄지방법원 판결)

II. 일본의 최근 소송 사례

3. 의견

2005년 헤이그 재판관할 합의 협약 제6조 c)항:

체약국의 법원 중 지정 법원 이외의 법원은 배타적 재판관할 합의가 적용되는 소송을 유예 또는 거부하여야 한다. 단, 다음의 경우는 예외로 한다.

...

c) 합의를 이행함으로써 명백한 부당성이 발생하게 되거나 소송이 제기된 법원 소재 국가의 공공 정책에 명백히 반하게 됨.

...

II. 일본의 최근 소송 사례

3. 의견

일본 민사소송법에는 이와 관련된 규정이 없다.

그러나 다음의 1975년 11월 28일 대법원 판결이 지금도 적용 가능하다는 것이 일반적인 견해이다.

재판관할 합의의 이행이 '상당히 비합리적이며 공공 정책에 반하는' 경우에는 해당 합의를 준수할 수 없다.

II. 일본의 최근 소송 사례

3. 의견

특정 사건에서 최우선 법률 규정의 적용이 일본에 매우 중요한 경우, 일본 법원은 일본 법원의 관할권을 배제하는 재판관할 합의를 이행하지 않아야 하며 해당 사건에 대한 관할권을 유지하여야 한다.

따라서 이 사건의 경우 MDSA의 재판관할 합의를 이행하는 것은 '상당히 비합리적이며 공공 정책에 반하는' 것이다.

II. 일본의 최근 소송 사례

3. 의견

참고로, 2012년 9월 5일 독일연방재판소는 웨스트버지니아 법원에 배타적 재판관할권을 부여한 재판관할 합의는 독일의 최우선 법률 규정의 적용을 회피하는 것이므로 준수할 수 없다는 판결을 내린 바 있다.

이 사건에서 독일의 한 기업이 자사와의 판매대리인 계약을 파기한 웨스트버지니아에 본사를 둔 기업을 상대로 독일 법원에 소송을 제기하였다. 이 독일 기업은 재판관할 합의에 따라 준거법으로 지정된 웨스트버지니아 법에서 허용되지 않는 독일의 최우선 법률 규정을 근거로 손해배상을 청구하였다.

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NAGASHIMA OHNO & TSUNEMATSU

2005년 헤이그 재판관할 합의 협약

감사합니다.

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국제재판 관할합의의 유효성---도쿄지방법원 2016년 2월 15일 중간판결에 대해

와세다대학 도가우치 마사토 (道垣内正人)

1. 시작하며

2. 도쿄지방법원 2016년 2월 15일 중간판결

- (1) 사실관계
- (2) 중간판결

3. 검토

- (1) 시작하며
- (2) '일정한 법률관계에 기인한 소송'
- (3) '대단히 불합리하고 공서법(公序法)에 반하는 경우'
 - (a) 민소법 개정에 의해서도 유지된 불문(不文)의 예외
 - (b) 절대적 강행법규
 - (c) 절대적 강행법규의 적용을 회피하는 전속관할합의

4. 마치며

1. 시작하며

국제비즈니스에는 국내비즈니스와는 이질적인 리스크가 있다. 그 중에는 환율변동, 전쟁·사회적 동란, 수출입 규제 등과 같이 어느 정도까지는 당사자가 그 발생을 예상하고 대처할 수 있지만 당사자의 컨트롤 범위를 넘어선 리스크도 적지 않다. 당사자간의 분쟁발생시 이를 해결하려고 해도 상호이해를 위한 공통기반이 없어 화해협상이 원활히 진행되지 않거나, 또 상대방 국가에서 분쟁해결이 진행되는 경우에 적절한 외국변호사를 찾기가 힘들고 절차의 최종결과 전망에 대해서 정확한 예측을 하기도 어려운 경우가 많다. 따라서 분쟁발생을 가능한 한 방지하기 위해 치밀하게 계약조건을 작성하고, 분쟁이 발생한 경우에도 일정기간 화해협상 기간을 정함으로써 분쟁의 악화를 억제하며, 그래도 시시비비를 가려야 할 필요가 있을 때에 대비해 중재라는 선택지를 검토하는 한편, 국가의

법원을 이용할 경우 관할합의를 해 두는 등의 조치를 강구하는 것은 국내 비즈니스 이상으로 중요한 가치를 갖는다.

관할합의는 국제비즈니스 소송에서 가장 빈번하게 발생하는 국제재판관할을 둘러싼 다툼에 미리 매듭을 지어 줌으로써 시간과 코스트 등을 절약하려는 것이다. 그리고 특히 단일 법원을 지정하는 전속관할합의를 해 두면 법정지가 하나로 정해지게 되고, 그 부차적인 효과로서는 적용되는 절차법 및 저촉법 규범을 통해 본안에 적용되는 준거법도 정해지기 때문에 협상의 기반이 명확해지며 화해 가능성이 커지는 잇점도 있을 수 있다.

각국의 국제재판관할에 관한 규범이 제각각이고, 또 그 규범의 해석·적용에 있어서는 불확실성도 적지 않다. 국제재판관할합의(이하 단순히 ‘관할합의’)의 유효성에는 일정한 요건이 부여되어 있고, 다음 재판례에서 문제가 되는 것처럼 그 유효성이 부정되는 경우도 있어 주의를 요한다.

이하에서는 먼저 2 에서 도쿄지법의 최근 재판례를 검토하고, 3 에서 향후의 국제계약 실무상 참고가 될 만한 논점으로서 관할합의에 관해 (1)‘일정한 법률관계에 기인한 소’의 요건과 (2)판례법상의 ‘현저하게 불합리하고 공서법에 반하는 경우’의 해당성 이 두 가지에 대해 검토하겠다.

2. 도쿄지법 2016 년 2 월 15 일 중간 판결¹

(1) 사실관계

원고 X(일본법인)와 피고 Y(캘리포니아주법인)는 Y 의 제품에서 사용하기 위한 부품을 X 가 개발·공급하는 것 등에 관한 기본계약인 Master Development Supply Agreement(이하 ‘본건MDSA’)를 2009년 9월에 체결하고(발효일은 2008년 6월 3일) 계속 거래를 하던 중, 2011년 4월 Y로부터 X에 대하여 새로운 부품(이하 ‘본건 핀’)의 개발·제조 의뢰가 있었다. 따라서 X 는 이에 응하여 개발을 진행해 2012 년 7 월에는 양산체제를 갖추었으나, Y 로부터는 그 익월에 소량 발주만 있었고 같은 해 9 월에 발주가 정지되었으며(이하 ‘본건 거래정지’) 그 후에도 미미한 발주밖에 없었기 때문에 X 는 대량의 재고를 떠안게 되었다. 2013 년 2 월 초순 Y 로부터 X 에 제시된 발주예측에 대해 양자가 논의를 진행하면서 X 는 발주재개를 획득하기 위해 Y 로부터의 대금감액 요구에 응하였다(이하 ‘본건감액요구’).

¹ 2014 년(ㄱ)제 19860 호, 주식회사 시마노제작소 vs Apple Inc, 손해배상청구사건. 본건의 평석으로 엔도 모토카즈(遠藤元一) ‘배타적 관할합의를 무효로 한 애플 · 시마노 소송 중간판결’ NBL1073 호 36 쪽 참조(말미에 중간판결 초록이 게재되어 있음).

같은 해 5 월 22 일 Y 는 X 에 대하여 구형 핀의 가격과 감액 후의 본건 핀 가격의 차액을 Y 가 보유하고 있는 구형 핀 재고수량만큼 보상하는 리베이트를 요구하였고(‘본건 리베이트 요구’) X 는 발주정지를 회피하기 위해 이 요구에도 응하였다.

그러나 이듬해 2014 년 X 는 Y 에 대하여 15 억여 엔 및 7800 만여 달러 그리고 지연손해금 지급을 요구하며 도쿄지법에 제소하였다. 그 주장에 따르면 일본의 독점금지법상 ①본건 거래정지는 계속적 계약관계에 따른 선관주의의무 위반 및 부당한 거래거절에 해당하며 ②본건 감액요구 및 본건 리베이트 요구는 우월적 지위의 남용에 해당한다고 보고 있다.

이에 대해 Y 는 본건 소송은 캘리포니아주 법원을 전속적으로 지정하는 관할합의에 반하는 부적법한 것이라고 주장, 소송 각하를 요구하였다. 이와 관련해, 본건 MDSA 별지 2 의 일반조항 제 12 항에는 다음과 같은 규정이 있다(이하 ‘본건 조항’).

a ‘양 당사자간에 분쟁이 발생할 경우, 양 당사자는 분쟁해결을 위하여 각 당사자의 대표로 지명되는 양 당사자 각 1 명씩의 상급관리직이 먼저 당해 분쟁 해결을 도모하도록 시도하는 것에 합의한다.

b ‘불만을 제기하는 당사자가 상대방에게 서면통지를 한 후 60 일 이내에 양 당사자가 그러한 절차로는 해결하지 못하는 경우, 양 당사자는 캘리포니아주 산타클라라 카운티 또는 샌프란시스코 카운티에서 실시되는 구속력이 없는 조정을 통해 당해 분쟁의 해결을 요청하기로 한다.’

c ‘양 당사자가 조정개시 후 60 일 이내에 분쟁을 해결하지 못하는 경우, 어느 쪽 당사자든 캘리포니아주 산타클라라 카운티의 주 또는 연방 법원(· · ·)에서 소송을 개시할 수 있다. 양 당사자는 당해 법원의 전속적 재판관할권에 취소불능으로 부탁하고, 당해 법원에 제기되는 소송이나 소송절차의 최종판결이 확정적이 된다는 점, 그리고 당해 판결(당해 판결의 등본은 당해 판결의 결정적인 증거가 된다.)에 따른 소송이나 또는 법률에서 규정된 그 밖의 방법으로 당해 판결을 기타 어느 법역에서도 강제집행할 수 있음에 합의한다.’

d ‘각 당사자는 적용되는 법률상 인정되는 가능한 한 최대한의 범위에서 다음 각호를 취소불능으로 포기한다. (i)상기의 법원에 재판을 설정하는 것에 대하여 행하는 이익신청 (ii)이러한 소송이나 소송절차가 불편한 재판지에 제기되어 있다는 취지의 주장(이하 생략)’

e ‘분쟁에 대하여 별도의 서면에 의한 계약이 적용되지 아니하는 한, 분쟁이 본 계약에 기인 혹은 관련하여 발생했는지 여부와 상관없이 본 조의 조건이 적용된다.’(밑줄 필자)

(2) 중간판결

도쿄지법은 본건 소송에 대해 일본법원에 관할이 없다는 피고의 본안 전 주장을 기각했다.

이에 따르면, X가 주장하는 불법행위에 의한 손해의 적어도 일부는 일본에서 발생한 것으로 인정하여 불법행위지 관할(민소법 3조의 3 제 8 호)을 긍정한 후에, 본건 조항 중 전속관할합의의 유효성에 대해 다음과 같이 판시하고 있다.

‘개정 민사소송법 3조의 7 제 2 항은, 국제적 재판관할의 합의는 “일정한 법률관계에 기인한 소에 관하”여 이루어지지 아니하면 그 효력을 발생하지 않는다고 규정하는 바, 동 규정은 합의 당사자의 예측가능성을 담보하고, 당사자에게 불측의 손해를 주는 사태를 방지하는 취지의 규정으로 해석된다.’ 부칙 2 조 2 항에 따라 ‘본건 조항에 관하여 개정민사소송법 3조의 7 의 적용은 없지만, 관할합의 당사자의 예측가능성을 담보할 필요성은 개정민사소송법 시행 전에 이루어진 합의에 대해서도 동등하게 인정되는 것이라 할 수 있다.’

‘본건 조항은 그 대상으로 하는 소송에 대하여 X·Y 간의 소송이라는 점 외에 어떠한 한정도 두지 않고 있어 . . . 동 조항이 대상으로 하는 소송에 대하여 그 기본이 되는 법률관계를 파악하는 것이 곤란하다. 따라서 동 조항이 일정한 법률관계에 기인한 소에 관하여 규정된 것으로 인정할 수 없다.’

‘이 점에 대해 Y는 본건 MDSA 관련소송이 본건 조항의 대상이 되는 소송이라는 것은 명백하며, 본건 소송은 본건 MDSA에 관한 소송이므로 본건 소송에 관하여 본건 조항을 적용하는 것이 X의 예측가능성을 저해하지 않는다고 주장한다.’

‘그러나 앞서 기술한 바와 같이, 본건 조항은 그 내용에서 일정한 법률관계에 기인한 소에 관하여 규정한 것으로 인정할 수 없는 바, 이 점은 구체적인 사안에서 실제로 X의 예측가능성을 저해하는 결과가 발생할지 여부와는 관계가 없으므로 Y의 위의 주장은 해당되지 않는다.’

3. 검토

(1) 시작하며

본 중간판결은, 국제재판관할합의는 ‘일정한 법률관계에 기인한 소’에 관한 것이어야 한다는 요건(민소법 3조의 7 제 2 항 및 그 이전의 조리)을 결여한다며 본건 조항의 효력을 부정하였다. 아래에서는 이 ‘일정한 법률관계에 기인한 소’의 요건(이하 ‘일정성 요건’)과 함께 이 요건을 통과한 경우에 문제가 되는 ‘현저하게 불합리하고 공서법에 반하는’(이하 ‘공서법 요건’)지 여부의 2 가지에 대해 검토하겠다.

(2) '일정한 법률관계에 기인한 소'

국내의 토지관할에 관한 합의에 대해서와 마찬가지로, 국제재판관할합의에 대해서도 '일정한 법률관계에 기인한 소'에 관한 것임이 유효조건의 하나로 여겨지고 있다. 이 일정성 요건은, 본래 제소할 수 있는 법정관할이 있는 법원을 배제하는 것은 당사자의 권리의무 및 그 공권적 판단에 중대한 영향을 미칠 수 있으므로 신중해야 하는 만큼 그 신중함을 담보하는 하나의 방안이라고 할 수 있다. 즉, 본 중간판결에서도 판시하고 있듯이 '합의 당사자의 예측가능성을 담보하고, 당사자에게 불측의 손해를 주는 사태를 방지한다는 취지'이다².

따라서, 기본계약에서 관할합의조항을 두고 있다면 그 기본계약 하의 분쟁으로 특정되기 때문에, 그 아래에서 이루어지는 개별 거래계약에서 관할을 합의할 필요는 없고³, 본 중간판결도 그 점은 문제삼지 않고 있다.

그럼, 본건 조항(e)와 같이 '분쟁이 본 계약에 기인 혹은 관련하여 발생했는지 여부와 상관없이 본 조의 조건이 적용된다.'는 규정은 어떻게 평가되어야 할 것인가. 이에 대해 도쿄지법은 ①본건 조항이 적용되는 조건을 '양 당사자간에 분쟁이 발생할 경우'(동항(a))로 규정하고 있다는 점, 이에 더해 ②본건 조항은 '분쟁이 본 계약에 기인 혹은 관련하여 발생했는지 여부와 상관없이' 적용된다(동항(e))고 규정하고 있다는 점에서 X·Y 간의 소송이라는 것 외에 아무런 한정도 없고, 일정한 법률관계에 기인한 소에 관하여 규정된 것으로 인정할 수 없다고 하였다. 그리고 '이것은 구체적인 사안에서 실제로 X의 예견가능성을 저해하는 결과가 발생할지 여부와는 관계가 없다'라며, 본건 소송 자체는 본건 MDSA에 관한 것이므로 예측가능성을 저해하는 점은 없다는 Y의 주장을 기각한 것이다.

그러나, 우선 본건 조항(a)의 '양 당사자간에 분쟁이 발생할 경우'라는 표현은 그 자체로서는 본건 MDSA 안의 조항인 이상, 본건 MDSA와 무관계한 분쟁에 대해서까지 넓게 규정한 것으로 해석하는 것은 부자연스럽다. 하지만, 동항(e)를 함께 읽어 보면 그 대상으로 하는 분쟁에 한정을 두고 있지 않는 것으로 해석된다. 그럼, (e)와 같은 규정을 두면 그것만으로 구체적인 사안에서의 소송이 일정한 법률관계에 기인한 것인지 여부와 상관없이 관할합의로서는 무효가 되는 것일까.

² 기쿠이 쓰나히로(菊井維大)·무라마쓰 도시오(村松俊夫)(원저)·아키야마 미키오(秋山幹男) 외 『코멘타르 민사소송법I(제2판)』 178쪽(2006).

³ 도가우치 마사토(道垣内正人) 『국제계약실무를 위한 예방법학』 199쪽(2012)

본건 조항은 다단계분쟁처리조항(multi-tiered dispute resolution clause)이라 불리는 것으로⁴, 분쟁의 악화를 억제하기 위해 거래 담당자가 아닌 상급관리직에 의한 최소 60 일 동안의 화해협상을 정하고((a)), 그것으로는 해결에 이르지 못한 경우에 최소 60 일 동안의 조정절차를 정하고 있으며((b)), 그래도 해결에 이르지 못한 경우에 비로소 소송에 관한 전속관할을 규정하고 있다. 따라서, 우선 (a) 및 (b)의 분쟁해결절차를 밟는 것에 대해서는 관할합의에 관한 규제가 미치지 않으므로 이에 관한 한 (e)의 규정은 유효하다. 그리고 또, (e) 가운데 본건 MDSA 에 따른 소송에 관한 부분은 유효하다고 보아도 무방한 것으로 해석된다. 여기에서는 국제관할합의에 국가가 개입하는 취지, 즉 당사자의 예측가능성 담보에 반하지 않고, X 가 불측의 손해를 입는 것도 아니기 때문이다. 사실 (e)는 일정한 법률관계에 기인한 소에 관해서만 관할합의가 유효하다는 규범과의 관계에서는 하자가 있고⁵, 가령 본건이 본건 MDSA 와는 무관계하게 발생한 X · Y 간의 분쟁에 대해서 X 가 일본에서 제소한 경우에 Y 가 상기의 (e)를 방소항변으로 제기하더라도 이는 인정되지 않지만, 본건 소송은 본건 MDSA 와 관련된 것인 이상 일정성 요건을 결여한다고는 할 수 없을 것이다.

또한, 도쿄지법은 ‘구체적인 사안에서 실제로 X 의 예견가능성을 저해하는 결과가 발생할지 여부와는 관계가 없다’고 판시하면서 그렇게 판단하는 이유를 제시하지 않고 있다. 그러나, 가령 일정성 요건이 공익을 지키는 것이라면 모를까 이것이 도쿄지법도 인정하는 것처럼 당사자의 사적 이익 보호에 있는 이상, 구체적인 사안에 있어서 X 의 예견가능성을 저해하는 결과가 발생할지 여부를 문제 삼아야 한다고 본다.

이 점을 형식적으로 설명해 보면 다음과 같다. 즉 상기의 (e)는 협상 · 조정합의를 규정하는 A 부분과 관할합의를 규정하는 B 부분의 2 가지로 나눌 수 있고, 또 B 부분은 본건 MDSA 에 따른 소송에 대한 관할합의부분(B1 부분)과 그 외의 X · Y 간 분쟁에 대한 관할합의부분(B2 부분)의 2 가지로 나눌 수 있다. 최초의 합의에서 일본법에 비추어 볼 때 유효하다고 할 수 없는 것은 B2 부분뿐이고, 본건은 B1 부분에 대하여 방소항변으로 인정할지 여부가 문제이기 때문에 여기에서는 유효한 합의라 해석된다.

이상과 같이 일정한 법률관계에 기인한다는 요건을 결여한다는 판결 요지에는 찬성할 수 없다.

⁴ 도가우치 · 위 글 주(3)225쪽.

⁵ ‘관할합의에 관한 조약’ (헤이그 국제사법(私法)회의에서 2005년 서명, 2015년 발효, 체결국은 멕시코와 EU회원국(덴마크 제외))3조(a)의 전속적 관할합의 정의에서 ‘특정한 법률관계에 관련하여 발생한 또는 발생할 분쟁을 해결하기 위한’ 것이라는 점이 규정되어 있고, 이 요건은 국제표준이라 할 수 있다. 이 규정의 취지에 대해서는 도가우치 마사토 『헤이그 국제재판관할조약』 381쪽(2009) 참조.

(3) ‘대단히 불합리하고 공서법에 반하는 경우’

(a) 민소법 개정에 의해서도 유지된 불문(不文)의 예외

본 중간판결은, 민소법 부칙 2 조 2 항에서 정하는 시제법에 따라 민소법 3 조의 7 은 본건에 적용되지 않으므로 그 이전의 조리에 의거하여 판단한다고 하면서, 최고재판소 1975 년 11 월 28 일 판결(민집(民集, 최고재판소민사판례집) 29 권 10 호 1554 쪽, ‘치사다네호 사건 판결’)을 인용하고 있다. 그렇지만, 결국은 민소법 3 조의 7 적용과 내용상 다른 점이 없기 때문에 아래에서 민소법 3 조의 7 적용을 전제로 검토하겠다.

법제심의회·국제재판관할법제부회 논의에서는, 치사다네호 사건 판결(하기의 ‘최판(最判, 최고재판소 판결)1975 년’과 동일)의 방론에서 ‘관할의 합의가 대단히 불합리하고 공서법을 위반할 때 등의 경우’에는 관할합의를 유효하다고 보지 않는다고 판시하고 있는 바, ‘일본법에 비추어 공서법을 위반하는 것이라면 합의의 유효성이 부정되기 때문에 특단의 규율을 둘 필요는 없다는 등의 생각’이 검토되었다⁶. 그리고, 심의 결과 ‘전속관할을 부여하는 합의에 대하여, 최판 1975 년의 “그 관할 합의가 대단히 불합리하고 공서법을 위반할 때 등의 경우는 별개이나, 원칙적으로 유효하다”라는 기준을 완화된 규율을 마련해야 한다는 의견이 나왔지만, 상기의 최판 1975 년의 기준을 완화된 기준을 구체적인 규율로서 표현하는 것이 어렵다는 점...일본법에 비추어 공서법에 반하는 경우에는 합의의 유효성이 부정되므로 이에 관하여 특단의 규율을 둘 필요는 없다는 의견이 있음을 고려해, 특단의 규율을 두지 않기로 하는 안을 제안하는 것이다.’라고 정리가 되었던 것이다.

따라서 3 조의 7 에는 공서법 요건이 명문화되어 있지는 않지만, 법제심의회로서는 상기의 최고재판소가 제시한 예외적 처리를 배제하려는 의도는 없었다고 할 수 있다. 사실

⁶ 2011년 법률36호에 의한 민소법 등의 개정으로 결실을 맺은 법제심의회·국제재판관할법제부회 제3회 회의(2008년12월19일 개최) 부회자료9의 주2에서는 ‘전속관할을 부여하는 합의에 대해 그것이 대단히 불합리하고 공서법에 반하는 등 사안의 구체적인 사정에 따라 합의의 효력을 부정해야 하는 경우가 있을 수 있는가, 있을 수 있다면 그것은 어떠한 경우인가.’라 하고, 그 참고로서 ‘이 점에 대해서는 (i)지정된 국가와 사안이 관련성을 결여하는 경우, 그 밖에 불합리한 결과가 발생할 경우에 합의의 효력을 부정한다는 생각, (ii)당사자의 편의, 공평의 견지에서 볼 때 합의의 내용이 합리성을 결여하는 경우에 합의의 효력을 부정한다는 생각, (iii)일본법에 비추어 공서법을 위반하는 것이라면 합의의 유효성이 부정되므로 특단의 규율을 마련할 필요는 없다는 등의 생각이 있을 수 있다.’고 기재되어 있다.

⁷ 법제심의회·국제재판관할법제부회 제7회 회의(2009년4월24일)의 부회자료15의 보충설명6. 이에 대해 히구라시 나오코(日暮直子) 관계관은 ‘치사다네호 사건이 제시한 기준은 대단히 불합리하고 공서법을 위반한다라는 표현을 사용하고 있는데, 이를 완화된 기준을 구체적으로 표현한다는 것이 매우 어렵다는 점, 그리고 제3회 부회에서는 특단의 규율을 두지 않더라도 일본의 공서법에 비추어 합의의 효력을 부정하면 되지 않는다는 의견도 나온 상황이기 때문에 이번 자료에서는 특단의 규율을 두지 않는 것을 제안한다.’고 설명하였다(제7회 회의(2009년 4월24일) 회의록16쪽)

예견가능성이 중시되어야 하는 국제거래에서 관할합의의 유효성이 불명확한 일반원칙에 의해 좌우되는 것은 가급적 피해야 하는 것이기에, 불문(不文)의 예외를 근거로 관할합의의 효력을 부정하는 것은 신중해야 한다. 그러나 하기와 같이, 공서법 요건을 활용함으로써 부당한 결과의 발생을 회피할 필요가 있는 경우는 실제로 존재하며, 이 요건은 정의를 실현하기 위한 절차법상의 장치로서 불가결하다고 생각된다.

그럼, 이 공서법 요건은 구체적으로 어떤 경우에 문제가 되는 것일까. 아마도 치사다네호 사건 판결 당시에 쉽게 예상되었던 것은 소비자계약사건이나 개별노동관계사건의 관할합의일 것이다. 유형적인 약자인 소비자·노동자가 본인 입장에서 제소가 어려운 곳으로 관할합의를 하는 것이 우려되고, 그러한 경우에 일반적인 요건을 구비하고 있더라도 여전히 합의의 효력을 부정할 필요가 있다고 생각했던 것으로 보인다⁸. 이 점은 현재 민소법 3조의 7 제 5 항·6 항에 규정이 마련되어 있다⁹.

그 밖에, 지정된 국가의 법원에서의 재판이 법률상 또는 사실상 불가능할 경우(해당 국가에서는 소송이 각하되는 경우나 내란, 전쟁으로 인해 재판기능이 정지된 경우 등)도 치사다네호 사건 판결의 공서법 요건은 커버하고 있던 것으로 생각되는데, 이는 민소법 3조의 7 제 4 항에 명문화되어 있다.

그럼 이외에 공서법 요건을 충족시키지 않는다고 생각되는 것은 어떤 경우일까.¹⁰ 이들 가운데 중요한 것은 국가이익(공익)을 해하는 경우이다. 일반적으로 국제재판관할에 대해

⁸ 공서법 위반을 이유로 소비자계약에서 관할합의 효력을 부정한 것으로는 도쿄고법 2014년11월17일 판결(판시 2243호28쪽)이 있다(사실 그 이유는 적당하지 않은 것으로 보인다. 특히, 운용이 어려웠음에도 불구하고, 금융상품 권유를 계속했다든가 구매자에게 필요한 설명을 충분히 하지 않았다는 것도 이유로서 들고 있는데, 이러한 것들은 본안의 문제이고, 관할합의가 사기·착오 등에 의한 무효라고는 할 수 없는 이상, 공서법 위반의 이유로서는 부적절한 것으로 생각된다). 그 밖에 도쿄고법 2012년6월28일 판결(미등재), 오사카고법 2014년2월20일 판결(판시2225호77쪽) 참조. 한편 노동계약에 관한 분쟁에서 관할합의 효력을 부정한 것으로 도쿄고법 2012년 11월 14일 판결(노판(勞判,노동판례집)1066호5쪽) 참조.

⁹ 민소법 개정 전에 중재합의에 대해서는 중재법(2003년 법률138호)부칙3조·4조에서 소비자·노동자보호규정을 두고 있다.

¹⁰ 본문에서 기술한 경우 외에 다음과 같은 경우를 생각할 수 있다. 즉, 양 당사자에게 있어 제3국의 법원을 지정하는 것은 중립적인 재판을 받을 것이라는 합리적인 기대에 따른 것이고 그 효력을 부정해서는 안 되지만, 이유없이 원격지를 지정해 사실상 재판 받을 기회를 빼앗게 되는 경우에는 공서법 요건을 발동할 수 있다고 생각된다. 또 예를 들어, 전속적으로 지정된 외국법원에서의 재판은 그 판결이 일본에서 승인·집행되지 않기 때문에, 원고가 바라는 해결을 얻을 수 없고 재판의 실질적인 거부가 되는 경우도 공서법 위반이라 해야 할 것이다. 예를 들어, 중국 프랜차이즈 Y와의 계약에 의해 일본에서 사업을 영위하는 프랜차이즈 X가 계약의 부당해제를 이유로 계약상의 지위확인을 요청하는 소송을 일본에서 제기하였는데 Y가 당해 계약에 중국 법원을 전속관할로 하는 합의가 있다는 방소항변을 제출한 경우, 일본과 중국 사이에는 민소법 118조4호의 상호 보증이 없어

생각할 때 당사자간의 공평성, 재판의 적정성·신속성이라는 국내 토지관할 규범의 배후에 있는 것과 동일한 절차적 정의의 관점에서 논의되는 경우가 많다¹¹. 그러나 하나의 재판기구 가운데 어느 1 심법원에서 사건을 접수하느냐¹²하는 국내 관할의 문제와는 달리, 국제재판관할의 유무 결정은 자국의 재판기구가 공권적 판단을 내리느냐, 외국의 재판기구에 맡기느냐의 문제다. 그리고 자국 법원의 국제재판관할을 부정하여 소송을 각하하고 외국 법원에 그 처리를 맡긴다면, 절차법이 다르고 또 국제사법(私法)규범의 차이로 인해 실체문제에 적용되는 준거법도 달라질 수 있을 뿐만 아니라, 자국이 중요하다고 생각하는 법 목적을 달성하지 못하거나, 자국의 주권행사와 관련된 사항에 대해 타국 법원이 자국 법원과 다른 판단을 내리는 등 자국의 국가이익을 해치는 결과가 초래될 우려가 있는 만큼 국가이익 확보를 중요한 고려요소로 추가할 필요가 있다¹³. 민소법 3 조의 5 가 일본의 회사 등 조직에 관한 소송, 일본의 등기 또는 등록에 관한 소송 및 일본의 지적재산권 가운데 설정 등록에 의해 발생하는 것의 존부 또는 효력에 관한 소송의 국제재판관할은 일본 법원에 전속한다고 규정하고 있는 것은 국가이익 확보라는 고려에 따른 것이다. 그리고, 국제재판관할에 대해 검토할 때에는 민사소송법 3 조의 5 와

중국 판결은 일본에서는 효력이 인정되지 않기 때문에(오사카 고법 1999년4월9일 판결(판시1841호111쪽), 도쿄고법 2015년11월25일 판결(미등재)), 일본에서의 소송을 각하하고 중국에 재판을 맡기는 것은 X가 가령 중국에서 승소하더라도 일본에서 요청한 지위확인이라는 공권적 판단은 얻을 수 없음을 의미하며, 일본에서의 프랜차이지 지위에 관한 분쟁에 대해 공권적 판단은 얻을 수 없게 된다. 이러한 경우 공서법 요건이 발동되어 해당 관할합의의 효력을 부정하는 것이 합당하다.

¹¹ 그 점이 가장 잘 나타나 있는 것이 최고재판소1981년10월16일 판결(민집35권7호1224쪽)이다. 최고재판소는 당시에 국제재판관할에 관한 명문 규정이 존재하지 않았기 때문에 '당사자간의 공평성, 재판의 적정성·신속성을 기한다는 이념으로 조리에 따라 결정하는 것이 상당'하다고 판시하였다. 학설에서도 '이러한 이념을 추구하는 점에 있어서는 국내 민사소송법이든 국제민사소송법이든 다르지 않을 것이다'라고 보고 있다(이케하라 스에오(池原季雄)·히라쓰카 마코토(平塚真)'섭외소송에서의 재판관할' 스즈키 츠이치(鈴木忠一)=미카즈키 아키라(三ヶ月章)감수 『실무민사소송강좌6』 13쪽(1971)).

¹² 민사법17조는 1심법원은 소송이 그 관할에 속하는 경우라도 지체를 피하는 것 등을 위해 다른 관할법원으로 이송할 수 있다고 하고, 동법 22조는 이 이송의 재판 구속력을 규정하고 있으므로 국내사건에 관해서는 일본의 재판기구에 제소가 된다고 할 수 있다.

¹³ 법제심의회·국제재판관할법제부회 제1회 회의(2008년10월17일 개최)에서 필자는 '당사자간의 공평성, 재판의 적정성·신속성이라는 것이 최고재판소가 제시하는 기준이고, 이는 그 나름의 민사소송법 관할에 대한 일반적인 생각에 따른 것이므로 정면으로 반대하지 않는다. 따라서 기본적으로는 문제가 없다고 하겠는데... 그러나 국제재판관할을 생각할 때에는 국가의 이익이나 주권의 충돌은 역시 고려해야 하지 않을까 생각한다. ... 최고재판소가 전제로 하는 통상적인 민사사건에 대해서는 제시한 기준으로 문제가 없겠지만, 예를 들어 외국특허권의 유효성이나 외국회사 설립무효확인과 같은 사건이 발생한 경우 최고재판소의 기준으로는 부족하다고 생각된다. ... 국제재판관할로서의 전속관할 논의, 이것은 국내 민사소송 논의에서는 언급되지 않을 것이므로 이 자리에서 논의해야 한다고 생각한다.'(회의록19-20쪽)고 발언하였다.

같은 명문 규정이 없더라도 국가이익은 항상 고려되어야 하고, 이것이 국내토지관할의 경우와 크게 다른 점이라는 인식이 필요하다. 국가이익 확보는 국제거래에서의 관할합의 존중이라는 법적 안정성을 뛰어넘는 가치이며, 외국법원을 지정하는 전속관할합의가 일본의 중요한 정책에 따른 법규를 회피하는 결과를 가져올 경우에는 공서법 요건을 발동하여야 한다. 이와 같은 예외적 처리가 관할합의와의 관계에서 필요하다는 것은 국제적으로도 일반적으로 인정되는 부분이다¹⁴.

(b) 절대적 강행법규

본건 MDSA에는 준거법 조항은 없는 것으로 보이는데, 통칙법 7조부터 9조까지의 규정에 의해 정해지는 계약준거법이 무엇이든, 본건의 X는 Y가 독금법상 금지된 불공정한 거래방법(독금법 2조 9항, 19조)을 사용하고 있다고 주장하며 손해배상청구를 하고 있다. 근래 국제사법(私法)이론에 비추어 보면, X는 일본의 독금법 근거조문을 ‘절대적 강행법규’라 주장하고 있는 것이다. 절대적 강행법규란 그것이 국가이익·사회이익에 자리한 법 정책의 발현이기 때문에 그 적용범위에 들어가는 한, 통상적인 국제사법(私法) 규범에서 정해지는 준거법이 외국법이라 하더라도, 이를 오버라이드 (Override)하여 적용되는 것이다. 그 적용 방식은 공법(公法)과 마찬가지로지만 절대적 강행법규라 불리는 이유는 사인(私人)간에 적용된다는 점에서 사법(私法)에 속하기 때문이다.

역사를 거슬러 올라가면 노동법의 등장에서 시작된 것으로 보이는 ‘사법(私法)의 공법화(公法化)’ 현상은 끊임없이 진행되었고, 나라마다 다른 다양한 사정에 따라 소비자, 채무자, 하청사업자 등의 약자보호, 그 밖의 공익적 관점에서 다양한 공법화한 사법이 탄생하고 있다¹⁵. 이러한 상황에 국제사법(私法)으로서 대응하려는 것이 절대적 강행법규의 논의다. 문제는 어디까지가 국제사법(私法)에 의해 준거법이 결정되어야 하는 영역이고, 어디부터가 공법(公法)이 스스로의 법 목적 달성을 위해 규정한 지역적 적용범위에 들어가는지 그 적용 유무가 정해지는 영역의 판단이다.

A국의 실질법상의 통상적인 강행법규는 A국 법이 준거법이 되지 않으면 적용되지 않는다는 의미에서 ‘상대적 강행법규’라 불리는 반면, 절대적 강행법규는 국제사법(私法)에

¹⁴ 위 글 주(5)의 ‘관할합의에 관한 조약’ 6조 (c)는 ‘그 합의의 효력을 인정하는 것이 명백한 부정의(不正義)를 초래하거나, 또는 수소법원 소속국의 공서(公序)에 명백하게 반하는 결과가 발생할 경우’에는 관할합의의 효력을 부정해도 된다고 규정한다. 이에 대해서는 도가우치·위 글 주(5)399쪽 참조.

¹⁵ 예를 들어, 한도액의 정함이 없는 근보증계약을 무효로 하는 민법 465조의2제2항이나 일정한 이율을 넘는 이자분의 계약을 무효로 하는 이자제한법 1조 등도 그 적용범위(예를 들어 채무자가 국내에 거주하는 경우)에 들어가는 사안이라면, 그리고 당사자간 계약의 준거법이 외국법이라 하더라도 반드시 적용해야 한다고 여겨지는 것이라면 절대적 강행법규가 된다.

의한 준거법 결정규범의 테두리 밖에서 그 적용범위가 정해진다는 점에서 법 적용에 있어서는 사실상 공법(公法)이라 해도 무방할 것이다. 절대적 강행법규라는 카테고리를 인식하는 발상은 사법(私法)과 공법(公法)의 경계선상에서 사법(私法)의 색채를 남기면서도, 강한 공공목적을 가지는 법 적용을 국제사법(私法)과의 관계에서 적절하게 자리매김하도록 하는 것이라 할 수 있다.

절대적 강행법규는 EU에서는 규칙에서 명문으로 규정되어 overriding mandatory rules라는 명칭이 부여되어 있고¹⁶ 몇몇 실정법에 채택되어 있다¹⁷. 또 일본에서도 통칙법 제정에 이르는 법제심의회·국제사법(私法)(현대화 관계) 부회 논의에서 통칙법이 그 정식명칭대로 ‘법의 적용에 관하여’ 통칙을 정한 것이 아니고, 공법의 지역적 적용에 관해서는 규정하고 있지 않음을 명확히 하기 위해 ‘우리나라의 공공 질서, 정치적, 사회적, 경제적 질서와 관련된 중요한 강행법규로서 준거법이 외국법이라 하더라도 적용되어야 하는 것은 ○조부터 ○조까지의 규정에도 불구하고, 적용되거나 혹은 그러한 법률은 그 적용을 방해할 수 없다라는 규정’과 같은 규정을 두어야 한다는 논의가 있었다. 최종적으로는 그러한 규정을 명문으로 두지는 않았지만, 이것이 절대적 강행법규의 존재를 결코 부정하는 것이 아니라는 사실은 법제심의회 논의에서도 확인된다.

일본의 재판례에서도 절대적 강행법규라는 개념은 채택되고 있다. 그 최초의 것은 도쿄지법 1965년 4월 26일 결정(노민집(勞民集, 노동관련민사재판례집) 16권 2호 308쪽, 판시(判時, 판례시보) 408호 14쪽)이다. 이것은 일본 항공회사에서 근무하던 미국인 파일럿과 미국 파견회사 사이의 고용계약 준거법이 캘리포니아주 법이었던 사안이다. 도쿄지법은, 미국 파견회사와 캘리포니아주 법을 준거법으로 하는 고용계약을 맺고 일본 항공회사에서 근무하던 미국인 해고를 둘러싼 다툼에 대하여 ‘노동계약에 따른 현실의 노무 급부가 본건과 같이 계속해서 일본 국내에서 행해지게 될 경우에는...준거법 선정자유의 원칙은 속지적으로 한정된 효력을 갖는 공서(公序)로서의 노동법에 의해 제약을 받는

¹⁶ 2008년의 계약상 채무의 준거법에 관한 유럽규칙(‘로마 I 규칙’(Regulation (EC) No593/2008)(2009년 시행) 9조는 “Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organization, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.”고 규정하고 있다.

¹⁷ 1986년의 헤이그물품매매 준거법조약 17조, 1987년의 스위스 국제사법(私法)18조·19조, 2015년의 국제상사계약의 준거법 선택에 관한 헤이그 원칙11조(NBL1072호34쪽)등 참조.

것으로 해석하는 것이 상당하다'고 하며, 계약준거법을 오버라이드 (Override)하여 일본의 노동조합법 규정을 적용했다¹⁸.

또 도쿄지법 2004년 2월 24일 판결 (판시 1853호 38쪽)은 종업원 발명에 관해 사후에 종업원이 회사에 대하여 상당한 대가를 청구할 수 있음을 규정한 특허법 35조가 외국특허를 받을 권리의 양도대가에도 적용되는지가 다투어진 사안에서 이는 고용계약의 문제라며, 고용계약에 대해서 '어떠한 준거법을 선택한 경우라도 절대적 강행법규의 성질을 갖는 노동법규는 적용되어야 한다'고 판시하였다.

나아가 본건과의 관계에서 가장 주목되는 것은 도쿄지법 2007년 8월 28일 결정(판타(判タ, 판례타임즈)1272호 282쪽)이다. 이것은 방론이기는 하나 계약의 준거법으로서 한국법을 합의하고 있는 사안에서 독점금지법 24조는 '준거법의 합의에도 불구하고 적용된다', 즉 절대적 강행법규라고 판시하고 있다¹⁹.

(c) 절대적 강행법규 적용을 회피하는 전속관할합의

그럼 일본의 절대적 강행법규의 적용범위에 들어가는 사안임에도 불구하고, 외국법원을 전속관할로 하는 관할합의가 당사자간에 존재하는 경우에 이를 방소항변으로 인정하고 일본에서의 소송을 각하해도 되는 것일까.

영국의 대법원 판례에는, 국제해상물품운송법 15조에 일정한 규정에 반하는 특약으로 하송인(荷送人), 하수인(荷受人) 또는 선하증권 소지인에게 불이익한 것은 무효로 한다고 규정된 바, 운송인(運送人)이 전속적 관할합의와 준거법 지정을 이용해 운송인의 책임이 경감되는 법의 적용을 확보하려고 한 사안에서 당해 관할합의의 효력을 부정한 사례가 있다²⁰. 일본에서도 치사다네호 사건 판결에서 원판결의 요지를 정리하는 부분에 '이른바 선하증권 통일조약 및 이에 의거한 국내법인 국제해상물품운송법의 정신에 비추어 보면, 선하증권상의 재판관할 약관은 그것이 운송인의 면책약관 남용방지를 위해 본래 적용되어야 하는 소위 공서법 적용을 회피하는 것을 목적으로 하거나, 또는 기업인으로서의 경제적 우위를 부당하게 이용하여 합리적 범위를 넘어 운송인에게 이익을 주는 등의 경우에는 무효로 하여야 하지만, 본건의 사실관계 하에서는 여전히 본건 관할약관이

¹⁸ 현재는 통칙법12조에 의해 동일한 결론에 이를 수 있다.

¹⁹ 본건 평석으로 나카노 슌이치로(中野俊一郎)·JCA저널 55권 8호 2쪽(2008) 참조.

²⁰ 이것은 스코틀랜드를 선적항으로 하는 국제운송계약에 관하여 선하증권상의 약관에 의해 네덜란드법을 준거법으로, 암스테르담 법원을 전속관할로 하는 합의를 한 사례에서, 이는 영국이 비준하고 있는 선하증권조약(헤이그 비스비 규칙(Hague-Visby Rules) 3조8항 (일본의 국제해상물품운송법 15조에 상당)의 적용을 회피하는 것이라며 영국 법원에서 영국법에 따라 재판한 경우이다 (The Hollandia, [1983]1 A.C.565) .

공서법을 위반한다고 인정하기에 부족하다'고 판시되어 있어 경우에 따라서는 영국과 동일하게 취급할 수 있는 가능성을 보여주고 있다²¹.

또 중재합의가 있을 경우에 대해서인데, 앞서 기재한 도쿄지법 2007년 8월 28일 결정은 서울시를 중재지로 하는 중재합의가 있는 사안에서, 그 중재합의에 대해 아무런 언급없이 독금법 24조에 의거한 금지청구에 관하여 동법 84조의 2 제1항에 따라 도쿄지법에 관할이 있다고 판시하였다.

이상으로부터 일반적으로 일본의 절대적 강행법규의 적용범위에 들어감에도 불구하고, 외국법원을 전속적으로 지정하는 관할합의가 있는 경우 그 관할합의의 효력을 부정하고 일본 법원에서(그 관할원인은 별도로 필요하다) 절대적 강행법규를 적용해야 한다²². 즉, 일본의 국가이익(공익)을 체현하는 법규를 회피하는 결과를 낳는 관할합의는 공서법을 위반하는 행위라고 해야 한다²³.

또한 어떠한 사안이든 당사자가 독금법 등의 절대적 강행법규의 적용을 주장하면 외국법원을 지정하는 전속관할합의를 방소항변으로 사용할 수 없게 되는가 하면 이는 지나친 것이다. 절대적 강행법규에 따른 청구가 인정되지 않음이 명백하다고 할 수 없고, 본안심리를 필요로 할 정도라는 일응(一應)의 심증을 법원이 얻은 경우에 한해 방소항변을 인정하지 않는다고 다루어야 할 것이다²⁴. 따라서 절대적 강행법규의 적용을 확보할 필요가 있다는 이유로 일본에서의 재판을 인정하였어도, 본안 판단에서는 당해 절대적 강행법규의 적용요건을 구비하고 있지 않다고 보는 경우도 있을 수 있다.

(d) 「불공정한 거래방법」

²¹ 도쿄지법 1999년9월13일 중간판결(해사법연구회지 154호 89쪽)은 선하증권상의 관할합의를 무효라 하였는데, 그 이유는 지정된 곳이 피고의 본점 소재지가 아니고 사안과의 관련성이 적기 때문이었다.

²² 도가우치·위 글 주(3)208-209쪽

²³ 사실 지정된 외국법원에서 일본의 절대적 강행법규가 적용되고 일본에서와 동일한 결론이 제시된다면 문제가 없을 수도 있지만, 유럽연합 회원국처럼 그들 사이의 법질서 안정이 우선시되는 밀접한 관계가 있는 경우라면 모를까 일반적으로는 어떤 국가도 외국의 절대적 강행법규 적용에는 소극적이므로 본건에서 일본의 절대적 강행법규가 캘리포니아주 법원에서 적용되는 것은 기대할 수 없을 것이다.

²⁴ 이것은 불법행위관할(민소법3조의3제8호)처럼 본안의 심리대상이 되는 법률개념이 관할규범에 사용된 경우에, 관할의 판단으로서 어디까지 깊이 개입해서 판단할 것인가 하는 문제와 유사하다. 최고재판소2001년6월8일판결(민집55권4호727쪽)은 불법행위관할을 인정하기 위한 '불법행위'의 인정에는 행위, 결과 및 그간의 사실적 인과관계만으로 충분하며, 고의·과실이나 위법성조각사유와 같은 것은 본안에서 심리하면 된다는 객관적 요건 구비 필요설을 채택했지만, '실체심리를 필요로 할 정도'로 불법행위라 할 수 있으면 된다는 일응(一應)의 증거조사설도 여전히 존재하고 있다(도가우치·위 글 주(3)174쪽). 본문의 기술은 후자의 설에 가까운 것이다.

본건에서 X가 적용을 주장하는 독점법상의 규범 중에 우월적 지위의 남용금지규범에 대해 2010년 11월 30일자 공정거래위원회의 ‘우월적 지위 남용에 관한 독점금지법상의 고찰’에 따르면, ‘당해 거래 상대방의 자유롭고 자주적인 판단에 의한 거래를 저해하고 . . . 공정한 경쟁을 저해할 우려가 있다’는 점을 이유로 보고 있다. 그리고 학설상 그 목적은 ‘자유경쟁기반의 확보’에 있다고 하겠다. 즉, 거래주체의 자유롭고 주체적인 판단에 따라 거래가 이루어지는 것이 자유경쟁의 기반이고, 그 침해는 공정한 경쟁을 저해하는 효과를 가져올 수 있기 때문이다²⁵. 자유경쟁은 민주주의 등과 함께 일본의 틀을 떠받치는 기반의 하나이고, 이를 지키기 위한 규범은 국가이익(공익)과 깊이 연결되어 있음은 자명하다. 이와 같은 가치의 실현을 체현하는 규범을 거래 당사자가 국제사법(私法)규범에 따라서 외국법을 계약의 준거법으로 하는 약속을 했다고 해서 간단히 피해갈 수 있어서는 안 된다. 우월적 지위의 남용금지 규범은 국제사법(私法)에 의해 적용 유무가 좌우되는 사법(私法)이 아니라, 그 목적달성에 필요하다면 준거 외국법을 오버라이드(Override)하여 적용되어야 하는 공법(公法), 또는 절대적 강행법규의 성질을 갖는 것이다.

그럼 우월적 지위 남용금지규범의 지역적 적용범위는 어떠한가. 이 점은 적어도 일본 시장에서의 자유경쟁기반 확보에 필요하다면 즉, 적어도²⁶ 자유롭고 자주적인 판단을 저해받는 자(본건에서는 X)가 일본에 소재하는 한, 일본시장의 자유롭고 공정한 경쟁에 영향을 미칠 것으로 생각되므로 행위자(본건에서는 Y)의 소재지를 불문하고 적용되어야 한다.

이상과 같이, 가령 본건의 Y가 국내사업자일 경우에 X의 독점법에 따른 청구가 인정된다면, 본건에 있어서도 같은 결론을 확보하기 위해, 전속관할합의를 본건에서 인정하는 것은 공서법 위반이 됨을 이유로 방소항변을 인정하지 않고, 어떠한 관할원인이 일본에 있는 한(이 점에 대한 본 중간판결 판단에는 찬성한다) 본안의 판단으로서, 그리고 절대적 강행법규로서 독점법상의 몇몇 규정을 적용하여 재판해야 한다고 본다.

4. 마치며

이상 도쿄지법 2016년 2월 15일 중간판결에 대한 2가지 논점을 검토하였다.

첫째, 기본계약 중에 화해협상에서 관할합의로 일정 기간을 두고 이행하는 다단계 분쟁처리조항이 있고, ‘분쟁이 본 계약에 기인 혹은 관련하여 발생했는지 여부에 상관없이’

²⁵ 네기시 아키라(根岸哲)=후나다 마사유키(舟田正之) 『독점금지법개설(제4판)』 291쪽(2010).

²⁶ 외국시장에서의 일본 사업자의 행위를 이 우월적 지위 남용금지규범이 적용대상으로 하는지 여부에 대해서는 여기에서 언급하지 않겠다.

적용된다고 규정되어 있는 경우, 민소법 3 조의 7 제 2 항이 요구하는 ‘일정한 법률관계에 기인한 소에 관’한 관할합의여야 한다는 요건에 비추어 효력이 부정되는 것은 구체적으로 제소 대상이 당해 기본계약에 관계가 없는 경우이고, 본건과 같이 구체적 분쟁이 당해 기본계약에 기인한 소송이라면 유효하다.

둘째, 외국법원을 지정하는 전속관할합의가 존재하는 경우라도 일본에서 제기된 소송이 일본의 절대적 강행법규에 의거한 것으로, 그 청구가 인정되지 않음이 명백하다고는 할 수 없고, 본안 심리를 필요로 하는 정도 이상이라는 일응(一應)의 심증을 법원이 얻은 경우에는 당해 관할합의는 공서법 위반이 되며 방소항변을 인정하지 않는다고 취급해야 한다.

따라서 국제계약 실무상 첫째에 대해서는 일부에 효력이 인정되지 않는 내용을 포함하는 계약조항이 문제이며 관할합의에 관해 일정한 법률관계에 기인한 소에 대해서만 적용되도록 주의해서 작성해야 한다. 또, 둘째에 대해서는 각국의 법 정책이 상이하여 각각 절대적 강행법규가 존재하는 것이므로, 그 적용범위에 들어가게 되면 이에 따른 소송이 제기되고, 관할합의에 따른 방소항변이 기각되며, 본안 소송에서 절대적 강행법규가 적용될 리스크가 있는 만큼 코스트와 리스크의 크기에 따라 다르기는 하겠지만, 가능한 한 문제가 될 수 있는 국가의 절대적 강행법규를 사전에 조사하여 이에 저촉되지 않도록 계약내용을 작성하고, 또 거래에 있어서도 이와 같은 리스크에 대해 주의를 환기해야 한다.



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SESSION 4.

Discussion

Yoon Jong Kim

Judge of Judicial Research Division in Supreme Court (Korea)

I. Introduction

I'm sincerely grateful for giving me a high privilege to participate in this memorable and exceptional conference. Personally, as a former secondee at the Permanent Bureau of HccH, it is deeply delightful to witness the unforgettable moment with mutual development on the relationship between HccH and Korean judiciary for 20years.

First of all I would like to express my gratitude to the Judicial Research & Training Institute for organizing the Conference and to Professor Masato Dogauchi for the fascinating presentation, which allows us to have a comprehensive understanding on the essential and progressive Convention for the development of the International private law.

Professor Masato Dogauchi is a co-author of the Explanatory Report on the Hague 2005 Choice of Court Agreement Convention('The Choice of Court Convention') and it was one of the most fundamental materials to study and interpret the Convention during my secondment period.

I would like to request a couple of questions for more in-depth understanding. If there is misunderstanding or misconception, Please accept my apology for lack of comprehension.

II. The Scope of the Choice of Court Convention

The first paragraph of Article 1 makes clear that the scope of the Convention is limited in three ways. It applies only in international cases on civil and commercial matters, which have exclusive choice of court agreements in principle.

However, the scope of the Convention, in particular, 'exclusions from the scope' might probably bring about a wide range of issues and debates.

Among them, my first question goes to the issue related to IPR.

Article 2 Exclusions from Scope

(2) This Convention shall not apply to the following matters-

o) infringement of intellectual property rights other than copyright and related rights, except where infringement proceedings are brought for breach of a contract between the parties relating to such rights, or could have been brought for breach of that contract

According to the above provision, the case where the breach of a contract between the parties related to IPR leads to a dispute, including infringement proceedings, can be applied under the Convention.

With regard to breach of a contract related IPR, the Supreme Court of Korea issued a noticeable ruling upholding the High Court decision in 2011.¹

The Seoul High Court held that the validity and interpretation of the patent transfer contract does not fall under the exclusive jurisdiction and the choice of court clauses between parties should be respected.²

¹ The Supreme Court 2009DA19093

² The Seoul high Court of Appeal 2007NA96470: The High Court regards the Choice of Court Convention as a considerable international standard on the validity of choice of court clauses, even though Korea have not signed yet the Convention.

In the phase of recognition and enforcement of the above-mentioned Korean judgment in the countries in which registrations of these patent rights have been applied for, the Courts addressed hold divergent decisions respectively.
It appears feasible and justifiable results, since the validity of the patent transfer contract might be interpreted with inconsistency under the different domestic regimes.

I would like to ask your opinion on the validity of the choice of court clauses in a patent transfer contract as regards the interpretation of Article 2(2)o) of the Convention.

III. Damages: Additional exception of Recognition and Enforcement

The value of a Choice of Court Agreement will be greater if the resulting judgment is recognized and enforced in as many other States as possible.

The Convention seeking to accomplishment this objective contains provision which state that a judgment given by a court in a Contracting State designated in an exclusive choice of court agreement must be recognized and enforce in other Contracting States.
This is not only one of the “key provisions” in the Convention, but might be a significant exemplar for drafting future international norm for recognition and enforcement on foreign judgment.

In this sense, I firmly believe that these essential provisions should more closely and thoroughly be analyzed and reviewed.

Among a broad spectrum of critical issues, what intrigued my interest is the provision concerning with Damage.

Article 11 Damage

- (1) Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered.
- (2) The court addressed shall take into account whether and to what extent the damages awarded by the court of origin serve to cover costs and expenses relating to the proceedings.

The provision permits the court addressed to refuse recognition or enforcement of judgment which awards exemplary or punitive damages.³

Undoubtedly, this provision should be interpreted and applied in as restrictive a way as possible and is not intend the court addressed is allowed to examine whether it could have awarded the same amount of damages or not.

The article only operates when it is obvious from the judgment that the award appears to go beyond the actual loss or harm suffered.

In addition, recognition and enforcement may only be refused to the extent that

³ According to the Explanatory report, ‘exemplary damages’ and ‘punitive damages’ are similar meaning, which refer to damages that are intended to punish the defendant and to deter him and others from doing something similar in the future.

the judgment goes beyond the actual loss or harm suffered in order to avoid the possibility of ‘all or nothing approach’.

However, if recognition and enforcement of the judgment awarding punitive damage shall be limitedly refused, but the court addressed is not allowed to examine what is actual damage, it is not clear how and to what extent the court determines specific scope of the recognition and enforcement of the judgment.

I would like to ask your comment on this practical problem.

IV. Japanese Case – overriding mandatory rule

The interlocutory judgment in Japan you introduced is a quiet thought-provoking case and I’m of the same opinion as below.

If my understanding is correct, the plaintiff claimed that the conduct of defendant was abused of dominant bargaining position under the Act on Prohibition of Private Monopolization and Securing of Fair Trade of Japan.

The Tokyo district Court dismissed the defendant’s assertion of exclusive choice of court agreement on the ground that the clause of MDSA, did not fulfill the requirement of ‘connection with a particular legal relationship’.

However, considering that the dispute in this case had apparently arisen in connection with the MDSA, it might be more reasonable and acceptable that the court interprets clause in question, which refers to ‘multi-tiered dispute resolution clause’, as valid and applicable.

Given that the predictability is one of the most essential elements in the international choice of court agreement, the reasoning process of the Court did not appear sufficient grounds.

In terms of ‘predictability’, public policy is also intended to set a high threshold. The provision does not permit a court to disregard a choice of court agreement simply because it would not be binding under domestic law.

However, the second issue you brought in might be a good example for a ‘manifest injustice’ or ‘manifestly contrary to the public policy of the State of the court seized’ under the Art 6 c).

Article 6 *Obligations of a court not chosen*

A court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies unless –
c) giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seized;

The Monopoly Regulation and fair Trade Act in Korea, such as the Japanese Act in question, is generally regarded as overriding mandatory rule.

Therefore, I support the conclusion that if the plaintiff alleged breach of the Japanese Act and the assertion sound reasonable and logical, the Court seized the

case should not dismiss proceedings.

My last question is about findings of a court in the phrase of interlocutory judgment.

What if the court come to the conclusion that the dispute in question is irrelevant to mandatory rules or the party did not breach the domestic law considered overriding mandatory rules? In that case, I wonder whether the court seized the case shall suspend or dismiss proceedings.

V. Closing Remarks

As for the Choice of Court Convention, it is stunning and inspiring that a significant number of Member States are considering joining and EU and U.S. already signed or ratified.

I hope there is an opportunity to actively discuss and consider joining the Convention in our country as well.

Thank you for your attention.



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SESSION 4.

Discussion

Gyoocho Lee

Tenured Professor at Chung-Ang University (Korea)

Discussion

Prof. Gyoocho Lee (Chung-Ang University School of Law)

- I. According to Article 2, para. 1 (a) of 2005 Hague Choice of Court Agreements Convention, the Convention is not applicable to exclusive choice of court agreements to which a consumer is a party.

In this regard, I would like to ask you whether a user of the google service falls within the concept of ‘consumer’ under this Convention. Actually, the google service includes standard contract terms which contain exclusive choice of court agreement and choice of law agreement.

FYI, the Seoul Central District Court (Judgment rendered by Seoul Central District Court on October 16, 2015 (Case No. 2014 Gahap 38116)) held that exclusive choice of court agreement between Google and the Koreans who used its service for other than occupational or business activities is null and void because, in this case, Article 27 (6) of the Korean Private International Act would be applied. Also, this court went on to hold that the exclusive choice of court agreement between Google and the Koreans who used its service for occupational or business activities is valid and those users could not bring a lawsuit before a Korean court.

2005 Hague Choice of Court Agreements Convention

Article 2 – Exclusions from scope

- 1 This Convention shall not apply to exclusive choice of court agreements –
 - a) to which a natural person acting primarily for personal, family or household purposes (a consumer) is a party;
 - b) relating to contracts of employment, including collective agreements.

Korean Private International Act

Article 27 (Consumer Contract)

- (1) In case a contract, which a consumer concludes for a purpose besides his/her occupational or business activities, falls under any of the following subparagraphs, the protection given by the mandatory provisions of the country, where the habitual residence of the consumer is located, shall not be deprived even if the parties choose the applicable law:

1. In case, prior to the conclusion of the contract, the opposite party of the consumer conducted solicitation of transactions and other occupational or business activities by an

advertisement in that country or conducted solicitation of transactions and other occupational or business activities by an advertisement into that country from the areas outside that country and the consumer took all the steps necessary for the conclusion of the contract in that country;

2. In case the opposite party of the consumer received an order of the consumer in that country;

3. In case the opposite party of the consumer induced the consumer to go to a foreign country and give his/her order in the foreign country.

(2) In case the parties do not choose the applicable law, the contract under the provision of paragraph (1) shall be governed by the law of the habitual residence of the consumer irrespective of the provision of Article 26.

(3) The method of a contract under the provision of paragraph (1) shall be governed by the law of the habitual residence of the consumer irrespective of the provisions of Article 17 (1) through (3).

(4) In case of the contract under the provision of paragraph (1), the consumer may file a lawsuit against the opposite party of the consumer even in the country where the habitual residence of the consumer is located.

(5) In case of the contract under the provision of paragraph (1), a lawsuit entered by the opposite party of the consumer against the consumer may be filed only in the country where the habitual residence of the consumer is located.

(6) The parties of the contract under the provision of paragraph (1) may agree on the international jurisdiction in writing: Provided, That such agreement shall be effective only in any of the following subparagraphs:

1. In case a dispute already occurred;

2. In case filing a lawsuit with other courts in addition to the competent court under this Article is permitted to the consumer.

II. The ruling rendered by Tokyo District Court on 28 August 2007 ruled that a lawsuit for injunction based on Article 24 of Japanese Anti-monopoly Act is within jurisdiction of Tokyo District Court pursuant to Article 84-2, para. 1 of the

Act even though there is an arbitration agreement between parties which agreed that arbitrate their dispute in Seoul.

It will be fruitful for you to share its specific facts with us.

According to Article 6, para. 2 (h) of 2005 Hague Choice of Court Agreements Convention, this Convention is not applicable to anti-trust matters. In this regard, it seems to me that the Convention will not affect the holding of the Japanese case.

III. I would like to ask you whether the laws which protect privacy or personal information constitute overriding mandatory rules.

Cf. Article 30(2) and (4) of the ACT ON PROMOTION OF INFORMATION AND COMMUNICATIONS NETWORK UTILIZATION AND INFORMATION PROTECTION, ETC. are mandatory rules prescribed under Article 27(1) of the Korean Private International Act (Judgment rendered by Seoul High Court on 16 February, 2017 (Case No. 2015 Na 2065729))
IV.

Article 30 (Rights of Users)

- (1) Every user may, at any time, revoke his/her consent given to a provider of information and communications services or similar to allow the provider to collect, use, or furnish his/her personal information.
- (2) Every user may request a provider of information and communications services or similar to allow him/her to peruse, or to furnish with any of the following subparagraphs, and may also require the provider to correct an error, if there is any error:
 1. Personal information of the user, which the provider of information and communications services or similar possesses;
 2. Details of which the provider of information and communications services or similar has used personal information of the user or furnished it to a third party;
 3. Details of which the user has given a consent to he provider of information and communications services or similar to collect, use, or furnish his/her personal information.
- (3) If a user withdraws his/her consent pursuant to paragraph (1), a provider of information and communications services, etc. shall immediately take necessary measures, such as the destruction of collected personal information in an irrecoverable or in

unreproducible way. <Amended by Act No. 12681, May 28, 2014>

- (4) A provider of information and communications services or similar shall, in receipt of a request to peruse or furnish matters in accordance with paragraph (2), take necessary measures without delay.
- (5) A provider of information and communications services or similar shall, in receipt of a request for correction of an error in accordance with paragraph (2), correct the error, notify the user of the reasons why it is unable to correct the error, if it is the case, or take any other necessary measures, and may not use the relevant personal information or furnish it to a third party until he/she completes taking such measures: Provided, That he/she may furnish the personal information to a third party or use the information, if requested to furnish the personal information pursuant to any other Act.
- (6) A provider of information and communications services or similar shall make how to revoke consent under paragraph (1), how to request to peruse personal information or furnish such information under paragraph (2), and how to request correction of an error, easier than how to collect personal information.
- (7) Paragraphs (1) through (6) shall apply mutatis mutandis to a transferee of business or similar. In such cases, "provider of information and communications services or similar" shall be deemed "transferee of business or similar."



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SESSION 4.

Discussion

Yongping XIAO

Director of Wuhan University (China)

An Analysis of China's Ratification of the Convention on Choice of Court Agreements and my Suggestions



XIAO Yongping
Director of International Law Institute
at Wuhan University



武汉大学国际法研究所
<http://www.translaws.com>

I. The Positive Sides

- To facilitate the enforcement of Chinese judgments abroad
- To improve the Chinese law on choice of court agreements;
- To improve the Chinese law on the recognition and enforcement of foreign judgments;
- To improve indirectly the Chinese arbitration law by offering parties the choice of litigation.
- To promote the “One Belt One Road” Initiative (OBOR) and the New Concept of “Creating a Community of Shared Future for Mankind”





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II. The Potential Negative Impacts

- The Inherent Defect of the Convention
- The Potential Impact of Substantive Fairness for Chinese Parties
- The Potential Impact on China's State Interests



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III. The Avoidance of Negative Impacts

- The Changing Position of Chinese Parties in Transactions
- Curing the Inherent Defect of the Convention
- The Changed Competitiveness of Chinese Courts
- The Positive Competition between Litigation and Arbitration





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IV. Specific Suggestions and Responses

IV. 1 (1) Declaration on IPR

The Convention does not apply to intellectual property rights disputes, including the allocation, contract, tort, unfair competition, antitrust under Article 21, unless otherwise provided in this declaration.

As exceptions the Convention applies to the following intellectual property rights disputes:

- a. use and transfer contracts of copyrights and neighbouring rights, excluding software, folk literature and art, database, and allocation of copyrights and neighbouring rights.*
- b. use and transfer contracts of patents, excluding layout-designs of integrated circuits, new varieties of plants, and genetic resources.*
- c. use and transfer contracts of trademarks, excluding those of geographical identifications.*

The nature of a dispute is determined by the law on which the claimant relies for claims and the law on which court decisions are based.

China reserves the right to review this declaration under the Convention and to make decision in three years since this declaration is made whether to maintain or modify this declaration.



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IV.1 (2) The Declaration on Exclusive Jurisdiction

The court where the real estate is located has exclusive jurisdiction over real estate disputes.

The court where the legal person is located has exclusive jurisdiction over the validity, invalidity, dissolution, of the legal person, and of the decision of its organ.

The court where rights are registered has exclusive jurisdiction over the validity or tort of patents, trademarks, design model, other similar rights which required mandatory registration.





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IV. 1(3) The Declaration on the Real Connection

Agreements choosing a court with no connection with the parties or dispute are invalid.

The connection includes the place of the domicile of defendant, place of performance of contract, place of conclusion of contract, place of domicile of claimant, place of subject matter, as well as the principal place of business, place of representative, place of registration, place of shipping and transfer.



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IV. 2 Some Modifications of Domestic Law

- Determine the international case
- Change standard of reciprocity
- Express the law applicable to the validity of choice of court agreements
- special arrangements should be made with regard to Hong Kong and Macau





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Thank you for your attention and comments!



An Analysis of China's Ratification of the Convention on Choice of Court Agreements and my Suggestions

Yongping Xiao^{*}

The Convention on Choice of Court Agreements (Convention) came into force on 1 October 2015. Since then there have been heated discussions on whether and when China would ratify the Convention. I want to introduce the various opinions of Chinese scholars and my suggestions on China's position and response regarding the Convention.

I. The Positive Sides

Generally, Chinese scholars believe that the Convention harmonises the law on the express choice of court agreements, and recognition and enforcement of judgments resulting therefrom, shows respect for party autonomy, ensures the proper court over a dispute, enhance judicial certainty, and promote cross-border movement of judgments. If China ratify the Convention, the positive effects may be listed:

1. To facilitate the enforcement of Chinese judgments abroad;
2. To improve the Chinese law on choice of court agreements;
3. To improve the Chinese law on the recognition and enforcement of foreign judgments;
4. To improve indirectly the Chinese arbitration law by offering parties the choice of litigation.
5. To promote the "One Belt One Road" Initiative (OBOR) and the New Concept of "Creating a Community of Shared Future for Mankind", because the ratification of the Convention may avoid concluding bilateral treaties with the OBOR countries

II. The Potential Negative Impacts

However, some Chinese scholars have identified three negative sides of the Convention.

1. The Inherent Defect of the Convention

The three key provisions (articles 5, 6, 8) of the Convention highlight the party autonomy and aims at the recognition and

^{*} Changjiang distinguished professor, Director of International Law Institute at Wuhan University.

enforcement of foreign judgments. The obligation on the chosen court to exercise jurisdiction goes beyond established doctrines on consensual jurisdiction that the chosen court is competent because of the parties' choice, but not obliged to exercise jurisdiction.

2. The Potential Impact of Substantive Fairness for Chinese Parties

The choice of court agreement is justified by the assumption of the intentions of equal parties, which may not work where parties are unequal, despite the Convention's exclusion of numerous matters. So Chinese parties in a weaker position than foreign counterparties may suffer from China's adoption of the Convention.

3. The Potential Impact on China's State Interests

Although the recognition and enforcement of foreign judgments mainly involve private interests, state interests and public interests are inevitably involved. For courts of most developing countries, the Convention provisions implicate heavier obligations to recognize and enforce foreign judgments and the possible transfer of domestic assets to foreign (mainly developed countries), and damage to their judicial competence and judicial sovereignty, because of the Convention provisions on the respect for the party choice and the jurisdiction of the chosen court. Courts of most developing countries with less developed legal systems, less trial expertise, party misunderstanding, and territorial prejudice, may hardly be chosen by reasonable parties, thus risking the loss of competence. But the Convention overemphasizes the free movement of judgments by making the law of the chosen court the applicable law to the validity of choice of court agreements.

III. The Negative Impacts may be Avoided

Academics' concerns of potential negative impact of the Convention assume that Chinese parties and Chinese courts in a disadvantaged position in competition. But I find the situation is changing.

1. The Changing Position of Chinese Parties in Transactions

Statistics in 2015 of Chinese foreign trade show that Chinese parties are not in a weak position in most situations. Statistics in 2015 of

Chinese investment show that Chinese investment overseas ranked the second globally exceeding foreign investment in China; most Chinese investment are in developing countries; and investment in and from Hong Kong accounts for 70% of both outbound and inbound investment of Mainland China. The Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region Pursuant to Choice of Court Agreements between Parties Concerned modeled on the Convention has worked well. Thus the ratification of the Convention would hardly bring about radical changes.

It would be inaccurate to conclude that Chinese parties are on many occasion weak parties.

2. Curing the Inherent Defect of the Convention

Contracting states may resort to Articles 6 and 9 to cure the inherent defect. In practice, if parties choose a foreign court, the foreign judgment would not be barred from recognition and enforcement in China, either by China's non-ratification or a declaration under Convention Article 21 excluding its application. Chinese courts have to rely on bilateral treaties and domestic law to decide whether to recognize or enforce. Articles 6 or 9 of manifest unfairness or inconsistency with the public policy of the forum is not available which actually would not benefit weak Chinese parties. If parties choose a Chinese court, the chosen Chinese court would exercise jurisdiction and make judgment capable of recognition and enforcement abroad. The benefit is clear. The inherent defect of the Convention would not prevent China's ratification.

3. The Changed Competitiveness of Chinese Courts

Chinese courts' trial of international disputes needs to be improved. Progress has been made with China's judicial reform. My survey of foreign related cases of Wuhan Intermediate People's Court and Hubei Provincial Higher People's Court from 2001 to 2015 show that over 52% foreign parties won and the average time of a case takes 240 days.

In fact, parties' choice of a court depends on numerous factors such as the rule of law of the chosen court, the judicial creditability of the

chosen court, parties' comparative advantage. Usually, the Parties' comparative advantage is decisive. Since Most Chinese parties are not in a weaker position, there is no need for worrying cases going to foreign courts.

Dr. YANG Yuwen's survey shows that cases in Chinese courts involving choice of court agreements fell from 28 in 2014 to 17 in 2015. This may show that cases have gone to international arbitration abroad. The ratification of the Convention would not increase new transfer of cases abroad.

Some scholars argue the the best time for China's ratification would be the time when Chinese parties are absolutely strong, China's rule of law is developed and parties (foreign and Chinese) are confident in and willing to choose Chinese courts. This is mechanic, I think, because Non-ratification would save China the obligation to recognize and enforce foreign judgments while less Chinese judgments would be recognized and enforced abroad.

4. The Positive Competition between Litigation and Arbitration

Ratification of the Convention would provide litigation in addition to arbitration to Chinese parties with convention guarantees. In the long term, ratification of the Convention may lead cases to litigation instead of arbitration. Chinese parties with stronger positions would benefit from the choice of Chinese court. Chinese parties with weaker positions may choose arbitration, or choose a foreign court not necessarily prejudiced against Chinese parties, or may trigger the Convention Articles 6 or Article 9 exceptions. Under none of the three situations, would Chinese parties suffer.

Introducing competition between litigation and arbitration would compel the improvement of both mechanism and increase the competitiveness of Chinese arbitration and Chinese litigation globally.

In conclusion, where Chinese parties in international trade and investment are not always weaker parties in most situations, the negative impact on parties can be avoided by improving Chinese parties' awareness of law and choice of courts. Chinese courts may resort to the Convention's mechanisms designed to cure its inherent defects. In this

way ratification of the Convention would improve Chinese international litigation and arbitration, enhance its competitiveness, and provide judicial safeguard for the OBOR. It is suggested that China ratify the Convention in the near future.

IV. Specific Suggestions and Responses

To ratify the Convention China needs to make declarations under the Convention and modify domestic law.

I suggest that China make declarations on intellectual property rights, the exclusive jurisdiction and the real connection requirement. The specific text reads as follows.

1. The Declaration on the Intellectual Property Rights

The Convention does not apply to intellectual property rights disputes, including the allocation, contract, tort, unfair competition, antitrust under Article 21, unless otherwise provided in this declaration.

As exceptions the Convention applies to the following intellectual property rights disputes:

a. use and transfer contracts of copyrights and neighbouring rights, excluding software, folk literature and art, database, and allocation of copyrights and neighbouring rights.

b. use and transfer contracts of use and transfer contracts of patents, excluding layout-designs of integrated circuits, new varieties of plants, and genetic resources.

c. use and transfer contracts of trademarks, excluding those of geographical identifications.

The nature of a dispute is determined by the law on which the claimant relies for claims and the law on which court decisions are based.

China reserves the right to review this declaration under the Convention and to make decision in three years since this declaration is made whether to maintain or modify this declaration.

2. The Declaration on Exclusive Jurisdiction

The court where the real estate is located has exclusive jurisdiction over real estate disputes.

The court where the legal person is located has exclusive jurisdiction over the validity, invalidity, dissolution, of the legal person, and of the decision of its organ.

The court where rights are registered has exclusive jurisdiction over the validity or tort of patents, trademarks, design model, other similar rights which required mandatory registration.

3. The Declaration on the Real Connection

Agreements choosing a court with no connection with the parties or dispute are invalid.

The connection includes the place of the domicile of defendant, place of performance of contract, place of conclusion of contract, place of domicile of claimant, place of subject matter, as well as the principal place of business, place of representative, place of registration, place of shipping and transfer.

On the other hand, China needs to modify the following domestic provisions.

1. Determine the international case

The Convention is clear on international cases by excluding pure domestic cases, and permitting states to limit their jurisdiction, and providing extended international cases for the purpose of recognition and enforcement of foreign judgments. I think no declaration on international case under Convention Article 21 or Article 19 is necessary.

2. Change standard of reciprocity

Chinese Civil Procedure Law provides reciprocity in the recognition and enforcement of foreign judgments, but Chinese courts usually require *de facto* reciprocity that Chinese judgments have been recognized and enforced by a foreign court. I suggest that China confirm reciprocity with countries which do not require reciprocity by law or not refuse to recognize a Chinese judgment on the basis of reciprocity in practice.

3. Express the law applicable to the validity of choice of court agreements

Chinese law is silent and Chinese courts vary in applying the law of the forum, the law chosen by the parties, or Chinese law in practice. I

suggest China ratify the Convention without declaration on this, that is to say, China may accept the law of the chosen court as the applicable law of the choice of court agreement.

In addition, a special arrangements should be made with regard to Hong Kong and Macau.



HCCH Asia Pacific Week 2017

*3rd(Mon) - 6th(Thu) July 2017
Four Seasons Hotel Seoul*



SESSION 5.

Hague Judgments Project : Recognition & Enforcement of Foreign Judgments

Moderator

Kwang Hyun SUK
Professor at Seoul National University (Korea)

Presenter

Tiong Min Yeo
Chair Professor at Singapore Management University,
Academic Director of Asian Business Law Institute (Singapore)

Panelist

Junhyok Jang
Professor at Sungkyunkwan University (Korea)

Frank Y.K. Poon
next Representative of Asia Pacific Regional Office of the HCCH

Yuko Nishitani
Professor at Kyoto University (Japan)

Injun Hwang
Judge of Suwon District Court (Korea)

Ning ZHAO
Senior Legal Officer of the HCCH



Moderator

Kwang Hyun SUK

Professor at Seoul National University (Korea)

Education

- College of Law, Seoul National University (B. Jur., 1979)
- Albert-Ludwigs-Universitaet in Freiburg i. Br., Germany (LL.M., 1991)
- Graduate School of Law, Seoul National University (Doctor Jur., 2000)

Work Experience

- Member of Kim & Chang, law firm of Korea (1984 – 1999)
- Member of the Korean Delegations to various Hague Conference on Private International Law, UNCITRAL and UNIDROIT Projects (1997 -)
- Professor of Hanyang University, College of Law (1999 - 2007)
- Professor of School of Law, Seoul National University
- President of the Korea International Trade Law Association (2013.3. – 2015.5.)
- Vice-President of the Korea Private International Law Association (2011.3. –)

Published Books

- Articles (in Korean)
 - Private International Law Issues relating to International Adoption with an Emphasis on the Special Adoption Act and the Hague Adoption Convention, Family Law Review Vol. 26 No. 3 (2012)
 - Hague Convention on the Civil Aspects of International Child Abduction and Korea's Accession, in Seoul Law Journal, Vol. 54 No. 2 (2013)
- and others on private international law, international civil procedure law and international commercial law
- Books (in Korean)
 - International Jurisdiction to Adjudicate (2001)
 - Private International Law of Korea revised in 2001, 1st edition (2001), 2nd edition (2003)
 - Private International Law and International Litigation, Volumes 1 & 2 (2001), Volume 3 (2004), Volume 4 (2007), Volume 5 (2012)
 - Law of Contracts for the International Sale of Goods : Commentary on CISG (2010)
 - International Civil Procedure Law (2012)
 - Commentary on Private International Law of Korea (2013)
- Articles (in English)
 - The New Conflict of Laws Act of the Republic of Korea, in Yearbook of Private International Law, Volume 5 (2003)
 - Korea's Accession to the Hague Child Abduction Convention, Family Law Quarterly, Vol. 48, No. 2 (Summer 2014)
 - Recognition and Enforcement of Foreign Judgments in the Republic of Korea, in Yearbook of Private International Law, Vol. 15 (2013/2014) (2014)
 - Harmonization of Private International Law Rules in Northeast Asia, Japanese Journal of International Law and Diplomacy, Vol. 114, No. 1 (2015)
- Books (in English)
 - South Korea Section, in International Secured Transactions edited by Dennis Campbell, Binder 2 (Oceana Publications, Inc., Dobbs Ferry, NY, 2004)



Presenter

Tiong Min Yeo

Chair Professor at Singapore Management University,
Academic Director of Asian Business Law Institute (Singapore)

Education

- DPhil (Oxon) (2002)
- BCL (Oxon) (1992)
- LLB (NUS) (1990)

Work Experience

- Dean, School of Law, Singapore Management University (1 Jul 2012-30 Jun 2017)
- Professorial Fellow, Singapore Institute of Legal Education (2011-)
- Associate Dean (Research), School of Law, Singapore Management University (1 Jan 2009-30 Dec 2011)
- Professor of Law, Singapore Management University (1 July 2007-)
- Senior Research Fellow, University of Oxford (1998-2000)
- Sub-Dean, Faculty of Law, National University of Singapore (1996- 1998)
- Senior Tutor, Lecturer, Senior Lecturer, Associate Professor, Faculty of Law, National University of Singapore (1 July 1990-30 June 2007)

Published Books

- The Law in His Hands (edited, with Chao Hick Tin, VK Rajah and Andrew Phang) (Academy Publishing, 2012)
- Developments in Singapore Law between 2006 and 2010 – Trends and Perspectives (edited, with Hans Tjio and Tang Hang Wu) (Academy Publishing, 2011)
- Conflict of Laws, Halsbury's Laws of Singapore (LexisNexis, 2009)
- The Law Relating to Specific Contracts in Singapore (edited, with Michael Hwang) (Sweet & Maxwell Asia, 2008)
- Choice of Law for Equitable Doctrines, Oxford Series in Private International Law (Oxford University Press, 2004)

Awards

- Public Service Medal (Republic of Singapore, 2011)
- Singapore Law Merit Award (Singapore Academy of Law, 2008)



Panelist

Junhyok Jang

Professor at Sungkyunkwan University (Korea)

Education

- Ph.D., Seoul National University, 2002.
- LL.M., New York University, 2000.
- LL.M., University of Chicago, 1998.
- M.A. Seoul National University, 1994.
- LL.B. Seoul National University, 1991.

Work Experience

- Professor/Associate professor, Sungkyunkwan University (2007-)
- Associate professor, KyungHee University (2003-2007)



Panelist

Frank Y.K. Poon

next Representative of Asia Pacific Regional Office of the HCCH

Mr Frank Poon joined the Hong Kong Government in 1978 after obtaining an honours degree in public administration from the University of Ottawa, Canada. He has since served in various posts in the Government. In 1991, he joined the Department of Justice (then Legal Department) as a Crown Counsel after qualifying as a solicitor in England and Hong Kong. He obtained an LL.M degree from the University of Hong Kong in 1995.

While in the Department of Justice, Mr Poon served in various posts in the Civil Division, International Law Division and Legal Policy Division. He was appointed as the Solicitor General of Hong Kong from August 2010 to September 2015. His major areas of interest include public law, private and public international law, air law and international trade law.

Among other duties, Mr Poon was responsible for implementing legislative reform of arbitration law in Hong Kong. His other responsibilities included promoting the rule of law in Hong Kong, advising the Government on constitutional law such as the Basic Law of the Hong Kong Special Administrative Region and human rights law. He also oversaw cooperation on legal matters between Hong Kong and the Mainland of China.

Mr Poon has participated in the negotiation of a number of international agreements as a representative of the Hong Kong Special Administrative Government. Since 1998, he participated in a number of meetings of the Hague Conference on Private International Law as a member of the Chinese delegation. He was also closely involved in Hong Kong's efforts to enter into legal cooperation arrangements with other jurisdictions in the Greater China region.

Mr Poon retired from Government service in September 2015. He began hearing appeals from asylum claimants from November 2016 as a member of the Torture Claims Appeal Board of Hong Kong. He will serve as the representative of the Asia Pacific Regional Office of the Hague Conference on Private International from August 2017.



Panelist

Yuko Nishitani

Professor at Kyoto University (Japan)

Education

- 1998 Ph.D. in Law (Heidelberg University, Germany)
- 1994 - 1997 Research at Max Planck Institute and Heidelberg University, Germany
- 1992 - 1994 Master Studies at Kyoto University, Japan (LL.M. in Law)
- 1988 - 1992 Undergraduate Studies at Kyoto University, Japan (B.A. in Law)

Work Experience

- Since 2015 Professor at Kyoto University, Japan
- 2011 - 2015 Professor at Kyushu University, Japan
- 1997 - 2007 Associate Professor at Tohoku University, Japan
- Since 2007 Visiting Professor at several universities (Duke University (US), Brescia University (Italy) and Tel Aviv University (Israel))
- Since 2017 Member of Curatorium of the Hague Academy of International Law
- Since 2003 Member of several Legislative Committees of the Japanese Ministry of Justice
- Since 2011 Representative of Japan in several projects of the HCCH

Published Books

- 2017 (forthcoming) (editor) "Treatment of Foreign Law - Dynamics towards Convergence?" (Springer, Jus Comparatum series) (English)
- 2008 (editor with Jürgen Basedow and Harald Baum) "Japanese and European Private International Law in Comparative Perspective" (Mohr Siebeck) (English)
- 2007 (editor with Karl Riesenhuber) "Wandlungen oder Erosion der Privatautonomie? – Deutsch-japanische Perspektiven des Vertragsrechts –" (De Gruyter) (German)
- 2000 (monograph) "Mancini und die Parteiautonomie im Internationalen Privatrecht - Eine Untersuchung auf der Grundlage der neu zutage gekommenen kollisionsrechtlichen Vorlesungen Mancinis -" (C.Winter-Verlag) (German)

Awards

- 1998 Lucia- und Rolf-Serick-Preis 1998 (award for doctoral thesis at Heidelberg University)



Panelist

Injun Hwang

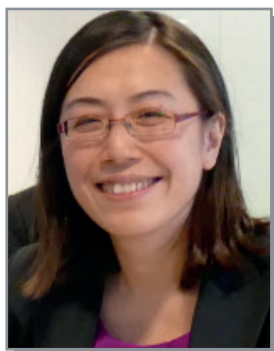
Judge of Suwon District Court (Korea)

Education

- 2013 Summer Course of International Commercial Litigation and Arbitration, London School of Economics and Political Science
- 2011 Master of Law (Civil Law) Program, Graduate School of Legal Studies, Korea University (Completed all coursework but the thesis)
- 2006-2008 Apprenticeship Program, The Judicial Research and Training Institute
- 1999- 2004 Bachelor of Law, College of Law, Korea University

Work Experience

- 2016 Aug – Judge at Suwon District Court
- 2015 - 2016 Judge on Secondment, Hague Conference on Private International Law (HCCH, The Hague)
- 2015 Feb-Aug Judge at Incheon District Court
- 2011-2015 Judge at Busan District Court
- 2008-2011 Judge Advocate General's Corps of Republic of Korea Air Force
- 2007 May-July Intern, The International Institute for the Unification of Private Law (UNIDROIT, Rome)
- 2005 Passed the 47th Korean Judicial Examination



Panelist

Ning ZHAO

Senior Legal Officer of the HCCH

Education

- 2007-2012 PhD researcher at University of Groningen, The Netherlands
- 2009 Max Planck Institute for Comparative and International Private Law, Hamburg, visiting scholar
- 2005-2006 Master of European Law and International Law, University of Nijmegen, The Netherlands
- 2004-2005 Master of International Economic and Business Law, University of Groningen, The Netherlands

Work Experience

- 2014-the present Hague Conference on Private International Law, Senior Legal Officer
- 2011-2014 Jomec Business and Legal Consulting, Legal Consultant

Published Books

- Choice-of-law in Cross-border Copyright and Related Rights Disputes - comparative inspiration for the PRC, (2012), Ulrik Huber Institute for Private International Law, The Netherlands
- The First Codification of Choice-of-Law Rules in the People's Republic of China: an overview, Nederlands Internationaal Privaatrecht, issue 2, 2011, pp. 303-311

SESSION 5.

Presentation

HAGUE JUDGMENTS PROJECT: RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

Tiong Min Yeo

Chair Professor at Singapore Management University,
Academic Director of Asian Business Law Institute (Singapore)

HCCCH Asia Pacific Week 2017

HAGUE JUDGMENTS PROJECT: RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

PROFESSOR YEO TIONG MIN (SINGAPORE MANAGEMENT UNIVERSITY, ASIAN BUSINESS LAW INSTITUTE)

PARTY AUTONOMY IN THE PROPOSED NEW HAGUE JUDGMENTS CONVENTION

Judgments Project: a short history

1992 Proposed convention on international jurisdiction and enforcement of foreign judgments (Brussels Convention/Regulation model)

2005: Hague Choice of Court Convention

- In force in Mexico, the EU (except Denmark), and Singapore; US and Ukraine have signed but not implemented
- Narrow focus on party autonomy: applies to exclusive choice of court agreements only
- Chosen court of Contracting State will assume jurisdiction unless the choice of court agreement is void
- Non-chosen courts of other Contracting States will not assume jurisdiction unless the choice of court agreement is void or there are highly exceptional circumstances
- Resulting judgment will be recognised and enforced in other Contracting States subject to limited defences. Chosen court's findings of jurisdictional facts will be binding on other States unless the judgment is given by default.

Judgments Project: a short history

2011-2012, internal discussions within the Hague Conference led to decision to restart a Judgments Project.

2013-2015: Working Group laboured on draft text.

2016-2017: 2 Special Commission meetings to discuss the draft (judgments only; jurisdiction is the subject of a different project).

Current draft of February 2017 (<https://assets.hcch.net/docs/d6f58225-0427-4a65-8f8b-180e79cafdbb.pdf>).

Current draft drew much inspiration and comparative discussions from the 2005 Choice of Court Convention.

Draft is subject to further negotiations and changes. “[xxx]” in draft indicates strongly disputed provisions.

General Scheme of Draft Judgments Convention 2017

Judgments from one Contracting State within the **SCOPE** [Articles 1 & 2] of the Convention will be recognised and/or enforced in another Contracting State if any one of the **BASES** [Article 5] of indirect jurisdiction is satisfied, provided that the court did not rule on a matter within the **EXCLUSIVE JURISDICTION** [Article 6] of another state, and the **DEFENCES** [Article 7] do not apply.

Preservation of national law [Article 17]: Convention does not preclude Contracting State from applying its own private international law to recognise or enforce a foreign judgment from another Contracting State (except for **EXCLUSIVE JURISDICTION**).

Possible **DECLARATIONS** by a Contracting State:

- Not to apply Convention to specific subject matter [Article 21]
- Not to apply Convention to dispute wholly domestic to the requested state [Article 20]

SCOPE

Civil or commercial matters

Exclusions:

- Revenue, customs, or administrative matters [Article 1]
- Excluded subject matters [Article 2(1)]
- Arbitration and related proceedings [Article 2(2)]

BASES

“Home” rule: Habitual residence [Article 15(1)(a)]

“Agreement” rule: Provision that *supplements* the Hague Choice of Court Convention 2005 [Article 5(1)(p)] :

- Judgment by “a court designated in an agreement ... other than an exclusive choice of court agreement”
 - Non-exclusive choice of court
 - Exclusive choice of more than one court
 - Asymmetric choice of court
- Not applicable against employees and consumers [Article 5(2)(b)]

BASES

“Consent” rules:

- Express consent to jurisdiction in the course of proceedings [Article 5(1)(e)] (consumer or employee needs to address consent to the court: Article 5(2)(a))
- Choice of court designated in trust instrument [Article (1)(n)(i)]
- person bringing claim (other than counterclaim) [Article 5(1)(c)]
- person losing to a counterclaim if it arose out of the same transaction or occurrence as the claim [Article 5(o)(i)]
- person losing in a counterclaim, unless compelled by foreign procedure to file that counterclaim [Article 5(o)(ii)]
- Arguing on merits without contesting jurisdiction unless objection would be futile [Article 5(1)(f)] [not applicable against consumers and employees: Article 5(2)(b)]

BASES

“Connection” rules:

- “Conducting business”:
 - Principal place of business of natural person and judgment arose out of activities of that business [Article 5(1)(b)]
 - Place of branch, agency or other establishment and judgment arose of activities of that entity [Article 5(1)(d)]
- “Contract”: ruling on contractual obligation in the state in which performance of that obligation took place or should have taken place, and purposeful and substantial connection between activities and the state [Article 5(1)(g)] (not applicable against consumer or employee: Article 5(2)(b))
- “Tort”: ruling on death, physical injury, damage to or loss of tangible property caused by act or omission in that state [Article 5(1)(j)]
- Ruling on tenancy of immovable property in the state where property is situated [Article 5(1)(h)]
- Ruling on contractual obligation secured by in rem right against immovable property in the state where the property is situated [Article 5(1)(i)]

BASES

“Connection” rules:

- special additional rules for intellectual property disputes [Articles 5(1) (k), (l), and (m)]
- special additional rules for trusts [Article 5(1)(n) (ii) (place of governing law) and (iii) (principal place of administration)]

Note: Judgment is not conclusive on jurisdictional facts (even for non-default judgments), unlike the position under the Hague Convention on Choice of Court Agreements 2005

EXCLUSIVE JURISDICTION

These judgments will **not** be recognised or enforced:

- Ruling on registration or validity of various intellectual property and similar rights [Article 6(a)] from any state other than the state where grant or application has been applied for, taken place [Article 6(a)].
- Ruling on rights *in rem* in immovable property from any state other than the state where the property is situated [Article 6(b)].
- Ruling on tenancy of immovable property for period of more than 6 months from any state other than the state where the property is situated [Article 6(c)].

DEFENCES

Failure of adequate notice [Article 7(1)(a)]

Judgment obtained by fraud [Article 7(1)(b)]

Contravention of public policy [Article 7(1)(c)]

Inconsistency with judgment of requested state [Article 7(1)(e)] or recognised previous judgment of another state [Article 7(1)(f)]

Judgment ruling on intellectual property infringement applying a law other than the law governing that right [Article 7(1)(g)]

DEFENCES

Provision that *complements* the Hague Choice of Court Convention 2005 [Article 7(1)(d)] :

- Recognition or enforcement may be refused if “proceedings ... were contrary to an agreement ... under which the dispute in question was to be determined in a court other than the court of origin”
- But: defence does not apply to judgments of not being recognised or enforced through this Convention
- [Common law: breach of contract as potential defence or counter-claim to neutralise foreign judgment]

Observations

What incentives are there for states to sign/ratify the Convention?

- International peace and harmony
- International judicial co-operation
- Harmonisation of recognition rules to facilitate international trade and international mobility
- Giving effect to rulings from “connected” foreign courts
- Holding parties accountable for their actions in relation to foreign courts
- Giving effect to parties’ agreement (supplementing and complementing the Hague Convention on Choice of Court Agreements 2005)

What may be disincentives?

- Protectionism?
- Lack of trust?
- Inflexibility in the Convention?
- Too far apart from national laws?

**Special Commission on the Recognition
and Enforcement of Foreign Judgments
(16-24 February 2017)**



FEBRUARY 2017 DRAFT CONVENTION*

*This document reproduces the text set out in Working Document No 170 E revised

CHAPTER I – SCOPE AND DEFINITIONS

Article 1

Scope

1. This Convention shall apply to the recognition and enforcement of judgments relating to civil or commercial matters. It shall not extend in particular to revenue, customs or administrative matters.

2. This Convention shall apply to the recognition and enforcement in one Contracting State of a judgment given by a court of another Contracting State.

Article 2

Exclusions from scope

1. This Convention shall not apply to the following matters –

- (a) the status and legal capacity of natural persons;
- (b) maintenance obligations;
- (c) other family law matters, including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships;
- (d) wills and succession;
- (e) insolvency, composition, resolution of financial institutions, and analogous matters;
- (f) the carriage of passengers and goods;
- (g) marine pollution, limitation of liability for maritime claims, general average, and emergency towage and salvage;
- (h) liability for nuclear damage;
- (i) the validity, nullity, or dissolution of legal persons or associations of natural or legal persons, and the validity of decisions of their organs;
- (j) the validity of entries in public registers;
- (k) defamation [and privacy];
- [(l) intellectual property rights[, except for copyright and related rights and registered and unregistered trademarks]].

2. A judgment is not excluded from the scope of this Convention where a matter to which this Convention does not apply arose merely as a preliminary question in the proceedings in which the judgment was given, and not as an object of the proceedings. In particular, the mere fact that such a matter arose by way of defence does not exclude a judgment from the Convention, if that matter was not an object of the proceedings.

3. This Convention shall not apply to arbitration and related proceedings.

4. A judgment is not excluded from the scope of this Convention by the mere fact that a State, including a government, a governmental agency or any person acting for a State, was a party to the proceedings.

5. Nothing in this Convention shall affect privileges and immunities of States or of international organisations, in respect of themselves and of their property.

Article 3
Definitions

1. In this Convention –
 - (a) “defendant” means a person against whom the claim or counterclaim was brought in the State of origin;
 - (b) “judgment” means any decision on the merits given by a court, whatever that decision may be called, including a decree or order, and a determination of costs or expenses by the court (including an officer of the court), provided that the determination relates to a decision on the merits which may be recognised or enforced under this Convention. An interim measure of protection is not a judgment.
2. An entity or person other than a natural person shall be considered to be habitually resident in the State –
 - (a) where it has its statutory seat;
 - (b) under whose law it was incorporated or formed;
 - (c) where it has its central administration; or
 - (d) where it has its principal place of business.

CHAPTER II – RECOGNITION AND ENFORCEMENT

Article 4
General provisions

1. A judgment given by a court of a Contracting State (State of origin) shall be recognised and enforced in another Contracting State (requested State) in accordance with the provisions of this Chapter. Recognition or enforcement may be refused only on the grounds specified in this Convention.
2. Without prejudice to such review as is necessary for the application of the provisions of this Chapter, there shall be no review of the merits of the judgment given by the court of origin.
3. A judgment shall be recognised only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin.
4. If a judgment referred to in paragraph 3 is the subject of review in the State of origin or if the time limit for seeking ordinary review has not expired, the court addressed may –
 - (a) grant recognition or enforcement, which enforcement may be made subject to the provision of such security as it shall determine;
 - (b) postpone the decision on recognition or enforcement; or
 - (c) refuse recognition or enforcement.

A refusal under sub-paragraph (c) does not prevent a subsequent application for recognition or enforcement of the judgment.

Article 5
Bases for recognition and enforcement

1. A judgment is eligible for recognition and enforcement if one of the following requirements is met –
 - (a) the person against whom recognition or enforcement is sought was habitually resident in the State of origin at the time that person became a party to the proceedings in the court of origin;

- (b) the natural person against whom recognition or enforcement is sought had his or her principal place of business in the State of origin at the time that person became a party to the proceedings in the court of origin and the claim on which the judgment is based arose out of the activities of that business;
- (c) the person against whom recognition or enforcement is sought is the person that brought the claim, other than a counterclaim, on which the judgment is based;
- (d) the defendant maintained a branch, agency, or other establishment without separate legal personality in the State of origin at the time that person became a party to the proceedings in the court of origin, and the claim on which the judgment is based arose out of the activities of that branch, agency, or establishment;
- (e) the defendant expressly consented to the jurisdiction of the court of origin in the course of the proceedings in which the judgment was given;
- (f) the defendant argued on the merits before the court of origin without contesting jurisdiction within the timeframe provided in the law of the State of origin, unless it is evident that an objection to jurisdiction or to the exercise of jurisdiction would not have succeeded under that law;
- (g) the judgment ruled on a contractual obligation and it was given in the State in which performance of that obligation took place, or should have taken place, in accordance with
 - (i) the parties' agreement, or
 - (ii) the law applicable to the contract, in the absence of an agreed place of performance, unless the defendant's activities in relation to the transaction clearly did not constitute a purposeful and substantial connection to that State;
- (h) the judgment ruled on a tenancy of immovable property and it was given in the State in which the property is situated;
- (i) the judgment ruled against the defendant on a contractual obligation secured by a right *in rem* in immovable property located in the State of origin, if the contractual claim was brought together with a claim against the same defendant relating to that right *in rem*;
- (j) the judgment ruled on a non-contractual obligation arising from death, physical injury, damage to or loss of tangible property, and the act or omission directly causing such harm occurred in the State of origin, irrespective of where that harm occurred;
- [(k) the judgment ruled on an infringement of a patent, trademark, industrial design, plant breeder's right, or similar right required to be granted or registered and it was given by a court in the State of origin in which the grant or registration of the right concerned has taken place, or is deemed to have taken place under the terms of an international or regional instrument[, unless the defendant has not acted in that State to initiate or further the infringement, or their activity cannot reasonably be seen as having been targeted at that State];]
- [(l) the judgment ruled on the ownership or subsistence of copyright or related rights, [or use-based trademarks, trade names, or unregistered designs] [or other intellectual property rights not required to be registered] and the right is governed by the law of the State of origin;]
- [(m) the judgment ruled on an infringement of copyright or related rights, [or use-based trademarks, trade names, or unregistered designs] [or other intellectual property rights not required to be registered] and the right is governed by the law of the State of origin, [unless the defendant has not acted in that State to initiate or further the infringement, or their activity cannot reasonably be seen as having been targeted at that State];]
- (n) the judgment concerns the validity, construction, effects, administration or variation of a trust created voluntarily and evidenced in writing, and –
 - (i) at the time the proceedings were instituted, the State of origin was designated in the trust instrument as a State in which disputes about such matters are to be determined;

- (ii) the law of the State of origin is expressly or impliedly designated in the trust instrument as the law governing the aspect of the trust that is the subject of the litigation that gave rise to the judgment[, unless the defendant's activities in relation to the trust clearly did not constitute a purposeful and substantial connection to that State]; or
- (iii) at the time the proceedings were instituted, the State of origin was expressly or impliedly designated in the trust instrument as the State in which the principal place of administration of the trust is situated.

This sub-paragraph only applies to judgments regarding internal aspects of a trust between persons who are or were within the trust relationship;

- (o) the judgment ruled on a counterclaim –
 - (i) to the extent that it was in favour of the counterclaimant, provided that the counterclaim arose out of the same transaction or occurrence as the claim;
 - (ii) to the extent that it was against the counterclaimant, unless the law of the State of origin required the counterclaim to be filed in order to avoid preclusion;
- (p) the judgment was given by a court designated in an agreement concluded or documented in writing or by any other means of communication which renders information accessible so as to be usable for subsequent reference, other than an exclusive choice of court agreement.

For the purposes of this sub-paragraph, an "exclusive choice of court agreement" means an agreement concluded by two or more parties that designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one State or one or more specific courts of one State to the exclusion of the jurisdiction of any other courts.

2. If recognition or enforcement is sought against a natural person acting primarily for personal, family or household purposes (a consumer) in matters relating to a consumer contract, or against an employee in matters relating to the employee's contract of employment –

- (a) paragraph 1(e) applies only if the consent was addressed to the court, orally or in writing;
- (b) paragraph 1(f), (g) and (p) do not apply.

Article 6

Exclusive bases for recognition and enforcement

Notwithstanding Article 5 –

- [(a) a judgment that ruled on the registration or validity of a patent, trademark, industrial design, plant breeder's right, or similar right required to be granted or registered shall be recognised and enforced if and only if the State of origin is the State in which grant or registration has been applied for, has taken place, or is deemed to have been applied for or to have taken place under the terms of an international or regional instrument;]
- (b) a judgment that ruled on rights *in rem* in immovable property shall be recognised and enforced if and only if the property is situated in the State of origin;
- (c) a judgment that ruled on a tenancy of immovable property for a period of more than six months shall not be recognised and enforced if the property is not situated in the State of origin and the courts of the Contracting State in which it is situated have exclusive jurisdiction under the law of that State.

Article 7
Refusal of recognition or enforcement

1. Recognition or enforcement may be refused if –
 - (a) the document which instituted the proceedings or an equivalent document, including a statement of the essential elements of the claim –
 - (i) was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant entered an appearance and presented his case without contesting notification in the court of origin, provided that the law of the State of origin permitted notification to be contested; or
 - (ii) was notified to the defendant in the requested State in a manner that is incompatible with fundamental principles of the requested State concerning service of documents;
 - (b) the judgment was obtained by fraud;
 - (c) recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State [and situations involving infringements of security or sovereignty of that State];
 - (d) the proceedings in the court of origin were contrary to an agreement, or a designation in a trust instrument, under which the dispute in question was to be determined in a court other than the court of origin;
 - (e) the judgment is inconsistent with a judgment given in the requested State in a dispute between the same parties; or
 - (f) the judgment is inconsistent with an earlier judgment given in another State between the same parties on the same subject matter, provided that the earlier judgment fulfills the conditions necessary for its recognition in the requested State;
 - [(g) the judgment ruled on an infringement of an intellectual property right, applying to that right a law other than the law governing that right.]
2. Recognition or enforcement may be postponed or refused if proceedings between the same parties on the same subject matter are pending before a court of the requested State, where –
 - (a) the court of the requested State was seised before the court of origin; and
 - (b) there is a close connection between the dispute and the requested State.

A refusal under this paragraph does not prevent a subsequent application for recognition or enforcement of the judgment.

Article 8
Preliminary questions

1. Where a matter to which this Convention does not apply, or a matter referred to in Article 6 on which a court other than the court referred to in that Article ruled arose as a preliminary question, the ruling on that question shall not be recognised or enforced under this Convention.
2. Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment was based on a ruling on a matter to which this Convention does not apply, or on a matter referred to in Article 6 on which a court other than the court referred to in that Article ruled.

3. However, in the case of a ruling on the validity of a right referred to in Article 6, paragraph (a), recognition or enforcement of a judgment may be postponed, or refused under the preceding paragraph, only where –

- (a) that ruling is inconsistent with a judgment or a decision of a competent authority on that matter given in the State referred to in Article 6, paragraph (a); or
- (b) proceedings concerning the validity of that right are pending in that State.

A refusal under sub-paragraph (b) does not prevent a subsequent application for recognition or enforcement of the judgment.

Article 9 *Equivalent effects*

A judgment recognised or enforceable under this Convention shall be given the same effect it has in the State of origin. If the judgment provides for relief that is not available under the law of the requested State, that relief shall, to the extent possible, be adapted to relief with effects equivalent to, but not going beyond, its effects under the law of the State of origin.

Article 10 *Severability*

Recognition or enforcement of a severable part of a judgment shall be granted where recognition or enforcement of that part is applied for, or only part of the judgment is capable of being recognised or enforced under this Convention.

Article 11 *Damages*

1. Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered.

2. The court addressed shall take into account whether and to what extent the damages awarded by the court of origin serve to cover costs and expenses relating to the proceedings.

[Article 12 *Non-monetary remedies in intellectual property matters*

A judgment granting a remedy other than monetary damages in intellectual property matters shall not be enforced under this Convention.]

Article 13 *Judicial settlements (transactions judiciaires)*

Judicial settlements (*transactions judiciaires*) which a court of a Contracting State has approved, or which have been concluded in the course of proceedings before a court of a Contracting State, and which are enforceable in the same manner as a judgment in the State of origin, shall be enforced under this Convention in the same manner as a judgment[, provided that such settlement is permissible under the law of the requested State].

Article 14
Documents to be produced

1. The party seeking recognition or applying for enforcement shall produce –
 - (a) a complete and certified copy of the judgment;
 - (b) if the judgment was given by default, the original or a certified copy of a document establishing that the document which instituted the proceedings or an equivalent document was notified to the defaulting party;
 - (c) any documents necessary to establish that the judgment has effect or, where applicable, is enforceable in the State of origin;
 - (d) in the case referred to in Article 13, a certificate of a court of the State of origin that the judicial settlement or a part of it is enforceable in the same manner as a judgment in the State of origin.
2. If the terms of the judgment do not permit the court addressed to verify whether the conditions of this Chapter have been complied with, that court may require any necessary documents.
3. An application for recognition or enforcement may be accompanied by a document relating to the judgment, issued by a court (including an officer of the court) of the State of origin, in the form recommended and published by the Hague Conference on Private International Law.
4. If the documents referred to in this Article are not in an official language of the requested State, they shall be accompanied by a certified translation into an official language, unless the law of the requested State provides otherwise.

Article 15
Procedure

1. The procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment, are governed by the law of the requested State unless this Convention provides otherwise. The court addressed shall act expeditiously.
2. The court of the requested State shall not refuse the recognition or enforcement of a judgment under this Convention on the ground that recognition or enforcement should be sought in another State.

[Article 16
Costs of proceedings

1. No security, bond or deposit, however described, shall be required from a party who in one Contracting State applies for enforcement of a judgment given in another Contracting State on the sole ground that such party is a foreign national or is not domiciled or resident in the State in which enforcement is sought.
2. An order for payment of costs and expenses of proceedings, made in a Contracting State against any person exempt from requirements as to security, bond, or deposit by virtue of paragraph 1 shall, on the application of the person entitled to the benefit of the order, be rendered enforceable in any other Contracting State.]

Article 17
Recognition or enforcement under national law

Subject to Article 6, this Convention does not prevent the recognition or enforcement of judgments under national law.

CHAPTER III – GENERAL CLAUSES

Article 18 *Transitional provision*

This Convention shall apply to the recognition and enforcement of judgments if, at the time the proceedings were instituted in the State of origin, the Convention was in force in that State and in the requested State.

[Article 19 *No legalisation*

All documents forwarded or delivered under this Convention shall be exempt from legalisation or any analogous formality, including an Apostille.]

Article 20 *Declarations limiting recognition and enforcement*

A State may declare that its courts may refuse to recognise or enforce a judgment given by a court of another Contracting State if the parties were resident in the requested State, and the relationship of the parties and all other elements relevant to the dispute, other than the location of the court of origin, were connected only with the requested State.

Article 21 *Declarations with respect to specific matters*

1. Where a State has a strong interest in not applying this Convention to a specific matter, that State may declare that it will not apply the Convention to that matter. The State making such a declaration shall ensure that the declaration is no broader than necessary and that the specific matter excluded is clearly and precisely defined.
2. With regard to that matter, the Convention shall not apply –
 - (a) in the Contracting State that made the declaration;
 - (b) in other Contracting States, where recognition or enforcement of a judgment given in a Contracting State that made the declaration is sought.

[Article 22 *Declarations with respect to common courts*

1. A Contracting State may declare that –
 - (a) a court common to two or more States exercises jurisdiction over matters that come within the scope of this Convention; and
 - (b) such a court –
 - (i) has only an appellate function; or
 - (ii) has first instance and appellate functions.
2. Judgments of a Contracting State include –
 - (a) judgments given by a court referred to in paragraph 1(b)(i);
 - (b) judgments given by a court referred to in paragraph 1(b)(ii) if all States referred to in paragraph 1(a) are parties to this Convention.
3. If a court referred to in paragraph 1(b)(i) serves as a common court for States some of which are Contracting States and some of which are non-Contracting States to this Convention, judgments given by such a court shall only be considered as judgments of a Contracting State if the proceedings at first instance were instituted in a Contracting State.

4. In case of a judgment given by a court referred to in paragraph 1(b)(ii) the reference to the State of origin in Articles 5 and 6 shall be deemed to refer to the entire territory over which that court had jurisdiction in relation to that judgment.]

Article 23
Uniform interpretation

In the interpretation of this Convention, regard shall be had to its international character and to the need to promote uniformity in its application.

Article 24
Review of operation of the Convention

The Secretary General of the Hague Conference on Private International Law shall at regular intervals make arrangements for –

- (a) review of the operation of this Convention, including any declarations; and
- (b) consideration of whether any amendments to this Convention are desirable.

Article 25
Non-unified legal systems

1. In relation to a Contracting State in which two or more systems of law apply in different territorial units with regard to any matter dealt with in this Convention –

- (a) any reference to the law or procedure of a State shall be construed as referring, where appropriate, to the law or procedure in force in the relevant territorial unit;
- (b) any reference to habitual residence in a State shall be construed as referring, where appropriate, to habitual residence in the relevant territorial unit;
- (c) any reference to the court or courts of a State shall be construed as referring, where appropriate, to the court or courts in the relevant territorial unit;
- (d) any reference to a connection with a State shall be construed as referring, where appropriate, to a connection with the relevant territorial unit.

2. Notwithstanding the preceding paragraph, a Contracting State with two or more territorial units in which different systems of law apply shall not be bound to apply this Convention to situations which involve solely such different territorial units.

3. A court in a territorial unit of a Contracting State with two or more territorial units in which different systems of law apply shall not be bound to recognise or enforce a judgment from another Contracting State solely because the judgment has been recognised or enforced in another territorial unit of the same Contracting State under this Convention.

4. This Article shall not apply to a Regional Economic Integration Organisation.

Article 26
Relationship with other international instruments

1. This Convention shall be interpreted so far as possible to be compatible with other treaties in force for Contracting States, whether concluded before or after this Convention.

2. This Convention shall not affect the application by a Contracting State of a treaty that was concluded before this Convention entered into force for that Contracting State, if applying this Convention would be inconsistent with the obligations of that Contracting State to any non-Contracting State. This paragraph shall also apply to treaties that revise or replace a treaty concluded before this Convention entered into force for that Contracting State, except to the extent that the revision or replacement creates new inconsistencies with this Convention.

3. This Convention shall not affect the application by a Contracting State of a treaty, whether concluded before or after this Convention, for the purposes of obtaining recognition or enforcement of a judgment given by a court of a Contracting State that is also a Party to that treaty. However, the judgment shall not be recognised or enforced to a lesser extent than under this Convention.

4. This Convention shall not affect the application by a Contracting State of a treaty which, in relation to a specific matter, governs the recognition or enforcement of judgments, even if concluded after this Convention and even if all States concerned are Parties to this Convention. This paragraph shall apply only if the Contracting State has made a declaration in respect of the treaty under this paragraph. In the case of such a declaration and to the extent that any inconsistencies exist between the above-mentioned treaty and this Convention, other Contracting States shall not be obliged to apply this Convention to a judgment which relates to that specific matter and which was rendered by a court of a Contracting State that made the declaration.

5. This Convention shall not affect the application of the rules of a Regional Economic Integration Organisation that is a Party to this Convention, whether adopted before or after this Convention as concerns the recognition or enforcement of judgments as between Member States of the Regional Economic Integration Organisation.

CHAPTER IV – FINAL CLAUSES

Article 27

Signature, ratification, acceptance, approval or accession

1. This Convention is open for signature by all States.
2. This Convention is subject to ratification, acceptance or approval by the signatory States.
3. This Convention is open for accession by all States.
4. Instruments of ratification, acceptance, approval or accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention.

Article 28

Declarations with respect to non-unified legal systems

1. If a State has two or more territorial units in which different systems of law apply in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that the Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.
2. A declaration shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.
3. If a State makes no declaration under this Article, the Convention shall extend to all territorial units of that State.

4. This Article shall not apply to a Regional Economic Integration Organisation.

Article 29

Regional Economic Integration Organisations

1. A Regional Economic Integration Organisation which is constituted solely by sovereign States and has competence over some or all of the matters governed by this Convention may similarly sign, accept, approve or accede to this Convention. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that the Organisation has competence over matters governed by this Convention.
2. The Regional Economic Integration Organisation shall, at the time of signature, acceptance, approval or accession, notify the depositary in writing of the matters governed by this Convention in respect of which competence has been transferred to that Organisation by its Member States. The Organisation shall promptly notify the depositary in writing of any changes to its competence as specified in the most recent notice given under this paragraph.
3. For the purposes of the entry into force of this Convention, any instrument deposited by a Regional Economic Integration Organisation shall not be counted unless the Regional Economic Integration Organisation declares in accordance with Article 30, paragraph 1, that its Member States will not be Parties to this Convention.
4. Any reference to a "Contracting State" or "State" in this Convention shall apply equally, where appropriate, to a Regional Economic Integration Organisation that is a Party to it.

Article 30

Accession by a Regional Economic Integration Organisation without its Member States

1. At the time of signature, acceptance, approval or accession, a Regional Economic Integration Organisation may declare that it exercises competence over all the matters governed by this Convention and that its Member States will not be Parties to this Convention but shall be bound by virtue of the signature, acceptance, approval or accession of the Organisation.
2. In the event that a declaration is made by a Regional Economic Integration Organisation in accordance with paragraph 1, any reference to a "Contracting State" or "State" in this Convention shall apply equally, where appropriate, to the Member States of the Organisation.

Article 31

Entry into force

1. This Convention shall enter into force on the first day of the month following the expiration of [three] [six] months after the deposit of the second instrument of ratification, acceptance, approval or accession referred to in Article 27.
2. Thereafter this Convention shall enter into force –
 - (a) for each State or Regional Economic Integration Organisation subsequently ratifying, accepting, approving or acceding to it, on the first day of the month following the expiration of [three][six] months after the deposit of its instrument of ratification, acceptance, approval or accession;
 - (b) for a territorial unit to which this Convention has been extended in accordance with Article 28 on the first day of the month following the expiration of [three] [six] months after the notification of the declaration referred to in that Article.

Article 32
Declarations

1. Declarations referred to in Articles 20, 21, 26(4), 28 and 30 may be made upon signature, ratification, acceptance, approval or accession or at any time thereafter, and may be modified or withdrawn at any time.
2. Declarations, modifications and withdrawals shall be notified to the depositary.
3. A declaration made at the time of signature, ratification, acceptance, approval or accession shall take effect simultaneously with the entry into force of this Convention for the State concerned.
4. A declaration made at a subsequent time, and any modification or withdrawal of a declaration, shall take effect on the first day of the month following the expiration of [three] [six] months following the date on which the notification is received by the depositary.
5. A declaration made at a subsequent time, and any modification or withdrawal of a declaration, shall not apply to judgments resulting from proceedings that have already been instituted before the court of origin when the declaration takes effect.

Article 33
Denunciation

1. This Convention may be denounced by notification in writing to the depositary. The denunciation may be limited to certain territorial units of a non-unified legal system to which this Convention applies.
2. The denunciation shall take effect on the first day of the month following the expiration of twelve months after the date on which the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the date on which the notification is received by the depositary.

Article 34
Notifications by the depositary

The depositary shall notify the Members of the Hague Conference on Private International Law, and other States and Regional Economic Integration Organisations which have signed, ratified, accepted, approved or acceded in accordance with Articles [...] of the following –

- (a) the signatures, ratifications, acceptances, approvals and accessions referred to in Article 27;
- (b) the date on which this Convention enters into force in accordance with Article 31;
- (c) the notifications, declarations, modifications and withdrawals of declarations referred to in Article 32; and
- (d) the denunciations referred to in Article 33.



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SESSION 5.

Discussion

Junhyok Jang

Professor at Sungkyunkwan University (Korea)

Discussion Paper on the Judgment Project

Prepared for the 2017 Hcch Asia-Pacific Week (Seoul, Thu, 6 July 2017)

Junhyok Jang
Professor, Sungkyunkwan University

The Judgment Project aims at creating a binding uniform (though not exclusively so) law that touches on the recognition and enforcement of judgments and also possibly direct jurisdiction. The discussant would like to briefly talk about the basic framework, rather than the individual provisions, of the February 2017 Preliminary Draft. The views are expressed in the capacity of an individual researcher alone.

1. The Quest for an Optimal Level of Integration

The initial concern is where to find the optimal level of integration. The discussant would like to approach it in two angles: the deference to national laws as expanded in the February 2017 Preliminary Draft, and the mechanisms that may moderate the uniformity of the convention rules.

A. The Shift of Focus from the Creation of Ideal Delineation of Jurisdiction to an Expanded Deference to National Laws

The renewed Judgments Project follows the two-phased working agenda: the Special Commission is asked to work first on recognition and enforcement, and subsequently on direct jurisdiction and its exercise in *lis pendens* situation.

The original Judgment Project was notable in presenting a mixed convention, but this character was strengthened in the renewed phase of this project. Compared to the 1999 Preliminary Draft and the 2001 Interim Text, the working preliminary draft takes a more careful approach in identifying minimum common core bases of jurisdiction and putting them down as convention bases. This careful approach will be complemented by allowing the contracting States to apply their national rules as long as they are more favorable to recognition and judgment. What should be noted in this context is that the current Preliminary Draft on recognition and enforcement does not envisage a list of prohibited jurisdiction, thereby giving an almost free rein to the State requested in applying its national law to recognize or enforce foreign judgments. An exorbitant jurisdiction may pass the national law tests of the State of origin and the State requested. For example, if both States acknowledge *forum legis* in their national law, a third contracting State has no way to prevent its application.

Practically, this structure may end up with giving the potential and actual parties a relatively weaker guarantee of foreseeability and legal security in two different contexts: they will have to look up national rules of relevant contracting States; and the unsuccessful defendant may find itself exposed, not only to the exorbitant jurisdiction of the State of origin in the litigation stage, but also to the lenient (or dispensation of) review of indirect jurisdiction in the State requested in the recognition and enforcement

stage. The parties may try to overcome the first difficulty with the help of attorneys specialized in international litigation, but the second may remain.

B. Prudential Moderations Under Discussion: (i) Limitation of the Scope; (ii) Emphasis on Recognition and Enforcement; (iii) Highly Selective Approach in Setting Out Convention Bases of Jurisdiction, and (iv) Acceptance/Refusal Mechanism

The current working draft includes or leaves open the following mechanisms which illustrate the orientation to a careful integration in the current drafting process.

Firstly, the current work reveals a more conservative approach to the material scope of application. The working draft excludes defamation and other sensitive areas from the scope. The list of indirect jurisdiction rules does not include a place of harm. Whether to include intellectual property and in what scope is still under discussion.

Secondly, the renewed Judgments Project puts an implicit emphasis on recognition and enforcement, by having the Expert Group to reserve its decision on whether to proceed to work on direct jurisdiction and *lis pendens*, until the Special Commission finalizes its draft rules on recognition and enforcement.

Thirdly, the ongoing work tends to be more selective in providing the autonomous bases of jurisdiction, as compared to the 1999 Preliminary Draft and the 2001 Interim Text.

Fourthly, the closing chapter of the future instrument may include an acceptance/refusal mechanism, so as to enable each contracting state to choose the context in which it will enter into a binding relationship with other contracting states. The adoption of a bilateralization mechanism is also open to discussion.

It remains to be seen how these moderation efforts will be finalized.

2. The Problem of State Interests

As the members are working on an international instrument on the recognition and enforcement of foreign judgments, it is natural for the members to pay due attention to state interests as well as private interests. But it is always not an easy question to strike a balance of both interests.

In some areas, states may have an interest in disallowing circulation of judgments, but the individuals and entities, who are the primary figures of the legal situation, may prefer recognition and enforcement. In other contexts such as exorbitant jurisdiction in purely civil or commercial matters, states may find no serious problem with circulating judgments under national laws, while individuals and entities may be concerned about the possibility of the requested State's giving effect to the exorbitant jurisdiction rules of the State of origin. The day will come when each member should speak to its citizens and other stakeholders to examine if the future instrument will serve their interests well.

As a practical matter, it may perhaps be advisable to minimize attention to peripheral issues such as the definition of civil or commercial matters, the relationship between litigation and arbitration, or the idea of incorporating some concrete criteria of sovereign immunity into the future instrument. It appears that these issues may and would better be left to future developments in national laws and public international law.

SESSION 5.

Discussion

Frank Y.K. Poon

next Representative of Asia Pacific Regional Office of the HCCH

The Hague Judgments Project

In light of the Current International Regimes

for Recognition and Enforcement of Civil and Commercial Judgments

Recognition and Enforcement Based on Treaties and International Agreements

1. Unlike arbitral awards, a civil and commercial judgment given by a national court is generally unenforceable in the court of a foreign state unless there is an international agreement in place providing for reciprocal recognition and enforcement. International instruments such as the Brussels Convention (Brussels Regulations) and Lugano Convention only apply as between European States which are members of the EU or EFTA.
2. Regional instruments in other parts of the world are few and far between, perhaps with the exception of South America where such an arrangement exists between State members of MERCOSUR¹. Enforcement of civil and commercial judgments are not covered by WTO agreements and many free trade agreements. This is due to the fact that arbitration is generally promoted as a better means of resolving international commercial dispute.
3. Outside regional or multilateral agreements (such as the 2005 Hague Choice of Court Agreements Convention), many states rely on their own network of bilateral agreements (commonly known as civil procedure agreements) to provide for mutual recognition and enforcement of civil and commercial judgments.
4. The biggest problem with using bilateral international agreements to underpin the reciprocal enforcement of civil and commercial judgments is that they are highly inefficient because they can only deal with one partner/state at a time. Sometimes negotiation of these agreements takes years and it would require considerable time and resources for a state to build up a network of such agreements with its economic and trade partners.
5. Not many states are enthusiastic about building up such a network because of resources and other implications. China has been regularly concluding bilateral civil procedure agreements in the past decade which normally include a section on recognition and enforcement of judgments. UK has a network of bilateral agreements but negotiations of new bilateral agreements have slowed down as far as the author is aware. Some states are not interested in concluding such agreements for reasons of their own, for example there may be a strong desire

¹ Protocol on Co-operation and Jurisdictional Assistance in Civil, Commercial, Labour and Administrative matters among members of MERCOSUR. Currently Argentina, Brazil, Paraguay and Uruguay are full members of MERCOSUR.

to preserve the jurisdiction and autonomy of a state's own national court particularly in matters that may affect the vital interests of the state.

6. The status quo in terms of international assistance in recognition and enforcement of civil and commercial judgments is therefore highly unsatisfactory. This adds to the uncertainty to individuals and commercial entities when they enter into dealings with foreign individuals or commercial entities. This ambiguity and uncertainty in turn have the undesirable effect of adding hidden and tangible costs to international commercial transactions.

The gap in cross-border recognition and enforcement of civil and commercial judgments – the case for closing the gap

7. As the economic well-being of states are now increasingly dependent on international trade and commerce², the current state of affairs where businesses are compelled to resort to arbitration as nearly the most effective means of resolving commercial disputes is not entirely satisfactory. Something has to be done to fill the gap.
8. This “gap” is particular wide and uneven for common law jurisdictions. The reason for this is that legal systems based on the common law are generally regarded as “generous” in recognizing and enforcing foreign judgments. The principle for such matters does not rely so much on reciprocity. Instead it is mostly based on the comity principle afforded to a foreign state and its court. Many common law systems would provide for recognition and enforcement of foreign money judgments without a review of the merits as long as they are satisfied of the following matters:
 - a. that the judgment is given by a competent court. Very often they will apply their own national law (known as conflict of law rules) to determine whether the foreign court that issued the judgment had properly exercised jurisdiction in that particular case;
 - b. that the judgment is a final and conclusive judgment on the merit (e.g. it cannot be re-opened by the same court); and
 - c. that the recognition and enforcement of the foreign judgment is not contrary to the public policy of the requested state.
9. In view of the unilateral way in which foreign judgments may be recognized and enforced in many common law jurisdictions, the status quo is regarded as even more unsatisfactory for common law states and jurisdiction.

² Note the WTO Agreement and the proliferation of bilateral and regional free trade agreements. Recently, China has embarked on a new trade initiative known as the “Belt and Road” initiative covering what it describes as the land-based “Silk Road Economic Belt” and the sea-based “21st Century Silk Road of the sea”. The routes cover more than 60 countries and regions from Asia to Europe via Southeast Asia, South Asia, Central Asia, West Asia and the Middle East.

10. The Hague Conference's initiative on improving the international recognition and enforcement regime for civil and commercial judgments is long overdue and, in the author's view, would be particularly welcomed by common law jurisdictions where incoming money judgments may be enforced whereas the enforcement of their outgoing judgments in civil law jurisdictions often depends on whether there are already in place reciprocal arrangements with the state where enforcement is sought.

The Hague Conference's initiatives

11. Despite the many years of hard work, the first and a significant milestone was only reached in 2005 when the Choice of Court Agreements Convention was concluded in a diplomatic conference of the Hague Conference. As more states elect to become a party to the 2005 Convention, the Convention will provide commercial entities with more choice for dispute resolution. In addition to arbitration, commercial entities may resolve their disputes in a court of their choice by entering into an exclusive choice of court agreement.
12. To many states, in particular states in this region, there still exists a gap for civil and commercial judgments that are not covered by exclusive choice of court agreements. The on-going Hague judgments project represents the best opportunity for states to cooperate with and assist each other in providing an effective means for such judgments to be recognized and enforced.

A global instrument – some ingredients for success

13. Such an international instrument, if it is to become useful and successful, must be widely accepted by states around the globe. Hence the challenge for the drafters of the Convention and the Hague Conference is to ensure that the end product of the negotiations provide clear rules for national courts to apply for the purposes of recognizing and enforcing foreign judgments. In the opinion of the author, the following must form part of the essential features of the proposed Convention:-
 - a. the "jurisdiction rules" must not be seen to be overly impinging on the jurisdiction of the domestic court, irrespective of the system of laws (civil law, common law or any other) of a state party³;
 - b. the Convention must provide for a widely acceptable definition to determine when a judgment becomes final as the "standards" differ significantly in different legal systems⁴;

³ See Article 5 of the Draft Convention of the Hague Judgments Project (Working Doc. No 170) entitled "Bases for recognition and enforcement" and Article 7 entitled "Refusal of recognition or enforcement". See also Article 21 which allows a state to make declaration to exclude specific matter from the scope of the Convention.

⁴ See Article 4(3) of the Draft Convention which provides that "A judgment shall be recognized only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin. Article 4(4) of

- c. states must be allowed to apply their national law rules to decide whether a foreign judgment is contrary to its public policy or *ordre public* provided that such rules are uniformly and consistently applied (as against an exhaustive or autonomous definition)⁵.

14. Apart from the above, there remain many challenges facing the experts working on the current Hague judgments project. Judging by the speed with which they have worked on this project in the past several years, it would seem to the author that the goal of reaching a final consensus in the course of 2018 is not entirely unrealistic and that we may all look forward to seeing their work crystallised in the form of a draft Convention to be put before a diplomatic conference of the Hague Conference in the not so distant future.

Frank Poon
July 2017, Hong Kong

the Draft Convention provides for situations where the requested state may stay or postpone enforcement proceedings.

⁵See Article 7(1)(c) of the Draft Convention.



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SESSION 5.

Discussion

Yuko Nishitani

Professor at Kyoto University (Japan)

July 6th, 11:20 – 13:00 / Panelist / Session 5 (Hague Judgments Project: Recognition & Enforcement of Foreign Judgments)

Comments by Yuko Nishitani

The Hague Conference is envisaging to adopt a new convention on the recognition and enforcement of foreign judgments in civil and commercial matters. Following the discussions at the 1st and 2nd Special Commissions, comments are provided in relation to several important points and remaining issues as follows:

- Relationship between the 2005 Choice of Court Convention and the Judgments Project
- Scope of the Instrument and Excluded Matters (state immunity, arbitration and mediation)
- Whether and how far Intellectual Property ought to be addressed (in light of the territoriality principle)
- Exclusive Jurisdiction Grounds
- Treatment of Judicial Settlements

SESSION 5.

Discussion

Ning ZHAO

Senior Legal Officer of the HCCH





IP Related Judgments in the Judgments Project

HCCH Asia Pacific Week 2017
Seoul, South Korea
6 July 2017

Ning Zhao
Senior Legal Officer, HCCH

Outline



- The Judgments Project in a nutshell
- IP judgments under the current text
- Looking ahead





First Phase

The Hague Conference (HCCH) has been working towards a global instrument on international jurisdiction of courts and foreign judgments for decades

1992

Initial plan for a treaty covering both *jurisdiction* and *recognition / enforcement*.

Was it too ambitious?

2002-2005

The HCCH focused on an instrument dealing with international choice of court agreements.

The Choice of Court Convention was concluded in 2005, and entered into force on 1 October 2015. (29 States and 1 REIO are bound by the Convention)



Second Phase

Developing a global instrument to facilitate the recognition and enforcement of judgments

1992

2002-2005

2011-2013

Experts' Group

Advised on the feasibility of a new instrument.

(Discussion on the feasibility of jurisdiction rules is still pending.)

2012-2015

Working Group

Focused on the recognition and enforcement of foreign judgments.

The group met five times and produced a Proposed Draft Text.

2016-2017

Special Commission

1st meeting took place in June 2016, which produced the 2016 preliminary draft Convention.

2nd meeting took place in February 2017, which produced the February 2017 draft Convention.

3rd meeting will take place from 13-17 November 2017

Goals



Objectives

- develop a commonly accepted international standard on the recognition and enforcement of foreign judgments
- enhance foreseeability of international litigation to improve **access to justice**, including in cross-border dealings
- more legal certainty **facilitates cross-border trade and investment**

Advantages

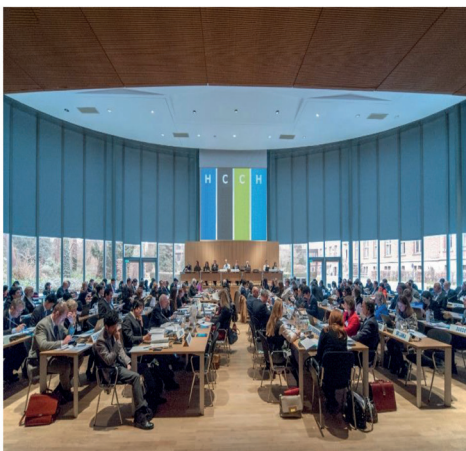
- certainty
- simplicity
- cost-effectiveness



Status quo



February 2017 draft Convention



- only deals with recognition and enforcement of judgments (between Contracting States)
- contains no rules on direct jurisdiction
- does not prevent recognition and enforcement under national law
- is a “floor”, not a “ceiling” for recognition and enforcement
- is largely modelled after the *2005 Choice of Court Convention*

Basic rules



State X: State of Origin



State Y: Requested State



No review of the merits
(Art. 4)

Bases of recognition and
enforcement (Art. 5)

Exclusive bases for recognition
and enforcement (Art. 6)

Grounds for refusal (Art. 7)

IP issues

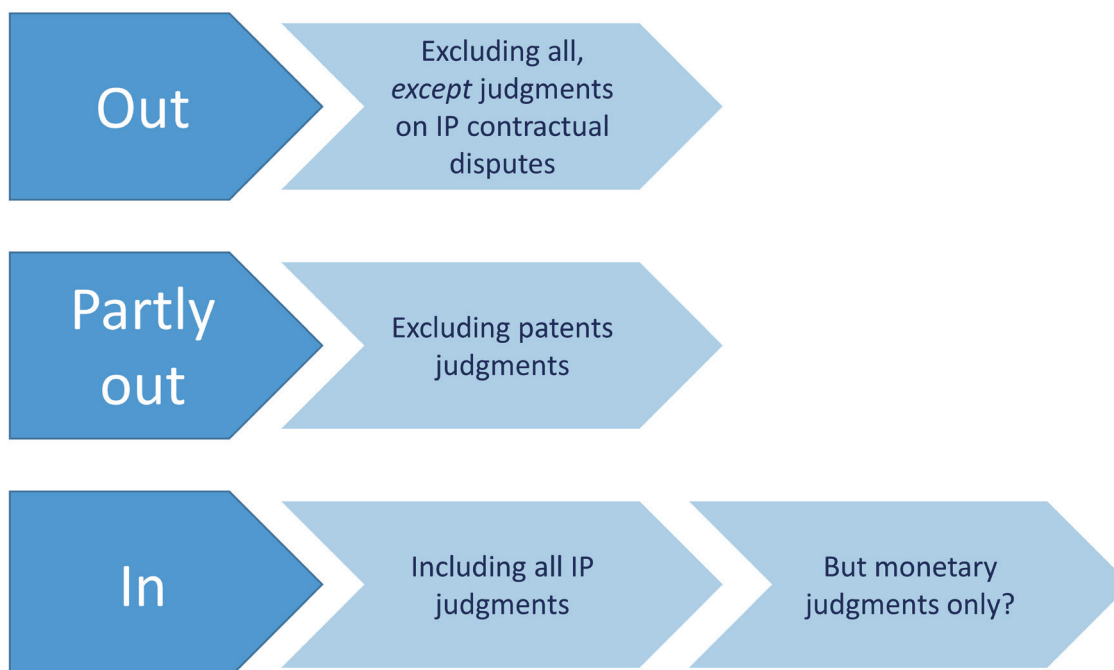


- “**Territoriality**” principle
- A topic for discussions throughout the Project
- Differs from the rules provided in the *2005 Choice of Court Convention*





Scope: in or out?



Jurisdictional filters

	Rights do not require registration	Registered rights
Infringement	Art 5(1)(m): the right is governed by the law of the State of origin, [unless the defendant has not acted in that State to initiate or further the infringement, or their activity cannot reasonably be seen as having been targeted at that State]	Art 5(1)(k): it was given by a court in the State of origin in which the grant or registration of the right concerned has taken place, or is deemed to have taken place under the terms of an international or regional instrument[, unless the defendant has not acted in that State to initiate or further the infringement, or their activity cannot reasonably be seen as having been targeted at that State]
Ownership or subsistence /registration or validity	Art 5(1)(l): the right is governed by the law of the State of origin	Art 6(a) – exclusive if and only if the State of origin is the State in which grant or registration has been applied for, has taken place, or is deemed to have been applied for or to have taken place under the terms of an international or regional instrument
Contract	Art 5(1)(g): it was given in the State in which performance of that obligation took place, or should have taken place, in accordance with (i) the parties' agreement, or (ii) the law applicable to the contract, in the absence of an agreed place of performance, unless the defendant's activities in relation to the transaction clearly did not constitute a purposeful and substantial connection to that State	

Scenario 1 (copyright)



Party A sues Party B regarding a copyright in a book

State X: State of Origin

State Y: Requested State

In favor of
Party A



Jurisdictional bases



Infringement of that copyright

Alternative:

If the copyright is governed by the law of State X, unless Party B did not target its activity in State X (Art 5(1)(m)), **or**

Ownership of that copyright

Alternative:

If the copyright is governed by the law of State X (Art 5(1)(l)), **or**

- Party B was a habitual resident in State X (Art 5(1)(a)); **or**
- Party B expressly consented to the jurisdiction of the court in State X (Art 5(1)(e)); etc...

Scenario 2 (patent)



Party A sues Party B regarding a patent

State X: State of Origin

State Y: Requested State

In favor of
Party A



Jurisdictional bases



Infringement of the patent

Alternative:

- If the grant of the patent has taken place, or is deemed to have taken place under the terms of an international or regional instrument, in State X, unless Party B did not target its activity in State X (Art 5(1)(k)); **or**
- Party B was a habitual resident in State X (Art 5(1)(a)); **or**
- Party B expressly consented to the jurisdiction of the court in State X; etc...

Validity of the patent

Exclusive:

if and only if the grant of the patent has taken place, or is deemed to have taken place for under the terms of an international or regional instrument, in State X

Scenario 3 (IP contract)



Party A (licensor) sues Party B (licensee) for late payment of licensing fee in State X

State X: State of Origin

State Y: Requested State

In favor of
Party A



Jurisdictional bases

Alternative:

- If the place of performance of the contract is in State X (based on Parties' agreement, or in the absence of such agreement, according to governing law of the contract), plus Party B's activities demonstrate a purposeful and substantial connection with State X (Art 5(1)(g)); **or**
- Party B was a habitual resident in State X (Art 5(1)(a)); **or**
- Party B expressly consented to the jurisdiction of the court in State X (Art 5(1)(e)); etc...

Scenario on R&E



Once the IP judgment is eligible for recognition or enforcement,

State X: State of Origin

State Y: Requested State



Grounds for refusal

R&E may be refused (Art 7):

- Traditional grounds for refusal (defective service, fraud, public policy and procedural fairness, inconsistent judgments);
- Applicable law review in IP infringement cases (Art 7(1)(g)) – “applying to that right a law other than the law governing that right”

Further discussion



- Should IP judgments be included in the future Convention?



- If so, how should the provisions on IP be crafted?
 - excluding injunctive reliefs? (Art 12)
 - adding a targeting requirement in IP infringement cases? (Art 5(1)(k) and (m))
 - adding an “applicable law” control as a ground for refusal in IP infringement cases? (Art 7(1)(g))
- How can common courts issue be dealt with (Art 22)?

Looking ahead...



November 2017 3rd Special Commission meeting

to continue its work on the February 2017 draft Convention, including IP, general and final clauses

Informal discussions will be organised before the meeting

Experts' Group

- to be convened
- shall consider direct jurisdiction in an additional instrument

Late 2018 or early 2019 Diplomatic Conference

will adopt a new HCCH Convention?



Website



Hague Conference on Private International Law
The World Organisation for Cross-border Co-operation in Civil and Commercial Matters

News

The Republic of Kazakhstan becomes the 32nd Member of the Hague.
14 Jun 2017

Vietnam: Diplomat Lawyer (Secretary).
13 Jun 2017

Kazakhstan accedes to the 2007 Hague Convention.
06 Jun 2017

Annual Report of the HCCH 2016.
05 Jun 2017

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- Adoption
- Child Abduction
- Child Support
- Protection of Adults
- Protection of Children

- Access to Justice
- Apostille
- Choice of Court
- Evidence
- Form of Wills
- Service

- Choice of Law in Contracts
- Securities
- Trusts

- INCEAT
- Support
- APP

- Cohabitation outside marriage
- Family agreements involving children
- Judicial cooperation
- Parentage/Surrogacy
- Protection Orders
- Protection of Adults
- Protection of Children
- Protection of Securities
- Protection of Trusts

- Upcoming meetings
- Experts' Group on the Recognition and Enforcement of Agreements in Family Matters
- HCCH Asia Pacific Week 2017
- Special Commission on the practical operation of the 1980 and 1996 Conventions



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THE JUDGMENTS PROJECT

Special Commission on the Judgments Project

About the Judgments Project

The 'Judgments Project' refers to the work undertaken by the Hague Conference since 1992 on two key aspects of private international law in cross-border litigation in civil and commercial matters: the international jurisdiction of courts and the recognition and enforcement of their judgments abroad.

Initially, the Judgments Project focused on developing a broad convention, which was subsequently scaled down to focus on international cases involving choice of court agreements. This led to the conclusion of the Hague Convention of 30 June 2005 on Choice of Court Agreements ('Choice of Court Convention'). For more information on the Choice of Court Convention, see the Choice of Court Homepage.

Overview of the Judgments Project

Mandate

In 2011, the Council on General Affairs and Policy agreed that an Experts' Group should be established to assess the possible merits of revisiting the Judgments Project.

In 2012, the Council agreed that work on the Judgments Project should proceed. The Council established a Working Group to prepare proposals on the recognition and enforcement of judgments, including jurisdictional filters, and requested the Experts' Group to further study and discuss the desirability and feasibility of making provisions in relation to jurisdiction.

In each of the years 2012-2015 (included), the Council revised the useful program made by the Working Group and invited the Working Group to continue its work.

In 2016, the Council on General Affairs and Policy welcomed the completion by the Working Group on the Judgments Project of a Proposed Draft Text, and decided to set up a Special Commission to prepare a draft Convention. The Council also endorsed the recommendation of the Working Group that matters relating to direct jurisdiction (including exorbitant grounds and its pendens / declining jurisdiction) should be put for consideration to the Experts' Group of the Judgments Project soon after the Special Commission has drawn up a draft Convention. The first meeting of the Special Commission took place from 1 to 3 June 2016 and produced the 2016 preliminary draft Convention.

In 2017, the Special Commission met for the second time from 16 to 24 February 2017 and produced the February 2017 draft Convention. In March 2017, the Council on General Affairs and Policy welcomed the very good progress made on this Project, which was confirmed as a priority for the Organisation, and decided that a third meeting of the Special Commission be held, tentatively from 13 to 17 November 2017. The Council took note of the Special Commission's recommendation that a Diplomatic Conference may be convened towards the end of 2016 or early 2018. The Council endorsed the recommendation of the Special Commission that, in preparation for the November 2017 meeting, further international work on certain issues is necessary.

Chronology of the Judgments Project (including relevant documentation)

- Special Commission
- Continuation of the Judgments Project (2010-2016)
- Focus on international litigation involving choice of court agreements (2002-2003)
- Response to the preliminary draft Convention (2000-2001)
- Preparation of a preliminary draft Convention (1997-1999)

Thank you!

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APPENDIX

1-1. 민사 또는 상사의_재판상 및 재판외 문서의 해외송달에 관한 협약

1-2. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters

2-1. 민사 또는 상사의 해외증거조사에 관한 협약

2-2. Convention on The Taking of Evidence Abroad in Civil or Commercial Matters

3-1. 헤이그재판관할합의협약

3-2. Convention on Choice of Court Agreement

민사 또는 상사의 재판상 및 재판외 문서의 해외 송달에 관한 협약

이 협약의 서명국은

해외에 송달되는 재판상 및 재판외 문서가 충분한 기일내에 수신인에게 전달되도록 이를 확보하는 적절한 수단의 창설을 희망하고, 그 절차를 단순화·신속화함으로써 그 목적을 위한 사법공조 조직의 개선을 희망하여, 이러한 취지로 협약을 체결하기로 결정하고, 다음의 규정에 합의하였다.

제1조

이 협약은 민사 또는 상사에 있어서 재판상 또는 재판외 문서를 해외에 송달하는 모든 경우에 적용된다. 이 협약은 문서를 송달 받을 자의 주소가 불명인 경우에는 적용되지 아니한다.

제1장 재판상 문서

제2조

각 체약국은 다른 체약국으로부터의 송달요청을 수령하고 제3조 내지 제6조의 규정에 따라 이를 처리할 중앙당국을 지정한다. 각국은 자국법에 따라 중앙당국을 조직한다.

제3조

촉탁국의 법상 권한있는 당국이나 사법공무원은 인증 또는 기타 이에 상응하는 절차의 수속없이 이 협약에 부속된 양식에 일치하는 요청서를 피촉탁국의 중앙당국에 송부한다.

송달되는 문서 또는 그 사본은 요청서에 첨부된다. 요청서와 문서는 각각 2부씩 제공되어야 한다.

제4조

중앙당국은 요청서가 이 협약의 규정에 일치하지 아니한다고 판단하는 경우에는 그 이의를 명시하여 즉시 신청인에게 통보한다.

제5조

피촉탁국의 중앙당국은 문서를 스스로 송달하거나 또는 적절한 기관으로 하여금 다음 각호의 방식에 의하여 이를 송달하도록 조치한다.

1. 국내소송에 있어서 자국의 영역안에 소재하는 자에 대한 문서의 송달에 대하여 자국법이 정하는 방식, 또는

2. 피촉탁국의 법에 저촉되는 아니하는 한, 신청인이 요청한 특정의 방식이 조의 제1단제2호의 적용을 전제로, 문서는 이를 임의로 수령하는 수신인에 대한 교부에 의하여 송달될 수 있다. 문서가 위의 제1단에 따라 송달되는 경우, 중앙당국은 그 문서가 피촉탁국의 공용어 또는 공용어중의 하나로 기재되거나 번역되도록 요청할 수 있다.

이 협약에 부속된 양식에 따라 송달될 문서의 요지를 담은 요청서의 해당부분은 문서와 함께 송달된다.

제6조

피촉탁국의 중앙당국 또는 피촉탁국이 지정하는 당국은 이 협약에 부속된 양식의 형태로 증명서를 작성한다. 증명서에는 문서가 송달되었다는 취지, 송달방식, 송달지, 송달일자, 그리고 그 해당 문서를 교부받은 자를 기재한다. 문서가 송달되지 못한 경우, 증명서에는 송달되지 못한 이유를 명시한다. 신청인은 중앙당국 또는 사법당국에 의하여 작성되지 아니한 증명서가 이러한 당국들 중 어느 한 당국에 의하여 부서되도록 요청할 수 있다. 증명서는 신청인에게 직접 송부된다.

제7조

이 협약에 부속된 양식의 표준문언은 반드시 붙어 또는 영어로 기재된다. 이 문언은 촉탁국의 공용어 또는 공용어중의 하나로 병기될 수 있다. 문언에 대응하는 공란은 수신국 언어, 붙어 또는 영어로 기재된다.

제8조

각 체약국은 강제력의 사용없이 자국의 외교관 또는 영사관원을 통하여 직접 해외소재자에게 재판상 문서를 송달할 수 있다. 촉탁국의 국민에게 그 문서가 송달되는 경우를 제외하고 모든 국가는 자국영역안에서의 그러한 송달에 반대한다고 선언할 수 있다.

제9조

각 체약국은 또한 문서송달의 목적을 위하여 다른 체약국이 지정하는 당국에 재판상 문서를 전달하기 위하여 영사관의 경로를 이용할 수 있다. 각 체약국은 예외적인 사정으로 인하여 필요한 경우, 동일한 목적을 위하여 외교경로를 이용할 수 있다.

제10조

목적지국이 반대하지 아니하는 한 이 협약은 다음의 권능을 방해하지 아니한다.

1. 외국에 소재하는 자에게 재판상 문서를 우편으로 직접 송부할 권능

2. 촉탁국의 사법공무원·관리 또는 기타 권한있는 자가 목적지국의 사법공무원·관리 또는 기타 권한있는 자를 통하여 재판상 문서를 송달할 권능

3. 재판절차의 모든 이해관계인이 목적지국의 사법공무원·관리 또는 기타 권한있는 자를 통하여 재판상 문서를 직접 송달할 권능

제11조

이 협약은 2 이상의 체약국이 재판상 문서의 송달을 위하여 이상의 조항에서 규정한 방식외의 전달경로와 특히 그들 각각의 당국 간에 직접적인 통신을 허가한다는 합의를 하는 것을 방해하지 아니한다.

제12조

체약국에서 발송되는 재판상 문서의 송달에 관하여 피촉탁국이 제공한 의무에 대하여는 요금이나 비용의 지불 또는 상환이 발생하지 아니한다. 신청인은 다음 각호로 인한 비용을 지불 또는 상환한다.

1. 사법공무원 또는 목적지국의 법에 따른 권한있는 자의 고용
2. 특정송달방식의 이용

제13조

송달요청서가 이 협약의 규정과 일치할 때, 피촉탁국은 이를 이행하는 것이 자국의 주권 또는 안보를 침해할 것이라고 판단하는 경우에 한하여서만 이를 거부할 수 있다.

피촉탁국은 자국법상 당해 소송의 주요쟁점에 대하여 전속적 재판관할권을 보유하거나 자국법이 송달요청의 기초가 되는 소송을 인정하지 아니한다는 근거만으로 송달요청의 이행을 거부할 수 없다. 중앙당국은 송달요청을 거부하는 경우 신청인에게 즉시 그 거부의 사유를 통지한다.

제14조

송달할 재판상 문서의 전달과 관련하여 발생하는 애로사항은 외교경로를 통하여 해결한다.

제15조

소환장 또는 이에 상응하는 문서가 이 협약의 규정에 의하여 송달할 목적으로 해외에 송부되었으나 피고가 출석하지 아니한 경우, 다음 각호의 사항이 확정되기 전까지는 판결을 하여서는 아니된다.

1. 그 문서가 국내소송에서의 문서송달을 위하여 피촉탁국의 국내법에 규정된 방식으로 동 국의 영역안에 소재하는 자에게 송달되었을 것
2. 그 문서가 이 협약에 규정된 다른 방식에 의하여 피고 또는 그의 거주지에 실제 교부되었을 것 또한 상기 각호의 경우에 있어서 송달 또는 교부는 피고가 자신을 변호할 수 있도록 충분한 시간을 두고 이루어졌을 것

각 체약국은 판사가 이 조 제1단의 규정에도 불구하고 송달 또는 교부가 있었다는 증명을 접수하지 아니하더라도 다음 각호의 제 조건이 충족되는 경우에는 판결을 내릴 수 있다고 선언할 수 있다.

1.문서가 이 협약에 규정된 방식중 하나로 송부되었을 것

2.문서의 송부일부터 최소한 6월 이상으로서 구체적 사안에 따라 판사가 적절하다고 보는 기간이 경과하였을 것

3.피촉탁국의 권한있는 당국을 통하여 어떤 종류의 증명이라도 취득하려고 상당한 노력을 하였음에도 불구하고 이를 얻지 못하였을 것

상기의 규정에도 불구하고 판사는, 긴급한 경우, 보전 또는 보호처분을 명할 수 있다.

제16조

소환장 또는 이에 상응하는 문서가 이 협약의 규정에 따라 송달목적으로 해외에 송부되었으나 출석하지 아니한 피고에 대하여 판결이 내려진 경우, 판사는 다음 각호의 제조조건이 충족되는 경우에 한하여 항소기간의 만료로부터 피고를 구제할 수 있다.

1.피고가 자신의 귀책사유없이 방어할 충분한 기간내에 문서에 대한 인지가 없었거나 또는 항소하기에 충분한 기간내에 판결에 대한 인지가 없었을 것

2.피고가 반증이 없는 한 승소가 확실시될 만한 변론을 제시할 것

구제신청은 피고가 판결을 인지한 후부터 합리적인 기간내에 접수되어야 한다. 각 체약국은 선언에 명시한 기일의 만료후에 접수된 신청은 수리되지 아니한다고 선언할 수 있으나, 그 기간은 어떠한 경우에도 재판일부터 1년 이상이어야 한다. 이 조는 자연인의 지위 또는 행위능력에 관한 재판에는 적용되지 아니한다.

제2장 재판외 문서

제17조

체약국의 당국 및 사법공무원이 작성하는 재판외 문서는 다른 체약국으로의 송달을 위하여 이 협약에 의한 방식과 규정에 따라 전달될 수 있다.

제3장 일반규정

제18조

각 체약국은 중앙당국외에 기타 당국을 지정할 수 있으며, 이 경우 그 권한범위를 정한다. 그러나 신청인은 모든 경우에 있어 요청서를 직접 중앙당국에 제출할 권리를 가진다. 연방국가는 2 이상의 중앙당국을 지정할 수 있다.

제19조

이 협약은 체약국의 국내법이 자국영역안에서의 송달을 위하여 해외로부터 발송되는 문서의 전달방식에 대하여 이상의 조항에서 규정한 방식외의 전달방식을 허용하는 데 영향을 미치지 아니한다.

제20조

이 협약은 2 이상의 체약국간의 협정으로 다음 각호를 면제하는 것을 막지 아니한다.

1. 전달되는 문서 및 요청서 각 2통을 요구하는 제3조제2단의 규정
2. 사용언어에 관한 제5조제3단 및 제7조의 규정
3. 제5조제4단의 규정
4. 제12조제2단의 규정

제21조

각 체약국은 비준서 또는 가입서의 기탁시 또는 그 이후에 네덜란드 외무부에 다음 각호의 사항을 통보한다.

1. 제2조 및 제18조에 따른 당국의 지정
2. 제6조에 의하여 증명서를 작성할 권한을 가진 당국의 지정
3. 제9조에 의하여 영사관을 통하여 전달되는 문서를 수령할 권한을 갖는 당국의 지정 마찬가지로 각 체약국은 적절한 경우 네덜란드 외무부에 다음 각호의 사항을 통보한다.
 1. 제8조 및 제10조에 의한 송부방식의 이용에 대한 이의
 2. 제15조제2단 및 제16조제3단에 의한 선언
 3. 상기의 지정·이의 및 선언에 대한 일체의 변경

제22조

이 협약의 당사국이 또한 1905년 7월 17일 및 1954년 3월 1일 헤이그에서 서명된 민사절차에 관한 협약중의 어느 하나 또는 양자의 당사국인 경우, 이 협약은 동 당사국간에 있어서 상기 협약들의 제1조 내지 제7조를 대체한다.

제23조

이 협약은 1905년 7월 17일 헤이그에서 서명된 민사절차에 관한 협약 제23조 또는 1954년 3월 1일 헤이그에서 서명된 민사절차에 관한 협약 제24조의 적용에 영향을 미치지 아니한다. 그러나, 이들 조문은 이러한 협약들에 규정된 통신방법과 동일한 방법이 이용되는 경우에만 적용된다.

제24조

1905년 협약 및 1954년 협약의 당사국들간의 보조협정들은 당사국들이 달리 합의하지 아니하는 한, 이 협약에도 동등하게 적용되는 것으로 본다.

제25조

제22조 및 제24조의 규정을 저해함이 없이, 이 협약의 체약국이 당사자이거나 당사자가 될 협약들이 이 협약의 규율사항에 관련 된 규정을 포함하게 되는 경우, 이 협약은 그로부터 벗어날 수 없다.

제26조

이 협약은 헤이그 국제사법회의의 제10차 회기에 대표를 파견한 국가들의 서명을 위하여 개방된다. 이 협약은 비준되어야 하며 비준서는 네덜란드 외무부에 기탁된다.

제27조

이 협약은 제26조제2단에 규정된 세번째 비준서가 기탁된 날부터 60일이 되는 날에 발효한다. 이 협약은 추후에 비준한 각 서명국에 대하여는 그 비준서가 기탁된 날부터 60일이 되는 날에 발효한다.

제28조

헤이그 국제사법회의의 제10차 회기에 대표를 파견하지 아니한 국가는 제27조제1단에 따라 협약이 발효한 후에 이 협약에 가입할 수 있다. 가입서는 네덜란드 외무부에 기탁된다. 협약은 이러한 가입국에 대하여는 가입서의 기탁 전에 협약을 비준한 국가가 네덜란드 외무부에서 그 가입을 통보한 날부터 6월 이내에 가입에 이의를 제기하지 아니한 경우에 발효한다.

그러한 이의제기가 없는 경우에는 이 협약은 가입국에 대하여 전단에 규정된 기간이 경과한 다음 달의 초일부터 발효한다.

제29조

모든 국가는 서명·비준 또는 가입시에 이 협약이 자국이 국제관계에 대하여 책임을 지는 모든 영역 또는 그 일부에 적용된다고 선언할 수 있다. 이러한 선언은 그 국가에 대하여 협약이 발효한 날부터 효력이 발생한다. 그 이후에 있어서는 그러한 적용의 확

장은 네덜란드 외무부에 이를 통지하여야 한다. 이 협약이 확장 적용되는 영역에 대하여 협약은 전단에 규정된 통지일부터 60일이 되는 날에 발효한다.

제30조

이 협약은 추후에 이를 비준 또는 가입한 국가에 대하여도 제27조제1단에 따라 협약이 발효한 날부터 5년간 유효하다. 협약은 어떠한 폐기통고도 없는 경우 5년마다 묵시적으로 갱신된다. 폐기통고는 적어도 5년의 기간이 경과하기 6월전까지 네덜란드 외무부에 통지되어야 한다. 폐기통고는 협약이 적용되는 특정한 영역에 대하여 국한될 수 있다.

폐기통고는 이를 통지받은 국가에 대하여서만 효력을 가진다. 협약은 다른 체약국에 대하여는 계속하여 유효하다.

제31조

네덜란드 외무부는 제26조에 규정된 국가 및 제28조에 따라 가입한 국가에 대하여 다음 각 호의 사항을 통지하여야 한다.

1. 제26조에 규정된 서명 및 비준
2. 제27조제1단에 따라 이 협약이 발효하는 날
3. 제28조에 규정된 가입 및 그 가입이 발효하는 날
4. 제29조에 규정된 확대적용 및 그것이 발효하는 날
5. 제21조에 규정된 지정행위·이의 및 선언
6. 제30조제3단에 규정된 폐기통고

이상의 증거로서 정당한 권한을 위임받은 하기 서명자는 이 협약에 서명하였다.

1965년 11월 15일 헤이그에서 동등하게 정본인 영어 및 불어로 본서 1통을 작성하였다. 본서는 네덜란드 정부보관소에 기탁하고 그 인증등본은 외교경로를 통하여 제10차 헤이그 국제사법회의에 대표를 파견한 각 국가에 송부된다.

협 약 부 속 서

양 식

민사 또는 상사의 재판상 및 재판외 문서의 해외송달 요청

1965년 11월 15일 헤이그에서 서명된
민사또는상사의재판상및재판외문서의해외송달에관한협약

신청인 성명 및 주소 수신당국 주소

아래 신청인은 다음의 문서 2부를 송부하며, 위의 협약 제5조에 따라 수신인에게 문서 1부의 신속한 송달을 요청하는 바입니다.

(수신인 성명 및 주소)

가)협약 제5조제1단제1문의 규정에 따름*

나)다음의 특정방식에 의함(제5조제1단제2문)* :

다)수신인이 이를 자발적으로 수취하는 경우, 수취인에게 배달(제5조제2단)*

신청인에게 뒷면의 증명서와 함께 문서의 사본을 반환하여 주시기 바랍니다.

문서목록

.....년월일, 에서

서명 (인)

*적절하지 아니한 경우에는 삭제합니다.

요청서 뒷면 증명서

아래 당국은 협약 제6조에 따라 다음 사항을 확인하는 바입니다.

1)문서가 다음과 같이 송달됨*

-일시

-장소

-제5조에 따라 허가된 다음의 방식중 하나에 의함 :

가)협약 제5조제1단제1문의 규정에 따름*

나)다음의 특정방식에 의함*

다)자발적으로 수취한 수신인에게 배달함*

요청서에 언급된 문서는 다음의 사람에게 배달됨 :

-(성명)

—수신인과의 관계(가족, 사업상 기타 관계)

.....

2)문서는 다음의 사유로 인하여 송달되지 못함* :

.....

협약 제12조제2단에 따라 신청인은 첨부된 진술서에 기재된 비용을 지불 또는 상환하여야 함*

부 록

반환된 문서

.....

적절한 경우, 송달을 증명하는 문서

.....

.....년월일, 에서

서명 (인)

*적절하지 아니한 경우에는 삭제합니다.

송 달 문 서 개 요

1965년 11월 15일 헤이그에서 서명된

민사또는상사의재판상및재판외문서의해외송달에관한협약

(제5조제4단)

요청당국의 성명 및주소.....

당사자의 명세*

재 판 상 문 서**

문서의 성질 및 목적 :

소송의 성질 및 목적, 그리고 적절한 경우 소송액 :

출정일시 및 장소** :

관할법원** :

재판일자** :

문서상의 기한** :

재판외서류**

문서의 성질 및 목적 :

문서상의 기한** :

* 적절한 경우에는, 문서전달 이해관계자의 성명 및 주소를 기재합니다.

** 적절하지 아니한 경우에는 삭제합니다.

선언내용

협약 제2조, 제6조에 따른 기관의 지정

1. 중앙당국(협약 제2조)

기관명 : 법원행정처(참조: 국제담당관)

주소 : 대한민국 서울특별시 서초구 서초동 967, 우편번호 137-750

전화 : 2 - 3480 - 1378

2. 송달증명서 작성권한 기관(협약 제6조)

중앙당국 이외에 송달을 실시할 지역을 관할하는 법원의 직원이 송달증명서를 작성할 수 있음

협약 제8조, 제10조 및 제15조제2단에 따른 선언

1. 협약 제8조에 따라 대한민국은 재판상 문서가 촉탁국의 국민에게 송달되는 경우를 제외하고, 대한민국 영역안에서 외교관 또는 영사를 통하여 직접 동 문서를 송달하는 데 반대한다.

2. 협약 제10조에 따라 대한민국은 다음 각목을 인정하지 아니한다.

가. 외국에 소재하는 자에게 재판상 문서를 우편으로 직접 송부할 권능

나. 촉탁국의 사법공무원, 관리 또는 기타 권한있는 자가 목적지국(目的地國)의 사법공무원, 관리 또는 기타 권한있는 자를 통하여 재판상 문서를 직접 송달할 권능

다. 재판절차의 모든 이해관계인이 목적지국의 사법공무원, 관리 또는 기타 권한있는 자를 통하여 재판상 문서를 직접 송달할 권능

3. 협약 제15조제2단에 따라 대한민국의 판사는 동조제1단의 규정에 불구하고 송달 또는 교부가 있었다는 증명을 접수하지 아니

하더라도 다음 각목의 제조건이 충족되는 경우에는 판결을 할 수 있다.

가.문서가 이 협약에 규정된 방식중 하나로 송부되었을 것

나.문서의 송부일부터 최소한 6월 이상으로서 구체적인 사안에 있어서 판사가 적절하다고 보는 기간이 경과하였을 것

다.피촉탁국의 권한있는 당국을 통하여 어떠한 종류의 증명을 취득하려고 상당한 노력을 하였음에도 불구하고 이를 얻지 못하였을 것

Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters

(Concluded November 15, 1965)

The States signatory to the present Convention,

Desiring to create appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time,

Desiring to improve the organisation of mutual judicial assistance for that purpose by simplifying and expediting the procedure,

Have resolved to conclude a Convention to this effect and have agreed upon the following provisions:

Article 1

The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad.

This Convention shall not apply where the address of the person to be served with the document is not known.

CHAPTER I JUDICIAL DOCUMENTS

Article 2

Each Contracting State shall designate a Central Authority which will undertake to receive requests for service coming from other Contracting States and to proceed in conformity with the provisions of Articles 3 to 6.

Each State shall organise the Central Authority in conformity with its own law.

Article 3

The authority or judicial officer competent under the law of the State in which the documents originate shall forward to the Central Authority of the State addressed a request conforming to the model annexed to the present Convention, without any requirement of legalisation or other equivalent formality.

The document to be served or a copy thereof shall be annexed to the request. The request and the document shall both

be furnished in duplicate.

Article 4

If the Central Authority considers that the request does not comply with the provisions of the present Convention it shall promptly inform the applicant and specify its objections to the request.

Article 5

The Central Authority of the State addressed shall itself serve the document or shall arrange to have it served by an appropriate agency, either ?

- a) by a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory, or
- b) by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed.

Subject to sub-paragraph (b) of the first paragraph of this Article, the document may always be served by delivery to an addressee who accepts it voluntarily. If the document is to be served under the first paragraph above, the Central Authority may require the document to be written in, or translated into, the official language or one of the official languages of the State addressed.

That part of the request, in the form attached to the present Convention, which contains a summary of the document to be served, shall be served with the document.

Article 6

The Central Authority of the State addressed or any authority which it may have designated for that purpose, shall complete a certificate in the form of the model annexed to the present Convention. The certificate shall state that the document has been served and shall include the method, the place and the date of service and the person to whom the document was delivered. If the document has not been served, the certificate shall set out the reasons which have prevented service. The applicant may require that a certificate not completed by a Central Authority or by a judicial authority shall be countersigned by one of these authorities. The certificate shall be forwarded directly to the applicant.

Article 7

The standard terms in the model annexed to the present Convention shall in all cases be written either in French or in English. They may also be written in the official language, or in one of the official languages, of the State in which the documents originate.

The corresponding blanks shall be completed either in the language of the State addressed or in French or in English.

Article 8

Each Contracting State shall be free to effect service of judicial documents upon persons abroad, without application of any compulsion, directly through its diplomatic or consular agents.

Any State may declare that it is opposed to such service within its territory, unless the document is to be served upon a national of the State in which the documents originate.

Article 9

Each Contracting State shall be free, in addition, to use consular channels to forward documents, for the purpose of service, to those authorities of another Contracting State which are designated by the latter for this purpose.

Each Contracting State may, if exceptional circumstances so require, use diplomatic channels for the same purpose.

Article 10

Provided the State of destination does not object, the present Convention shall not interfere with ?

- a) the freedom to send judicial documents, by postal channels, directly to persons abroad,
- b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,
- c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

Article 11

The present Convention shall not prevent two or more Contracting States from agreeing to permit, for the purpose of service of judicial documents, channels of transmission other than those provided for in the preceding Articles and, in particular, direct communication between their respective authorities.

Article 12

The service of judicial documents coming from a Contracting State shall not give rise to any payment or reimbursement of taxes or costs for the services rendered by the State addressed.

The applicant shall pay or reimburse the costs occasioned by-

- a) the employment of a judicial officer or of a person competent under the law of the State of destination,
- b) the use of a particular method of service.

Article 13

Where a request for service complies with the terms of the present Convention, the State addressed may refuse to comply therewith only if it deems that compliance would infringe its sovereignty or security.

It may not refuse to comply solely on the ground that, under its internal law, it claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not permit the action upon which the application is based.

The Central Authority shall, in case of refusal, promptly inform the applicant and state the reasons for the refusal.

Article 14

Difficulties which may arise in connection with the transmission of judicial documents for service shall be settled through diplomatic channels.

Article 15

Where a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and the defendant has not appeared, judgment shall not be given until it is established that

- a) the document was served by a method prescribed by the internal law of the State addressed for the service of documents in domestic actions upon persons who are within its territory, or
- b) the document was actually delivered to the defendant or to his residence by another method provided for by this Convention, and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend.

Each Contracting State shall be free to declare that the judge, notwithstanding the provisions of the first paragraph of this Article, may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled-

- a) the document was transmitted by one of the methods provided for in this Convention,
- b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document,
- c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed.

Notwithstanding the provisions of the preceding paragraphs the judge may order, in case of urgency, any provisional or protective measures.

Article 16

When a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and a judgment has been entered against a defendant who has not appeared, the judge shall have the power to relieve the defendant from the effects of the expiration of the time for appeal from the judgment if the following conditions are fulfilled ?

- a) the defendant, without any fault on his part, did not have knowledge of the document in sufficient time to defend, or knowledge of the judgment in sufficient time to appeal, and
- b) the defendant has disclosed a prima facie defence to the action on the merits. An application for relief may be filed only within a reasonable time after the defendant has knowledge of the judgment.

Each Contracting State may declare that the application will not be entertained if it is filed after the expiration of a time to be stated in the declaration, but which shall in no case be less than one year following the date of the judgment.

This Article shall not apply to judgments concerning status or capacity of persons.

CHAPTER II EXTRAJUDICIAL DOCUMENTS

Article 17

Extrajudicial documents emanating from authorities and judicial officers of a Contracting State may be transmitted for the purpose of service in another Contracting State by the methods and under the provisions of the present Convention.

CHAPTER III GENERAL CLAUSES

Article 18

Each Contracting State may designate other authorities in addition to the Central Authority and shall determine the extent of their competence.

The applicant shall, however, in all cases, have the right to address a request directly to the Central Authority.

Federal States shall be free to designate more than one Central Authority.

Article 19

To the extent that the internal law of a Contracting State permits methods of transmission, other than those provided for

in the preceding Articles, of documents coming from abroad, for service within its territory, the present Convention shall not affect such provisions.

Article 20

The present Convention shall not prevent an agreement between any two or more Contracting States to dispense with ?

- a) the necessity for duplicate copies of transmitted documents as required by the second paragraph of Article 3,
- b) the language requirements of the third paragraph of Article 5 and Article 7,
- c) the provisions of the fourth paragraph of Article 5,
- d) the provisions of the second paragraph of Article 12.

Article 21

Each Contracting State shall, at the time of the deposit of its instrument of ratification or accession, or at a later date, inform the Ministry of Foreign Affairs of the Netherlands of the following ?

- a) the designation of authorities, pursuant to Articles 2 and 18,
- b) the designation of the authority competent to complete the certificate pursuant to Article 6,
- c) the designation of the authority competent to receive documents transmitted by consular channels, pursuant to

Article 9.

Each Contracting State shall similarly inform the Ministry, where appropriate, of ?

- a) opposition to the use of methods of transmission pursuant to Articles 8 and 10,
- b) declarations pursuant to the second paragraph of Article 15 and the third paragraph of Article 16,
- c) all modifications of the above designations, oppositions and declarations.

Article 22

Where Parties to the present Convention are also Parties to one or both of the Conventions on civil procedure signed at The Hague on 17th July 1905, and on 1st March 1954, this Convention shall replace as between them Articles 1 to 7 of the earlier Conventions.

Article 23

The present Convention shall not affect the application of Article 23 of the Convention on civil procedure signed at The Hague on 17th July 1905, or of Article 24 of the Convention on civil procedure signed at The Hague on 1st March 1954.

These Articles shall, however, apply only if methods of communication, identical to those provided for in these Conventions, are used.

Article 24

Supplementary agreements between Parties to the Conventions of 1905 and 1954 shall be considered as equally applicable to the present Convention, unless the Parties have otherwise agreed.

Article 25

Without prejudice to the provisions of Articles 22 and 24, the present Convention shall not derogate from Conventions containing provisions on the matters governed by this Convention to which the Contracting States are, or shall become, Parties.

Article 26

The present Convention shall be open for signature by the States represented at the Tenth Session of the Hague Conference on Private International Law.

It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 27

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of Article 26.

The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

Article 28

Any State not represented at the Tenth Session of the Hague Conference on Private International Law may accede to the present Convention after it has entered into force in accordance with the first paragraph of Article 27. The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for such a State in the absence of any objection from a State, which has ratified the Convention before such deposit, notified to the Ministry of Foreign Affairs of the Netherlands within a period of six months after the date on which the said Ministry has notified it of such accession. In the absence of any such objection,

the Convention shall enter into force for the acceding State on the first day of the month following the expiration of the last of the periods referred to in the preceding paragraph.

Article 29

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for the territories mentioned in such an extension on the sixtieth day after the notification referred to in the preceding paragraph.

Article 30

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 27, even for States which have ratified it or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years. Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.

It may be limited to certain of the territories to which the Convention applies. The denunciation shall have effect only as regards the State which has notified it.

The Convention shall remain in force for the other Contracting States.

Article 31

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in Article 26, and to the States which have acceded in accordance with Article 28, of the following ?

- a) the signatures and ratifications referred to in Article 26;
- b) the date on which the present Convention enters into force in accordance with the first paragraph of Article 27;
- c) the accessions referred to in Article 28 and the dates on which they take effect;
- d) the extensions referred to in Article 29 and the dates on which they take effect;
- e) the designations, oppositions and declarations referred to in Article 21;
- f) the denunciations referred to in the third paragraph of Article 30.

In witness whereof the undersigned, being duly authorised thereto, have signed the present Convention.

Done at The Hague, on the 15th day of November, 1965, in the English and French languages, both texts being equally

authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States represented at the Tenth Session of the Hague Conference on Private International Law.

FORMS (REQUEST AND CERTIFICATE)
SUMMARY OF THE DOCUMENT TO BE SERVED

(annexes provided for Articles 3, 5, 6 and 7)

ANNEX TO THE CONVENTION

Forms

REQUEST
FOR SERVICE ABROAD OF JUDICIAL OR EXTRAJUDICIAL DOCUMENTS

.....

Convention on the Service Abroad of Judicial and Extrajudicial Documents in
Civil or Commercial Matters,
signed at The Hague, the 15th of November 1965.

Identity and address Address of receiving
of the applicant authority

The undersigned applicant has the honour to transmit - in duplicate - the documents
listed below and, in conformity with Article 5 of the above-mentioned Convention,
requests prompt service of one copy thereof on the addressee, i.e.,

(identity and address)

.....

- a) in accordance with the provisions of sub-paragraph (a) of the first paragraph of Article 5 of the Convention*.
- b) in accordance with the following particular method (sub-paragraph (b) of the first paragraph of Article 5)*:

.....

- c) by delivery to the addressee, if he accepts it voluntarily (second paragraph of Article

5)*.

The authority is requested to return or to have returned to the applicant a copy of the

documents - and of the annexes* - with a certificate as provided on the reverse side.

List of documents

.....

.....

.....

.....

.....

.....

.....

.....

Done at , the

Signature and/or stamp.

* Delete if inappropriate.

Reverse of the request

CERTIFICATE

.....

The undersigned authority has the honour to certify, in conformity with Article 6 of the Convention,

1) that the document has been served*

he (date)

at (place, street, number)

.....

- in one of the following methods authorised by Article 5:

a) in accordance with the provisions of sub-paragraph (a) of the first paragraph of Article 5 of the Convention*.

b) in accordance with the following particular method*:

.....

c) by delivery to the addressee, who accepted it voluntarily* .

The documents referred to in the request have been delivered to:

(identity and description of person)

.....

relationship to the addressee (family, business or other):

.....

.....

2) that the document has not been served, by reason of the following facts*:

.....

.....

.....

In conformity with the second paragraph of Article 12 of the Convention, the applicant is requested to pay or reimburse the expenses detailed in the attached statement*.

Annexes

Documents returned:

.....

.....

In appropriate cases, documents establishing the service:.....

.....

.....
.....

Done at , the

Signature and/or stamp.

* Delete if inappropriate.

SUMMARY OF THE DOCUMENT TO BE SERVED

.....

Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, signed at The Hague, the 15th of November 1965.

(Article 5, fourth paragraph)

Name and address of the requesting authority:.....

.....
.....

Particulars of the parties*:.....

.....
.....

JUDICIAL DOCUMENT**

Nature and purpose of the document:.....

.....
.....

Nature and purpose of the proceedings and, where appropriate, the amount in dispute:

.....

.....

Date and place for entering appearance**.....

.....

Court which has given judgment**.....

.....

Date of judgment**.....

Time-limits stated in the document**.....

.....

EXTRAJUDICIAL DOCUMENT**

Nature and purpose of the document:.....

.....

.....

Time-limits stated in the document**.....

.....

.....

* If appropriate, identity and address of the person interested in the transmission of the document.

** Delete if inappropriate.

Declarations

Designation pursuant to Articles 2 and 6

1. Central Authority(Article 2)

name : Ministry of Court Administration

Attention : Director of International Affairs

address : 967, Seocho-dong, Seocho-gu, Seoul 137-750, Republic of Korea

telephone : 2 - 3480 - 1378

2. Authority competent to complete the certificate of service(Article 6) In addition to the Central Authority, the clerk of the court for the judicial district in which the person is to be served.

Declaration pursuant to Article 8, Article 10, and Article 15, Paragraph 2

1. Pursuant to Article 8, the Republic of Korea objects to service of judicial documents directly through diplomatic or consular agents upon persons in its territory, unless the document is to be served upon a national of the State in which the documents originate.

2. Pursuant to Article 10, the Republic of Korea objects to the following.

- a) the freedom to send judicial documents, by postal channels, directly to persons abroad,
- b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officials or other competent persons of the State of destination,
- c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

3. Pursuant to Article 15, Paragraph 2, the judge of the Republic of Korea may give judgement even if no certificate of service or delivery has been received if all the following conditions are fulfilled.

- a) the document was transmitted by one of the methods provided for in this Convention,
- b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document,
- c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed.

민사 또는 상사의 해외증거조사에 관한 협약

이 협약의 서명국은,

촉탁서의 전달과 집행을 촉진시키고 서명국이 이러한 목적을 위하여 이용하는 다양한 방식의 조정을 진전시키기를 희망하고, 민사 또는 상사에 있어서 상호 간의 사법공조를 증진시킬 것을 희망하여, 이러한 취지로 협약을 체결하기로 결의하고, 다음의 규정에 합의하였다.

제1장 촉탁서

제1조

민사 또는 상사에 있어서 체약국의 사법 당국은 자국법의 규정에 따라서 다른 체약국의 권한 있는 당국에 촉탁서로써 증거취득 또는 그 밖의 사법적 처분의 이행을 요청할 수 있다.

촉탁서는 개시되었거나 또는 개시될 예정인 사법절차에서 사용할 의도가 없는 증거를 취득하는데 사용되지 아니한다.

“기타 사법적 처분”이라는 표현에는 재판상 서류의 송달, 판결이나 명령을 집행하기 위한 집행영장의 발부, 임시조치 또는 보호조치 명령은 포함되지 아니한다.

제2조

체약국은 다른 체약국의 사법 당국으로부터 촉탁서를 수령하고, 이를 집행 권한 있는 당국에 전달할 업무를 맡는 중앙당국을 지정한다. 각국은 자국법에 따라서 중앙당국을 조직한다.

촉탁서는 집행국의 기타 당국을 경유함이 없이 집행국의 중앙당국으로 송부된다.

제3조

촉탁서에는 다음의 사항을 명시한다.

1. 촉탁 당국 및 촉탁 당국이 알고 있는 경우, 이를 집행할 수탁 당국
2. 소송당사자의 성명 및 주소, 그리고 대리인이 있는 경우, 대리인의 성명 및 주소
3. 증거가 요청되는 소송절차의 성격 및 이에 관한 모든 필요한 정보의 제공
4. 취득할 증거 또는 이행할 그 밖의 사법적 처분. 적절한 경우, 촉탁서에는 특히 다음의 사항을 명시한다.

5.신문받을 자의 성명 및 주소

6.신문받을 자에게 할 질문 또는 신문이 이루어질 소송물에 관한 설명

7.검사될 서류, 그 밖의 부동산 또는 동산

8.증거가 선서 또는 서약에 의하여 제출되어야 하는 요건 및 사용될 특별한 형식

9.제9조에 따라 준수되는 특별한 방식 또는 절차

촉탁서에는 또한 제11조의 적용을 위하여 필요한 정보를 기재할 수 있다. 인증 또는 그 밖에 이와 유사한 절차는 요구되지 아니한다.

제4조

촉탁서는 이를 집행할 수탁 당국의 언어로 작성하거나 그 언어로 된 번역문을 첨부한다.

그럼에도 불구하고 체약국은 제33조에 의하여 인정되는 유보를 하지 아니하는 한, 영어나 불어로 작성된 촉탁서 또는 영어나 불어로 번역된 촉탁서를 접수하여야 한다.

공용어가 두 가지 이상이고 국내법상의 이유로 한 가지 공용어로 된 촉탁서를 자국의 전 영역에서 접수할 수 없는 체약국은, 선언으로써 자국의 특정 영역에서의 집행을 위하여 촉탁서 또는 그 번역문에 사용할 언어를 지정한다. 정당한 사유 없이 이 선언에 따르지 아니하는 경우 요청되는 언어로 번역하는 비용은 촉탁국이 부담한다.

체약국은 선언으로써 앞에서 언급한 언어 이외의 언어를 지정할 수 있으며, 이 경우 그 언어로 작성된 촉탁서는 그 체약국의 중앙당국에 송부될 수 있다.

촉탁서에 첨부되는 모든 번역문은 외교관이나 영사관원, 선서한 번역자 또는 각국에서 그러한 권한이 부여된 자에 의하여 정확하다고 확인되어야 한다.

제5조

중앙당국은 촉탁이 이 협약의 규정에 부합하지 아니한다고 판단하는 경우 촉탁서에 대한 이의를 명시하여 이를 송부한 촉탁국의 당국에 신속하게 통지한다.

제6조

촉탁서를 송부받은 당국에 이를 집행할 권한이 없는 경우, 촉탁서는 자국법 규정에 따라 이를 집행할 권한이 있는 자국 내 당국에 지체 없이 송부되어야 한다.

제7조

촉탁 당국이 희망하는 경우에는, 관계 당사자, 그리고 대리인이 있다면 대리인이 출석할 수 있도록, 촉탁 당국에 소송절차가 진행될 일시 및 장소를 통지한다. 촉탁국의 당국이 요청하는 경우, 이 통지는 당사자나 그들의 대리인에게 직접 송부되어야 한다.

제8조

체약국은 다른 체약국의 촉탁 당국의 법관이 촉탁서의 집행 시에 출석할 수 있다고 선언할 수 있다. 이 경우 그 선언국이 지정하는 권한 있는 당국에 의한 사전 승인이 요구될 수 있다.

제9조

촉탁서를 집행하는 사법당국은 준수할 방식 및 절차와 관련하여 자국법을 적용한다.

그러나, 사법당국은 그것이 집행국의 국내법에 저촉되거나 국내의 관행·절차 또는 현실적인 어려움 때문에 이행될 수 없는 경우가 아닌 한, 특별한 방식 또는 절차를 준수해 달라는 촉탁 당국의 요청에 따른다.

촉탁서는 신속하게 집행되어야 한다.

제10조

촉탁서를 집행함에 있어서 수탁 당국은 적절한 강제력을 사용하며, 그러한 강제력은 자국 당국이 발한 명령 또는 국내소송절차에서 당사자가 행한 신청을 집행함에 있어 국내법이 정하는 정도에 상응하여야 한다.

제11조

촉탁서를 집행함에 있어 관계자는 다음과 같은 경우 증거제출을 거부할 수 있다.

1. 집행국의 법에 의하여 증거제출을 거부할 특권이나 의무가 있는 경우, 또는
2. 촉탁국의 법에 의하여 증거제출을 거부할 특권이나 의무가 있고, 그 특권이나 의무가 촉탁서에 명시되거나 수탁당국의 발의에 따라 촉탁 당국이 그 특권이나 의무를 다른 방법으로 수탁 당국에 확인하여 준 경우

체약국은, 그 밖에, 선언에서 명시한 범위에서 촉탁국 및 집행국 외의 국가들의 법에 의한 특권 및 의무를 존중할 것이라는 선언을 할 수 있다.

제12조

다음의 경우에 한하여 촉탁서의 집행을 거부할 수 있다.

1.집행국에 있어서 촉탁서의 집행이 사법부의 직무범위 안에 속하지 아니하는 경우, 또는

2.수신국이 자국의 주권 또는 안보가 이를 집행함으로써 침해될 것이라고 판단하는 경우

집행국이 국내법상 소송물에 대하여 전속관할권을 가지고 있다고 주장하거나 집행국의 국내법이 그 사안에 대하여 소송을 허용하지 아니한다는 이유만으로 집행을 거부할 수 없다.

제13조

촉탁서의 집행을 입증하는 서류는 촉탁 당국이 이용한 것과 동일한 경로를 통하여 수탁 당국이 촉탁 당국에 송부한다.

촉탁서의 전부 또는 일부가 집행되지 아니한 경우에는 촉탁 당국에 동일한 경로를 통하여 그 사유를 즉시 통지한다.

제14조

촉탁서의 집행으로 인하여 발생한 어떠한 성격의 세금이나 비용도 상환의 대상이 되지 아니한다.

그럼에도 불구하고 집행국은 촉탁국에 대하여 전문가 및 통역인에게 지불한 보수, 그리고 제9조제2문에 의하여 촉탁국이 요청한 특별한 절차를 사용함으로써 발생한 비용의 상환을 청구할 권리를 갖는다.

수탁국의 법이 당사자에게 스스로 증거를 확보할 의무를 부과하고 있고, 수탁 당국이 독자적으로 촉탁서를 집행할 수 없는 경우, 수탁 당국은 촉탁 당국의 동의를 얻은 후에 이를 집행할 적당한 자를 선임할 수 있다. 이러한 동의를 구할 때 수탁 당국은 이러한 절차에서 발생하게 될 대략의 비용을 적시한다. 촉탁 당국이 동의를 하는 경우 촉탁 당국은 발생한 어떠한 비용도 상환하여야 하나 그러한 동의가 없는 경우에는 촉탁 당국은 그 비용에 대하여 책임을 지지 아니한다.

제2장

외교관, 영사관원 및 수임인에 의한 증거조사

제15조

민사 또는 상사에 있어서 체약국의 외교관이나 영사관원은 그가 대표하는 국가의 법원에서 개시된 소송절차를 돕기 위하여 다른 체약국의 영역 안에서, 그리고 자신의 직무수행 지역 안에서 그가 대표하는 국가의 국민에 대하여 강제력 없이 증거조사를 할 수 있다.

체약국은 자신이 지정한 적절한 당국에 외교관이나 영사관원, 또는 그를 대신한 자가 신청을 하여 허가를 얻은 경우에 한하여 외교관이나 영사관원에 의한 증거조사가 가능하다고 선언할 수 있다.

제16조

체약국의 외교관이나 영사관원은 다음의 조건이 갖추어진 경우에 그가 대표하는 국가의 법원에서 개시된 소송절차를 돕기 위하

여 다른 체약국의 영역 안에서, 그리고 자신의 직무수행 지역 안에서 자신이 직무를 수행하는 국가의 국민 또는 제3국 국민에 대하여 강제력 없이 증거조사를 할 수 있다.

1. 그가 직무를 수행하는 국가에서 지정한 권한 있는 당국이 일반적으로 또는 특정 사안에 대하여 이를 허가하였을 것, 그리고

2. 권한 있는 당국이 그 허가에서 명시한 조건을 준수할 것

체약국은 자신의 사전허가 없이 이 조에 의한 증거조사를 할 수 있다고 선언할 수 있다.

제17조

민사 또는 상사에 있어서 그 목적을 위하여 수임인으로 정당하게 선임된 자는 다음의 조건이 갖추어진 경우에 다른 체약국의 법원에서 개시된 소송절차를 돕기 위하여 한쪽 체약국의 영역 안에서 강제력 없이 증거조사를 할 수 있다.

1. 증거조사가 실시될 국가에서 지정한 권한 있는 당국이 일반적으로 또는 특정 사안에 대하여 이를 허가하였을 것, 그리고

2. 권한 있는 당국이 그 허가에서 명시한 조건을 준수할 것

체약국은 자신의 사전허가 없이 이 조에 의한 증거조사를 할 수 있다고 선언할 수 있다.

제18조

체약국은 제15조, 제16조 또는 제17조에 의하여 증거조사의 권한이 부여된 외교관, 영사관원 또는 수임인이 강제력에 의하여 증거를 취득하기 위하여 그 선언국이 지정한 권한 있는 당국에 적절한 원조를 신청할 수 있다고 선언할 수 있다. 선언국은 부과하기에 적절하다고 판단하는 조건을 선언에 포함시킬 수 있다.

권한 있는 당국이 신청을 허가하는 경우 그 당국은 적절한, 그리고 자국법에 의하여 국내소송절차에서 사용하도록 규정된 모든 강제력을 사용한다.

제19조

제15조, 제16조 또는 제17조에 언급된 허가를 함에 있어서, 또는 제18조에 언급된 신청을 허가함에 있어서, 권한 있는 당국은 적절하다고 판단하는 조건, 특히 증거조사 실시의 시간 및 장소에 관한 조건을 정할 수 있다. 마찬가지로 권한 있는 당국은 증거조사 실시의 시간, 일자 및 장소에 관하여 합리적인 기간을 두고 사전에 통보할 것을 요청할 수 있다. 그러한 경우 그 당국의 대표는 증거조사 실시에 출석할 권한이 있다.

제20조

이 장의 어떠한 조문에 의한 증거조사에 있어서도 관계자는 법적으로 대리될 수 있다.

제21조

외교관, 영사관원 또는 수임인이 제15조, 제16조 또는 제17조에 의하여 증거조사실시의 권한이 부여된 경우,

1. 그는 증거조사가 실시되는 국가의 법에 저촉되지 아니하고 위 각 조문에 따라 부여된 허가에 위반되지 아니하는 모든 종류의 증거를 조사할 수 있으며, 그러한 한도 내에서 선서를 시키거나 서약을 받을 권한이 있다.
2. 어떠한 자에 대한 출석 또는 증거제출촉탁서는, 그 수취인이 소송이 계속 중인 국가의 국민이 아닌 한, 증거조사가 실시되는 지역의 언어로 작성하거나 또는 그러한 언어로 된 번역문을 첨부한다.
3. 촉탁서에서는 그가 법적으로 대리될 수 있다는 것을 통지하며, 제18조에 의한 선언을 하지 아니한 국가에 있어서는 출석 또는 증거제출이 강제되지 아니한다는 것도 통지한다.
4. 소송이 계속 중인 법원의 준거법에서 규정한 방식이 증거조사가 실시되는 국가의 법에 의하여 금지되지 아니하는 경우 그러한 방식으로 증거조사를 할 수 있다.
5. 증거제출을 요구받은 자는 제11조에 포함된 증거제출을 거부할 특권 및 의무를 원용할 수 있다.

제22조

이 장에 규정된 절차에 따른 증거조사의 시도가 증거제출자의 거부로 인하여 실패하였다는 사실은 이후 제1장에 따른 증거조사의 신청을 하는데 장애가 되지 아니한다.

제3장 일반규정

제23조

체약국은 서명, 비준 또는 가입시에 보통법 국가에서 통용되는 기일 전 서류개시절차의 목적으로 작성된 촉탁서를 집행하지 아니할 것임을 선언할 수 있다.

제24조

체약국은 중앙당국 외에 기타 당국을 지정할 수 있으며, 기타 당국에 대해서는 그 권한 범위를 정한다. 그러나 촉탁서는 모든 경우에 중앙당국으로 송부될 수 있다.

연방국가는 둘 이상의 중앙당국을 지정할 수 있다.

제25조

둘 이상의 법체계를 가지고 있는 체약국은 그러한 법체계 중 하나의 당국을 지정할 수 있으며, 그 당국은 이 협약에 따라 촉탁서를 집행할 배타적 권한을 갖는다.

제26조

체약국은 헌법상의 제약으로 인하여 요구되는 경우 촉탁서의 집행과 관련하여 증거제출자의 출석을 강제하는데 필요한 영장송달의 수수료 및 비용, 그러한 자의 출석비용 및 증거의 사본비용의 상환을 촉탁국에 청구할 수 있다.

어느 국가가 제1문에 따라 청구를 한 경우 다른 체약국은 그 국가에 유사한 수수료 및 비용의 상환을 청구할 수 있다.

제27조

이 협약의 규정은 체약국의 다음 행위를 방해하지 아니한다.

- 1.촉탁서가 제2조에 규정된 경로 이외의 경로를 통하여 자국의 사법 당국에 전달될 수 있다고 선언하는 것
- 2.국내법이나 관행에 의하여 이 협약에서 규정하는 행위가 보다 완화된 조건으로 이행되도록 허용하는 것
- 3.국내법이나 관행에 의하여 이 협약에서 규정하는 방식 이외의 증거조사 방식을 허용하는 것

제28조

이 협약은 둘 이상의 체약국간의 협정으로 다음 각 호를 폐지하는 것을 막지 아니한다.

- 1.촉탁서의 전달 방식에 관한 제2조의 규정
- 2.사용될 언어에 관한 제4조의 규정
- 3.촉탁서의 집행 시 법관의 출석에 관한 제8조의 규정
- 4.증거제출을 거부할 증인의 특권 및 의무에 관한 제11조의 규정
- 5.집행된 촉탁서의 촉탁 당국으로의 회송 방식에 관한 제13조의 규정
- 6.보수 및 비용에 관한 제14조의 규정
- 7.제2장의 규정

제29조

1905년 7월 17일과 1954년 3월 1일 헤이그에서 서명된 민사절차에 관한 협약들 중 어느 하나 또는 양자의 당사국이기도 한 이 협약의 당사국들 간에 있어서 이 협약은 상기협약들의 제8조부터 제16조까지를 대체한다.

제30조

이 협약은 1905년 협약 제23조 또는 1954년 협약 제24조의 적용에 영향을 미치지 아니한다.

제31조

1905년 협약 및 1954년 협약의 당사국들 간의 보조협정들은 당사국들이 달리 합의하지 아니하는 한, 이 협약에도 동등하게 적용되는 것으로 본다.

제32조

제29조 및 제31조의 규정을 저해함이 없이, 이 협약의 체약국이 당사자이거나 당사자가 될 협약들이 이 협약의 규율사항에 관한 규정을 포함하는 경우, 이 협약은 그 협약들을 폐지하지 아니한다.

제33조

어느 국가든지 서명, 비준 또는 가입시에 제4조제2문과 제2장의 규정의 적용을 전부 또는 일부 배제할 수 있다. 이 이외의 어떠한 유보도 허용되지 아니한다.

각 체약국은 언제든지 자국이 한 유보를 철회할 수 있으며, 그 유보는 철회의 통지일부터 60일이 되는 날에 효력을 상실한다.

어느 국가가 유보를 한 경우 이에 의하여 영향을 받는 다른 국가는 유보국에 대하여 동일한 원칙을 적용할 수 있다.

제34조

어느 국가든지 시기에 관계없이 선언을 철회 또는 수정할 수 있다.

제35조

체약국은 비준서 또는 가입서의 기탁시, 또는 그 이후에 네덜란드 외무부에 제2조, 제8조, 제24조 및 제25조에 따른 당국의 지정을 통지한다.

또한 적절한 경우, 체약국은 네덜란드 외무부에 다음의 사항을 통지한다.

1. 제15조, 제16조 및 제18조에 따라 외교관 및 영사관원에 의한 증거조사에 있어 각각 통지를 수령하고, 필요한 허가를 내주며, 요청되는 원조를 제공할 당국의 지정
2. 제17조에 따라 수임인에 의한 증거조사에 있어 필요한 허가를 내줄 당국 및 제18조에 규정된 원조를 제공할 당국의 지정
3. 제4조, 제8조, 제11조, 제15조, 제16조, 제17조, 제18조, 제23조 및 제27조에 따른 선언
4. 위 지정 및 선언의 철회 또는 수정
5. 유보의 철회

제36조

이 협약의 운용과 관련하여 체약국간에 발생할 수 있는 어떠한 분쟁도 외교 경로를 통하여 해결한다.

제37조

이 협약은 헤이그 국제사법회의의 제11차 회기에 대표를 파견한 국가들의 서명을 위하여 개방된다.
이 협약은 비준되어야 하며, 비준서는 네덜란드 외무부에 기탁한다.

제38조

이 협약은 제37조제2문에 규정된 세 번째 비준서가 기탁된 날부터 60일이 되는 날에 발효한다.

이 협약은 추후에 비준한 각 서명국에 대하여는 그 비준서가 기탁된 날부터 60일이 되는 날에 발효한다.

제39조

헤이그 국제사법회의의 회원국이거나 유엔 또는 유엔의 전문기구의 회원국이거나 국제사법재판소 규정의 당사국으로서 헤이그 국제사법회의의 제11차 회기에 대표를 파견하지 아니한 국가는 제38조제1문에 따라 이 협약이 발효한 후에 이 협약에 가입할 수 있다.

가입서는 네덜란드 외무부에 기탁한다.

이 협약은 가입국에 대하여는 그 가입서가 기탁된 날부터 60일이 되는 날에 발효한다.

가입은 가입국과 그 가입을 수락하는 선언을 한 체약국간의 관계에 한해서만 효력이 있다. 그러한 선언은 네덜란드 외무부에 기탁한다. 네덜란드 외무부는 외교경로를 통하여 각 체약국에 인증등본을 송부한다.

이 협약은 가입국과 그 가입을 수락하는 선언을 한 국가 간에 있어서는 수락선언서가 기탁된 날부터 60일이 되는 날에 발효한다.

제40조

모든 국가는 서명, 비준 또는 가입 시에 자국이 그 국제관계에 대하여 책임을 지는 모든 영역 또는 그 일부에 이 협약을 확장 적용한다고 선언할 수 있다. 그러한 선언은 그 국가에 대하여 협약이 발효한 날부터 효력이 있다.

그 이후에 있어서는 그러한 적용의 확장은 네덜란드 외무부에 이를 통지하여야 한다.

이 협약이 확장 적용되는 영역에 대하여 협약은 전단에 규정된 통지일부터 60일이 되는 날에 발효한다.

제41조

이 협약은 추후에 이를 비준 또는 가입한 국가에 대하여도 제38조제1문에 따라 협약이 발효한 날부터 5년간 유효하다.

협약은 어떠한 폐기통고도 없는 경우 5년마다 묵시적으로 갱신된다.

폐기통고는 적어도 5년의 기간이 경과하기 6개월 전까지 네덜란드 외무부에 통지되어야 한다.

폐기통고는 협약이 적용되는 특정한 영역에 국한될 수 있다.

폐기통고는 이를 통지한 국가에 대하여서만 효력을 가진다. 협약은 다른 체약국에 대하여는 계속하여 유효하다.

제42조

네덜란드 외무부는 제37조에 규정된 국가 및 제39조에 따라 가입한 국가에 대하여 다음 각 호의 사항을 통지한다.

1. 제37조에 규정된 서명 및 비준
2. 제38조제1문에 따라 이 협약이 발효하는 일자
3. 제39조에 규정된 가입 및 그 발효 일자
4. 제40조에 규정된 확장 적용 및 그 발효 일자
5. 제33조 및 제35조에 규정된 지정, 유보 및 선언
6. 제41조제3문에 규정된 폐기통고

이상의 증거로서, 정당한 권한을 위임받은 하기 서명자는 이 협약에 서명하였다.

1970년 3월 18일 헤이그에서 동등하게 정본인 영어 및 불어로 본서 1통을 작성하였다. 본서는 네덜란드 정부보관소에 기탁하고 그 인증등본은 외교 경로를 통하여 헤이그 국제사법회의의 제11차 회기에 대표를 파견한 각 국에 송부한다.

유보 및 선언사항

〈유보사항〉

1. 제4조 제2항 및 제33조에 따라, 대한민국은 한국어 또는 영어 촉탁서 만을 접수한다. 한국어 번역문이 첨부되지 않은 촉탁서의 집행은 지체될 수 있다. 또한 상기 지정한 언어 이외의 언어로 된 촉탁서 만을 접수하는 국가에 대하여서는 한국어 촉탁서 만을 접수한다.

2. 제33조에 따라, 대한민국은 그 영토 내에서 이 협약 제2장 제16조 및 제17조를 적용하지 아니한다.

〈선언사항〉

1. 제8조에 따라, 대한민국 정부는 다른 체약국의 촉탁 당국의 법관 및 법원 직원이 대한민국의 권한 있는 당국의 사전승인을 받아 촉탁서의 집행 시에 출석할 수 있음을 선언한다. 이 조항과 관련하여 권한 있는 당국은 법원행정처이다.

2. 제23조에 따라, 대한민국 정부는 기일 전 서류개시절차의 목적으로 작성된 촉탁서를 집행하지 않을 것임을 선언한다. 나아가 대한민국 정부는 위에서 한 선언과 관련하여 “기일 전 서류개시절차의 목적으로 작성된 촉탁서”란 어떤 사람에게 다음의 사항을 요청하는 촉탁서를 포함하는 것으로 이해한다고 선언한다.

가. 촉탁서에서 언급된 소송과 관련된 어떠한 서류가 그의 점유, 보관 또는 권한 하에 있는지 또는 있었는지에 대한 진술

나. 촉탁서에 명시된 특정한 서류 이외의 서류로써 촉탁을 받은 법원이 판단하기에 그의 점유, 보관 또는 권한 하에 있거나 또는 있는 것으로 보이는 서류의 제출

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CONVENTION ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS

The States signatory to the present Convention,

Desiring to facilitate the transmission and execution of Letters of Request and to further the accommodation of the different methods which they use for this purpose,

Desiring to improve mutual judicial co-operation in civil or commercial matters,

Have resolved to conclude a Convention to this effect and have agreed upon the following provisions:

CHAPTER I LETTERS OF REQUEST

Article 1

In civil or commercial matters a judicial authority of a Contracting State may, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act.

A Letter shall not be used to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated.

The expression "other judicial act" does not cover the service of judicial documents or the issuance of any process by which judgments or orders are executed or enforced, or orders for provisional or protective measures.

Article 2

A Contracting State shall designate a Central Authority which will undertake to receive Letters of Request coming from a judicial authority of another Contracting State and to transmit them to the authority competent to execute them. Each State shall organize the Central Authority in accordance with its own law.

Letters shall be sent to the Central Authority of the State of execution without being transmitted through any other authority of that State.

Article 3

A Letter of Request shall specify

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- a) the authority requesting its execution and the authority requested to execute it, if known to the requesting authority;
 - b) the names and addresses of the parties to the proceedings and their representatives, if any;
 - c) the nature of the proceedings for which the evidence is required, giving all necessary information in regard thereto;
 - d) the evidence to be obtained or other judicial act to be performed. Where appropriate, the Letter shall specify, *inter alia*;
 - e) the names and addresses of the persons to be examined;
 - f) the questions to be put to the persons to be examined or a statement of the subject-matter about which they are to be examined;
 - g) the documents or other property, real or personal, to be inspected;
 - h) any requirement that the evidence is to be given on oath or affirmation, and any special form to be used;
 - i) any special method or procedure to be followed under Article 9. A Letter may also mention any information necessary for the application of Article 11. No legalization or other like formality may be required.

Article 4

A Letter of Request shall be in the language of the authority requested to execute it or be accompanied by a translation into that language.

Nevertheless, a Contracting State shall accept a Letter in either English or French, or a translation into one of these languages, unless it has made the reservation authorized by Article 33.

A Contracting State which has more than one official language and cannot, for reasons of internal law, accept Letters in one of these languages for the whole of its territory, shall, by declaration, specify the language in which the Letter or translation thereof shall be expressed for execution in the specified parts of its territory. In case of failure to comply with this declaration, without justifiable excuse, the costs of translation into the required language shall be borne by the State of origin.

A Contracting State may, by declaration, specify the language or languages other than those referred to in the preceding paragraphs, in which a Letter may be sent to its Central Authority.

Any translation accompanying a Letter shall be certified as correct, either by a diplomatic officer or consular agent or by a sworn translator or by any other person so authorized in either State.

Article 5

If the Central Authority considers that the request does not comply with the provisions of the present Convention, it shall promptly inform the authority of the State of origin which transmitted the Letter of Request, specifying the objections to the Letter.

Article 6

If the authority to whom a Letter of Request has been transmitted is not competent to execute it, the Letter shall be sent

forthwith to the authority in the same State which is competent to execute it in accordance with the provisions of its own law.

Article 7

The requesting authority shall, if it so desires, be informed of the time when, and the place where, the proceedings will take place, in order that the parties concerned, and their representatives, if any, may be present. This information shall be sent directly to the parties or their representatives when the authority of the State of origin so requests.

Article 8

A Contracting State may declare that members of the judicial personnel of the requesting authority of another Contracting State may be present at the execution of a Letter of Request. Prior authorization by the competent authority designated by the declaring State may be required.

Article 9

The judicial authority which executes a Letter of Request shall apply its own law as to the methods and procedures to be followed.

However, it will follow a request of the requesting authority that a special method or procedure be followed, unless this is incompatible with the internal law of the State of execution or is impossible of performance by reason of its internal practice and procedure or by reason of practical difficulties.

A Letter of Request shall be executed expeditiously.

Article 10

In executing a Letter of Request the requested authority shall apply the appropriate measures of compulsion in the instances and to the same extent as are provided by its internal law for the execution of orders issued by the authorities of its own country or of requests made by parties in internal proceedings.

Article 11

In the execution of a Letter of Request the person concerned may refuse to give evidence in so far as he has a privilege or duty to refuse to give the evidence:

- a) under the law of the State of execution; or
- b) under the law of the State of origin, and the privilege or duty has been specified in the Letter, or, at the instance of the

requested authority, has been otherwise confirmed to that authority by the requesting authority.

A Contracting State may declare that, in addition, it will respect privileges and duties existing under the law of States other than the State of origin and the State of execution, to the extent specified in that declaration.

Article 12

The execution of a Letter of Request may be refused only to the extent that:

- a) in the State of execution the execution of the Letter does not fall within the functions of the judiciary; or
- b) the State addressed considers that its sovereignty or security would be prejudiced thereby.

Execution may not be refused solely on the ground that under its internal law the State of execution claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not admit a right of action on it.

Article 13

The documents establishing the execution of the Letter of Request shall be sent by the requested authority to the requesting authority by the same channel which was used by the latter.

In every instance where the Letter is not executed in whole or in part, the requesting authority shall be informed immediately through the same channel and advised of the reasons.

Article 14

The execution of the Letter of Request shall not give rise to any reimbursement of taxes or costs of any nature.

Nevertheless, the State of execution has the right to require the State of origin to reimburse the fees paid to experts and interpreters and the costs occasioned by the use of a special procedure requested by the State of origin under Article 9, paragraph 2.

The requested authority whose law obliges the parties themselves to secure evidence, and which is not able itself to execute the Letter, may, after having obtained the consent of the requesting authority, appoint a suitable person to do so. When seeking this consent the requested authority shall indicate the approximate costs which would result from this procedure. If the requesting authority gives its consent it shall reimburse any costs incurred; without such consent the requesting authority shall not be liable for the costs.

CHAPTER II

TAKING OF EVIDENCE BY DIPLOMATIC OFFICERS, CONSULAR AGENTS AND COMMISSIONERS

Article 15

In civil or commercial matters, a diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, take the evidence without compulsion of nationals of a State which he represents in aid of proceedings commenced in the courts of a State which he represents.

A Contracting State may declare that evidence may be taken by a diplomatic officer or consular agent only if permission to that effect is given upon application made by him or on his behalf to the appropriate authority designated by the declaring State.

Article 16

A diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, also take the evidence, without compulsion, of nationals of the State in which he exercises his functions or of a third State, in aid of proceedings commenced in the courts of a State which he represents, if:

- a) a competent authority designated by the State in which he exercises his functions has given its permission either generally or in the particular case, and
- b) he complies with the conditions which the competent authority has specified in the permission.

A Contracting State may declare that evidence may be taken under this Article without its prior permission.

Article 17

In civil or commercial matters, a person duly appointed as a commissioner for the purpose may, without compulsion, take evidence in the territory of a Contracting State in aid of proceedings commenced in the courts of another Contracting State, if:

- a) a competent authority designated by the State where the evidence is to be taken has given its permission either generally or in the particular case; and
- b) he complies with the conditions which the competent authority has specified in the permission.

A Contracting State may declare that evidence may be taken under this Article without its prior permission.

Article 18

A Contracting State may declare that a diplomatic officer, consular agent or commissioner authorized to take evidence under Articles 15, 16 or 17, may apply to the competent authority designated by the declaring State for appropriate assistance to obtain the evidence by compulsion. The declaration may contain such conditions as the declaring State may see fit to impose.

If the authority grants the application it shall apply any measures of compulsion which are appropriate and are prescribed by its law for use in internal proceedings.

Article 19

The competent authority, in giving the permission referred to in Articles 15, 16 or 17, or in granting the application referred to in Article 18, may lay down such conditions as it deems fit, *inter alia*, as to the time and place of the taking of the evidence. Similarly it may require that it be given reasonable advance notice of the time, date and place of the taking of the evidence; in such a case a representative of the authority shall be entitled to be present at the taking of the evidence.

Article 20

In the taking of evidence under any Article of this Chapter persons concerned may be legally represented.

Article 21

Where a diplomatic officer, consular agent or commissioner is authorized under Articles 15, 16 or 17 to take evidence:

- a) he may take all kinds of evidence which are not incompatible with the law of the State where the evidence is taken or contrary to any permission granted pursuant to the above Articles, and shall have power within such limits to administer an oath or take an affirmation;
- b) a request to a person to appear or to give evidence shall, unless the recipient is a national of the State where the action is pending, be drawn up in the language of the place where the evidence is taken or be accompanied by a translation into such language;
- c) the request shall inform the person that he may be legally represented and, in any State that has not filed a declaration under Article 18, shall also inform him that he is not compelled to appear or to give evidence;
- d) the evidence may be taken in the manner provided by the law applicable to the court in which the action is pending provided that such manner is not forbidden by the law of the State where the evidence is taken;
- e) a person requested to give evidence may invoke the privileges and duties to refuse to give the evidence contained in Article 11.

Article 22

The fact that an attempt to take evidence under the procedure laid down in this Chapter has failed, owing to the refusal of a person to give evidence, shall not prevent an application being subsequently made to take the evidence in accordance with Chapter I.

CHAPTER III GENERAL CLAUSES

Article 23

A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.

Article 24

A Contracting State may designate other authorities in addition to the Central Authority and shall determine the extent of their competence. However, Letters of Request may in all cases be sent to the Central Authority.

Federal States shall be free to designate more than one Central Authority.

Article 25

A Contracting State which has more than one legal system may designate the authorities of one of such systems, which shall have exclusive competence to execute Letters of Request pursuant to this Convention.

Article 26

A Contracting State, if required to do so because of constitutional limitations, may request the reimbursement by the State of origin of fees and costs, in connection with the execution of Letters of Request, for the service of process necessary to compel the appearance of a person to give evidence, the costs of attendance of such persons, and the cost of any transcript of the evidence.

Where a State has made a request pursuant to the above paragraph, any other Contracting State may request from that State the reimbursement of similar fees and costs.

Article 27

The provisions of the present Convention shall not prevent a Contracting State from:

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- a) declaring that Letters of Request may be transmitted to its judicial authorities through channels other than those provided for in Article 2;
 - b) permitting, by internal law or practice, any act provided for in this Convention to be performed upon less restrictive conditions;
 - c) permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention.

Article 28

The present Convention shall not prevent an agreement between any two or more Contracting States to derogate from:

- a) the provisions of Article 2 with respect to methods of transmitting Letters of Request;
- b) the provisions of Article 4 with respect to the languages which may be used;
- c) the provisions of Article 8 with respect to the presence of judicial personnel at the execution of Letters;
- d) the provisions of Article 11 with respect to the privileges and duties of witnesses to refuse to give evidence;
- e) the provisions of Article 13 with respect to the methods of returning executed Letters to the requesting authority;
- f) the provisions of Article 14 with respect to fees and costs;
- g) the provisions of Chapter II.

Article 29

Between Parties to the present Convention who are also Parties to one or both of the Conventions on Civil Procedure signed at The Hague on the 17th of July 1905 and the 1st of March 1954, this Convention shall replace Articles 8-16 of the earlier Conventions.

Article 30

The present Convention shall not affect the application of Article 23 of the Convention of 1905, or of Article 24 of the Convention of 1954.

Article 31

Supplementary Agreements between Parties to the Conventions of 1905 and 1954 shall be considered as equally applicable to the present Convention unless the Parties have otherwise agreed.

Article 32

Without prejudice to the provisions of Articles 29 and 31, the present Convention shall not derogate from conventions containing provisions on the matters covered by this Convention to which the Contracting States are, or shall become Parties.

Article 33

A State may, at the time of signature, ratification or accession exclude, in whole or in part, the application of the provisions of paragraph 2 of Article 4 and of Chapter II. No other reservation shall be permitted.

Each Contracting State may at any time withdraw a reservation it has made; the reservation shall cease to have effect on the sixtieth day after notification of the withdrawal.

When a State has made a reservation, any other State affected thereby may apply the same rule against the reserving State.

Article 34

A State may at any time withdraw or modify a declaration.

Article 35

A Contracting State shall, at the time of the deposit of its instrument of ratification or accession, or at a later date, inform the Ministry of Foreign Affairs of the Netherlands of the designation of authorities, pursuant to Articles 2, 8, 24 and 25.

A Contracting State shall likewise inform the Ministry, where appropriate, of the following:

- a) the designation of the authorities to whom notice must be given, whose permission may be required, and whose assistance may be invoked in the taking of evidence by diplomatic officers and consular agents, pursuant to Articles 15, 16 and 18 respectively;
- b) the designation of the authorities whose permission may be required in the taking of evidence by commissioners pursuant to Article 17 and of those who may grant the assistance provided for in Article 18;
- c) declarations pursuant to Articles 4, 8, 11, 15, 16, 17, 18, 23 and 27;
- d) any withdrawal or modification of the above designations and declarations;
- e) the withdrawal of any reservation.

Article 36

Any difficulties which may arise between Contracting States in connection with the operation of this Convention shall be settled through diplomatic channels.

Article 37

The present Convention shall be open for signature by the States represented at the Eleventh Session of the Hague Conference on Private International Law.

It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 38

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of Article 37.

The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

Article 39

Any State not represented at the Eleventh Session of the Hague Conference on Private International Law which is a Member of this Conference or of the United Nations or of a specialized agency of that Organization, or a Party to the Statute of the International Court of Justice may accede to the present Convention after it has entered into force in accordance with the first paragraph of Article 38.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for a State acceding to it on the sixtieth day after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the sixtieth day after the deposit of the declaration of acceptance.

Article 40

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for the territories mentioned in such an extension on the sixtieth day after the notification indicated in the preceding paragraph.

Article 41

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 38, even for States which have ratified it or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.

It may be limited to certain of the territories to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 42

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in Article 37, and to the States which have acceded in accordance with Article 39, of the following:

- a) the signatures and ratifications referred to in Article 37;
- b) the date on which the present Convention enters into force in accordance with the first paragraph of Article 38;
- c) the accessions referred to in Article 39 and the dates on which they take effect;
- d) the extensions referred to in Article 40 and the dates on which they take effect;
- e) the designations, reservations and declarations referred to in Articles 33 and 35;
- f) the denunciations referred to in the third paragraph of Article 41.

In witness whereof the undersigned, being duly authorized thereto, have signed the present Convention.

Done at The Hague, on the 18th day of March, 1970, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States represented at the Eleventh Session of the Hague Conference on Private International Law.

Reservations and Declarations

<Reservations>

1. In accordance with paragraph 2 of Article 4 and Article 33, the Republic of Korea will accept only Letters of Request in Korean or English.

The Government of the Republic of Korea wishes to point out that the execution of Letters of Request which are not accompanied by a translation into Korean will take longer than that of Letters of Request with a Korean translation. The

Republic of Korea will accept only Letters of Request in Korean from Contracting States which do not accept Letters of Request in either language referred to in the previous paragraph.

2. In accordance with Article 33, the Republic of Korea excludes the application within its territory of the provisions of Articles 16 and 17 of Chapter II of the Convention.

<Declarations>

1. In accordance with Article 8, the Government of the Republic of Korea declares that members of the judicial personnel of the requesting authority of another Contracting State may be present at the execution of a Letter of Request with prior authorization by the competent authority of the Republic of Korea. For the purpose of this Article, the competent authority shall be the National Court Administration.

2. In accordance with Article 23, the Government of the Republic of Korea declares that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents. The Government of the Republic of Korea further declares that it understands "Letters of Request issued for the purpose of obtaining pre-trial discovery of documents" for the purposes of the foregoing Declaration as including any Letter of Request which requires a person:

- a. to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his or her possession, custody or power; or
- b. to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requested court to be, or to be likely to be, in his or her possession, custody or power.

200년 헤이그 재판관할합의협약¹⁾

(2005. 6. 30. 체결됨)

번역 석광현²⁾

이 협약의 당사국은 제고된 사법적 협력을 통하여 국제 무역과 투자를 촉진하기를 희망하고, 그러한 협력이 민사 또는 상사사건의 재판관할과 외국재판의 승인 및 집행에 관한 통일규칙에 의하여 제고될 수 있음을 확신하여, 그러한 제고된 협력은 특히 상사거래의 당사자들 간의 전속적 관할합의에 확실성을 부여하고 그 의 효력을 보장하며, 또한 그러한 합의에 기초한 소송으로부터 결과되는 재판의 승인 및 집행을 규율하는 국제적인 법제를 필요로 함을 확신하여 이 협약을 체결하기로 결정하고 다음의 규정에 합의하였다.

제I장 범위와 정의

제 1조 범위

1. 이 협약은 국제적인 사건에서 민사 또는 상사사건에서 체결된 전속적 관할합의에 적용된다.
2. 제II장의 목적상, 당사자들이 동일한 체약국에 거주하고 당사자들의 관계와, 분쟁에 관계된 모든 요소들이 그 국가에만 관련된 경우가 아니라면, 사건은 선택된 법원의 장소에 관계없이 국제적이다.
3. 제III장의 목적상, 외국판결의 승인 또는 집행을 구하는 경우 사건은 국제적이다.

제 2조 범위로부터의 제외

1. 이 협약은 다음의 전속적 관할합의에는 적용되지 않는다.
 - 가) 주로 개인적, 가족적 또는 가사적 목적을 위하여 행위하는 자연인(소비자)이 당사자인 경우
 - 나) 단체계약을 포함한 근로계약에 관한 경우
2. 이 협약은 다음의 사항들에는 적용되지 않는다.
 - 가) 자연인의 신분과 법적 능력
 - 나) 부양의무
 - 다) 부부재산제 및 혼인 또는 이와 유사한 관계로부터 발생하는 기타 권리와 의무를 포함한 기타 가족법상의 사항들
 - 라) 유언과 상속
 - 마) 도산, 화의 및 유사한 절차
 - 바) 여객 또는 물품의 운송
 - 사) 해상오염, 해상청구권에 대한 책임제한, 공동해손, 및 긴급예인과 구조

1) 협약을 "전속적 국제재판관할합의협약"이라고 번역할 수도 있으나 영문에 충실하게 본문과 같이 번역하였다. 텍스트는 http://hcch.eision.nl/index_en.php?act=conventions.text&cid=98을 참조.

2) 서울대학교 법학전문대학원 교수

- 아) 반독점(경쟁) 사건
 - 자) 핵손해에 대한 책임
 - 차) 자연인에 의하여 또는 자연인을 위하여 제기된 인적 손해에 대한 청구
 - 카) 계약관계로부터 발생하지 않는 유체물(tangible property)에 대한 손해로 인한 불법행위청구
 - 타) 부동산에 대한 물권과 부동산의 임대
 - 파) 법인의 유효, 무효 또는 해산 및 그들의 기관의 결정의 유효성
 - 하) 저작권 또는 저작인접권 이외의 지적재산권의 유효성
 - 거) 저작권 또는 저작인접권 이외의 지적재산권의 침해. 다만 침해소송이 그러한 권리에 관한 당사자들 간의 계약의 위반으로 제기된 경우, 또는 그 계약 위반으로 제기될 수 있었던 경우를 제외한다.
 - 너) 공부예의 기재의 유효성
3. 제2항에도 불구하고, 그 항에 따라 제외된 사항이 소송의 대상이 아니라 단지 先決問題로서만 제기되는 경우 그 소송은 협약의 적용범위로부터 제외되지 않는다. 특히 제2항에 따라 제외되는 사항이, 소송의 대상이 아니라 단지 항변으로서 제기된다는 사실만으로 그 소송이 협약으로부터 제외되지 않는다.
4. 이 협약은 중재 및 그와 관련된 절차에 적용되지 않는다.
5. 정부, 정부기관 또는 국가를 위해 직무를 수행하는 자가 소송의 당사자라는 사실만으로 그 소송이 이 협약의 적용범위로부터 제외되지 않는다.
6. 이 협약의 어느 것도 국가 또는 국제기구가 그 자신 및 그의 재산에 관하여 가지는 특권과 면제에 영향을 미치지 아니한다.

제 3 조 전속적 관할합의

이 협약의 목적상

- 가) “전속적 관할합의”는 둘 또는 그 이상의 당사자들에 의하여 체결되는 계약으로서, 다)항의 요건을 구비하고, 특정한 법률관계와 관련하여 발생하였거나 발생할 수 있는 분쟁을 재판할 목적으로, 하나의 체약국의 법원들, 또는 하나의 체약국 내의 하나 또는 둘 이상의 특정한 법원들을 지정하고 다른 모든 법원들의 관할을 배제하는 계약을 의미한다.
- 나) 하나의 체약국의 법원들 또는 하나의 체약국 내의 하나 또는 둘 이상의 특정한 법원들을 지정하는 관할합의는 당사자들이 명시적으로 달리 정하지 않으면 전속적인 것으로 본다.
- 다) 전속적 관할합의는 다음의 방식으로 체결되거나 작성되어야 한다.
 - i) 서면 또는
 - ii) 추후 참조를 위하여 사용될 수 있도록 정보에의 접근을 가능하게 하는 그 밖의 통신 수단
- 라) 계약의 일부를 구성하는 전속적 관할합의는 그 계약의 다른 조건들과는 독립적인 계약으로 취급된다. 그 계약이 유효하지 않다는 근거만으로 전속적 관할합의의 유효성을 다룰 수 없다.

제 4조 기타 정의들

- 1. 이 협약에서 “재판”은 명칭을 불문하고 본안에 관한 법원의 모든 재판을 의미하고, 결정 또는 명령과 법원(법원공무원을 포함한)에 의한 비용 또는 경비의 결정을 포함한다. 다만, 그 결정은 이 협약상 승인 또는 집행될 수 있는 본안에 관한 재판에 관련된 것이어야 한다. 임시적 보호조치는 재판이 아니다.

2. 이 협약의 목적상, 단체 또는 자연인 이외의 사람은 다음의 국가에 거주하는 것으로 본다.

- 가) 법상의 본거지
- 나) 설립 또는 조직의 준거법 소속국
- 다) 경영의 중심지 또는
- 라) 주된 영업소 소재지

제II장 재판관할

제 5조 선택된 법원의 관할

1. 전속적 관할합의에 의하여 지정된 체약국의 법원 또는 법원들은, 그 국가의 법률에 따라 그 합의가 무효가 아닌 한 그 합의가 적용되는 분쟁을 재판할 관할을 가진다.
2. 제1항에 따라 관할을 가지는 법원은 그 분쟁이 다른 국가의 법원에 의하여 재판되어야 한다는 근거로 관할을 행사하는 것을 거부할 수 없다.
3. 전항들은 다음의 규칙들에 영향을 미치지 아니한다.
 - 가) 분쟁의 대상 또는 청구의 가액에 관한 관할
 - 나) 체약국의 법원들간의 관할의 내부적 분배 그러나 선택된 법원이 이송을 할지에 관하여 재량을 가지는 경우에는 당사자들의 선택을 적절히 고려하여야 한다.

제 6조 선택되지 않은 법원의 의무

선택된 법원의 국가 이외의 체약국의 모든 법원은, 다음의 경우를 제외하고는 전속적 관할합의가 적용되는 소송절차를 중지하거나 각하하여야 한다.

- 가) 선택된 법원의 국가의 법에 따라 그 합의가 무효인 경우
- 나) 소가 계속한 법원의 국가의 법에 따라 당사자가 합의를 체결할 능력이 없는 경우
- 다) 그 합의의 효력을 인정한다면 명백한 부정의에 이르게 되거나 또는 소가 계속한 법원의 국가의 공서에 명백히 반하는 경우
- 라) 예외적인 이유로 인하여 그 합의가 합리적으로 이행될 수 없는 경우 또는
- 마) 선택된 법원이 그 사건을 심리하지 않기로 결정한 경우

제 7조 임시적 보호조치³⁾

임시적 보호조치는 이 협약에 의하여 규율되지 않는다. 이 협약은 체약국의 법원에 의한 임시적 보호조치의 부여, 거부 또는 취소를 요구하지도 않고 배제하지도 않으며, 당사자가 그러한 조치를 청구할 수 있는지 또는 법원이 그러한 조치를 부여, 거부 또는 취

3) 이는 'interim measures of protection'의 번역인데, '임시적(또는 잠정적) 보전조치'라고 할 수도 있겠다. 우리 법상의 보전처분에 상당하는 것이다.

소해야 하는지에 영향을 미치지 않는다.

제III장 승인 및 집행

제 8조 승인 및 집행

1. 전속적 관할합의에서 지정된 체약국의 법원이 선고한 재판은 이 장에 따라 다른 체약국에서 승인되고 집행된다. 승인 또는 집행은 이 협약에 명시된 근거에 기하여만 거부될 수 있다.
2. 재판국 법원⁴⁾이 선고한 재판의 실질에 대해서는 어떠한 심사도 할 수 없다. 다만, 이 장의 조항을 적용하기 위한 목적상 필요한 심사에는 영향을 미치지 아니한다. 결석재판이 아닌 한, 요청받은 법원은 재판국 법원이 관할의 근거로 삼은 사실 인정에 구속된다.
3. 재판은 재판국에서 효력을 가지는 경우에만 승인될 수 있고, 재판국에서 집행할 수 있는 경우에만 집행될 수 있다.
4. 만일 재판이 재판국에서 상소의 대상인 경우 또는 만일 통상의 상소를 구할 수 있는 기간이 만료되지 않은 경우 승인 또는 집행은 연기 또는 거부될 수 있다. 거부는 그 재판의 승인 또는 집행을 위하여 추후에 신청하는 것을 금지하지는 아니한다.
5. 이 조는 그 체약국의 선택된 법원으로부터 제5조 제3항이 허용하는 바에 따라 이송한 사건에 대하여 체약국의 법원이 선고한 재판에도 적용된다. 그러나, 그 선택된 법원이 이송을 할 것인지에 관하여 재량을 가지는 경우에는 재판국에서 이송에 대하여 적시에 이익을 제기한 당사자에 대하여는 재판의 승인 또는 집행이 거부될 수 있다.

제 9조 승인 또는 집행의 거부

다음의 경우 승인 또는 집행은 거부될 수 있다.

- 가) 선택된 법원이 그 합의가 유효하다고 결정한 경우가 아닌 한, 그 합의가 선택된 법원의 국가의 법에 따라 무효인 경우
- 나) 요청된 국가의 법에 따라 당사자가 합의를 체결할 능력이 없는 경우
- 다) 청구의 본질적인 요소를 포함하는 소송을 개시하는 서면 또는 그에 상응하는 서면이,
 - i) 피고에게 충분한 기간을 두고, 또한 방어를 할 수 있도록 하는 방법으로 고지되지 않은 경우. 그러나 피고가 재판국 법원에 서 고지를 다투지 아니하고 출석하여 변론한 경우에는 그러하지 아니하다. 다만, 재판국 법이 고지를 다투는 것을 허용하는 것을 조건으로 한다. 또는
 - ii) 요청받은 국가에서 문서의 송달에 관한 그 국가의 근본적인 원칙에 양립하지 않는 방법으로 피고에게 통지된 경우
- 라) 재판이 절차와 관련된 사기에 의해 획득된 경우
- 마) 승인 또는 집행이 요청받은 국가의 공서에 명백히 반하는 경우. 이는 재판에 이르게 된 특정 소송절차가 그 국가의 절차적 공평의 근본원칙과 양립되지 않은 상황을 포함한다.
- 바) 재판이 요청받은 국가에서 동일한 당사자들 간의 분쟁에서 선고된 재판과 양립하지 않는 경우
- 사) 재판이 동일한 당사자들 간에 동일한 청구원인에 관하여 다른 국가에서 선고된 선행 재판과 양립하지 않는 경우. 다만, 요청받은 국가에서 선행 재판이 승인을 위한 요건을 충족하는 것을 조건으로 한다.

4) 영문(court of origin)에 충실하자면 원천법원이 되어야 할 것이나 편의상 본문과 같이 번역하였다.

제 10조 先決問題

1. 제2조 제2항 또는 제21조에 따라 배제된 사항이 先決問題로 제기된 경우 그 문제에 관한 판단은 이 협약에 의하여 승인되거나 집행되지 않는다.
2. 재판의 승인 또는 집행을, 그 재판이 제2조 제2항에 따라 배제되는 사항에 관한 판단에 기초한 것인 경우에는, 그 범위 내에서 거부될 수 있다.
3. 그러나 저작권 또는 저작권접권 이외의 지적재산권의 유효성에 관한 판단의 경우에는, 재판의 승인 또는 집행은 다음에 경우에 한하여 전항에 따라 거부되거나 연기될 수 있다.
 - 가) 그 판단이 그의 법에 따라 지적재산권이 발생한 국가의 권한 당국이 그 사항에 관하여 선고한 재판 또는 결정과 불일치하는 경우, 또는
 - 나) 지적재산권의 유효성에 관한 소송이 그 국가에서 계속중인 경우
4. 재판의 승인 또는 집행을, 그 재판이 요청받은 국가가 제21조에 따라 한 선언에 의하여 배제되는 사항에 관한 판단에 기초한 것인 경우에는, 그 범위내에서 거부될 수 있다.

제 11조 손해배상

1. 재판의 승인 또는 집행을 그 재판이, 당사자에게 징벌적 손해배상을 포함하여 실제로 입은 손실 또는 손해를 전보하는 것이 아닌 손해배상을 인용하는 경우 그 범위 내에서는 거부될 수 있다.
2. 요청받은 법원은 재판국의 법원이 인용한 손해배상이 소송과 관련된 비용과 경비를 전보하는지의 여부와 그 범위를 고려해야 한다.

제 12조 재판상 화해

전속적 관할합의에서 지정된 계약국의 법원이 인가하거나 또는 소송과정에서 그 법원의 앞에서 체결되고, 재판국에서 재판과 동일한 방법으로 집행될 수 있는 재판상 화해는 이 협약에 따라 재판과 동일한 방법으로 집행된다.

제 13조 제출되어야 할 서류

1. 승인을 구하거나 집행을 신청하는 당사자는 다음의 서류를 제출해야 한다.
 - 가) 완전하고 증명된 재판의 사본
 - 나) 전속적 관할합의, 그의 증명된 사본 또는 그의 존재에 관한 증거
 - 다) 결석재판이 행해진 경우, 소송을 개시하는 서면 또는 그에 상응하는 서면이 결석한 피고에게 통지되었음을 증명하는 서류의 원본 또는 증명된 사본
 - 라) 재판이 재판국 법원에서 효력을 가지거나, 적용되는 경우 재판국에서 집행될 수 있음을 증명하는 서류
 - 마) 제12조에 언급된 경우, 재판상화해 또는 그의 일부가 재판국에서 재판과 동일한 방법으로 집행될 수 있다는 재판국 법원의 증명서
2. 만일 재판의 내용이 요청받은 법원이 이 장의 조건을 구비하는지의 여부를 확정하는 것을 허용하지 않는 경우, 그 법원은 모든 필요한 서류를 요구할 수 있다.

3. 승인 또는 집행의 신청은 재판국의 법원(법원의 공무원을 포함하여)이 헤이그국제사법회의가 추천하고 공간한 양식으로 발행한 서류를 동반할 수 있다.
4. 이 조에 언급된 서류가 요청받은 국가의 공식언어로 작성되지 않은 경우, 요청받은 국가의 법률이 달리 규정하지 않는 한, 그 서류들은 그 공식언어로 된 증명된 번역문을 동반하여야 한다.

제 14조 절차

승인, 집행가능선언 또는 집행을 등록과 재판의 집행의 절차는 이 협약이 달리 규정하지 않는 한 요청받은 국가의 법에 의하여 규율된다. 요청받은 법원은 신속히 행위하여야 한다.

제 15조 가분성

재판의 가분적인 일부의 승인 또는 집행은 일부 승인 또는 집행이 신청되거나, 또는 재판의 일부만이 이 협약에 따라서 승인 또는 집행될 수 있는 경우에 허용된다.

제Ⅳ장 일반조항

제 16조 경과규정

1. 이 협약은 선택된 법원의 국가에 대하여 협약이 발효한 후에 체결된 전속적 관할합의에 적용된다.
2. 이 협약은 소가 계속한 법원의 국가에 대하여 협약이 발효하기 전에 제기된 소송에 대하여는 적용되지 아니한다.

제 17조 보험계약과 재보험계약

1. 보험계약 또는 재보험계약에 따른 소송은 그 보험계약 또는 재보험계약이 이 협약이 적용되지 않는 사항에 관계된 것이라는 근거로 이 협약의 적용 범위로부터 제외되지는 않는다.
2. 보험계약 또는 재보험계약의 조건에 따른 책임에 관한 재판의 승인 및 집행은, 그 계약상의 책임이 다음 사항에 관하여 피보험자 또는 재보험의 피보험자에게 보상하는 책임을 포함한다는 근거로 제한되거나 거부될 수 없다.
 - 가) 이 협약이 적용되지 않는 사항, 또는
 - 나) 제11조가 적용될 수 있는 손해배상의 인용

제 18조 인증불요

이 협약에 따라 제공되거나 인도되는 모든 서류는 Apostille를 포함하여 인증 또는 유사한 방식요건으로부터 면제된다.

제 19조 관할을 제한하는 선언

어떤 국가든지 선택된 법원의 장소를 제외하고는 그 국가와 당사자들 또는 분쟁 간에 아무런 관련이 없는 경우 그의 법원들은 전속적 관할합의가 적용되는 분쟁을 재판하는 것을 거부할 수 있다는 선언을 할 수 있다.

제 20조 승인 및 집행을 제한하는 선언

어떤 국가든지 당사자들이 요청받은 국가에 거주하고 선택된 법원의 장소 이외에 당사자들의 관계와 분쟁에 관계된 그 밖의 모든 요소들이 요청받은 국가에만 관련된 경우에는 그의 법원들은 다른 체약국의 법원의 재판의 승인 또는 집행을 거부할 수 있다는 선언을 할 수 있다.

제 21조 특정사항에 관한 선언

1. 어떤 국가가 이 협약을 특정사항에 적용하지 않는 데 대하여 강한 이익을 가지는 경우, 그 국가는 협약을 그 사항에 적용하지 않겠다는 선언을 할 수 있다. 그러한 선언을 하는 국가는 선언이 필요 이상으로 광범위하지 않도록 하고, 그렇게 배제되는 특정 사항이 명확하고 정확하게 정의될 수 있도록 보장하여야 한다.

2. 그 사항에 관하여는, 이 협약은 다음의 경우 적용되지 않는다.

가) 그러한 선언을 한 체약국 내에서,

나) 전속적 관할합의가 그러한 선언을 한 국가의 법원들, 또는 하나 또는 그 이상의 특정한 법원들을 지정하는 경우 다른 체약국 내에서.

제 22조 비전속적 관할합의에 관한 상호적 선언

1. 체약국은 그의 법원들은 둘 이상의 당사자들이 체결하고 제3조 c)호의 요건을 구비하며, 특정한 법률관계와 관련하여 발생하였거나 발생할 수 있는 분쟁을 재판할 목적으로 하나 이상의 체약국의 법원 또는 법원들을 지정하는 관할합의(비전속적 관할합의)에서 지정된 다른 체약국의 법원들이 선고한 재판을 승인하고 집행할 것이라고 선언할 수 있다.

2. 그러한 선언을 한 체약국에서 선고된 재판의 승인 또는 집행을 그러한 선언을 한 다른 체약국에서 구하는 경우, 만일 다음의 요건이 구비되면 그 재판은 이 협약에 따라 승인되고 집행된다.

가) 재판법원이 비전속적 관할합의에서 지정되었고,

나) 그 비전속적 관할합의에 따라 소송이 제기될 수 있는 다른 법원이 선고한 재판이 존재하지 않고 그리고 동일 당사자 간에 동일 청구원인에 기하여 그러한 다른 법원에 계속중인 소송절차가 존재하지 않고 또한

다) 재판법원이 최초로 소가 계속한 법원이었을 것.

제 23조 통일적 해석

이 협약의 해석에는 그 국제적 성격 및 적용상의 통일을 증진할 필요성을 고려하여야 한다.

제 24조 협약의 운용의 검토

헤이그 국제사법회의의 사무총장은 정기적으로 다음을 위한 조치를 취하여야 한다.

- 가) 모든 선언을 포함한 이 협약의 운용의 검토 및
- 나) 이 협약에 대한 어떤 수정이 바람직한지의 고려

제 25조 불통일법체계

1. 이 협약에서 다루어지는 사항에 관하여 상이한 영토적 단위에서 둘 이상의 법체계가 적용되는 체약국에 관하여는

- 가) 어느 국가의 법 또는 절차에 관한 모든 언급은, 적절한 경우 당해 영토적 단위에서 효력을 가지는 법 또는 절차에 대한 언급으로 해석되고,
- 나) 어느 국가 내의 거소에 관한 모든 언급은, 적절한 경우 당해 영토적 단위 내의 거소에 대한 언급으로 해석되고,
- 다) 어느 국가의 법원 또는 법원들에 관한 모든 언급은, 적절한 경우 당해 영토적 단위 내의 법원 또는 법원들에 대한 언급으로 해석되고,
- 라) 어느 국가와의 관련에 관한 모든 언급은, 적절한 경우 당해 영토적 단위와의 관련에 대한 언급으로 해석된다.

2. 전항에도 불구하고, 상이한 법체계가 적용되는 둘 이상의 영토적 단위를 가지는 어떤 체약국은, 단지 그러한 영토적 단위들만에 관계된 상황에는 이 협약을 적용할 의무를 지지 않는다.
3. 상이한 법체계가 적용되는 둘 이상의 영토적 단위를 가지는 어떤 체약국의 어떤 영토적 단위 내의 법원은 단지 그 재판이 동일한 체약국의 다른 영토적 단위에서 이 협약에 따라 승인되었거나 또는 집행되었다는 이유만으로 다른 체약국의 법원의 판결을 승인하거나 또는 집행할 의무를 지지 않는다.

4. 이 조는 지역경제통합기구에는 적용되지 아니한다.

제 26조 다른 국제문서와의 관계

1. 이 협약은 이 협약의 전 또는 후에 체결되었던 간에 체약국에 대하여 효력이 있는 다른 조약들과 가능한 한 양립할 수 있도록 해석되어야 한다.
2. 이 협약은 당사자들 중 어느 누구도 그 조약의 당사자가 아닌 체약국에 거주하지 않는 경우에는 이 협약의 전 또는 후에 체결되었던 간에 체약국이 그 조약을 적용하는 데 영향을 미치지 아니한다.
3. 이 협약은 이 협약을 적용하는 것이 그 체약국의 다른 비체약국에 대한 의무와 양립하지 않는 경우에는 이 협약이 어느 체약국에 대하여 발효하기 전에 그 체약국이 체결한 조약을 적용하는 데 영향을 미치지 아니한다. 이 항은 이 협약이 그 체약국에 대하여 발효하기 전에 그 체약국이 체결한 조약을 개정하거나 대체하는 조약에도 또한 적용된다. 다만, 그 개정 또는 대체가 이 협약과 새로운 불일치를 창설하는 경우는 제외한다.
4. 이 협약은 이 협약의 전 또는 후에 체결되었던 간에 그 조약의 당사자이기도 한 체약국의 법원이 선고한 재판의 승인 또는 집행을 구하는 목적상 어느 체약국이 조약을 적용하는 데 영향을 미치지 아니한다. 그러나 그 재판은 이 협약에 따른 것보다 작은 범위 내에서 승인되거나 집행되어서는 아니된다.

5. 이 협약은 비록 그 조약이 이 협약의 후에 체결되었고 또한 모든 관계된 국가들이 이 협약의 당사자일지라도 체약국이 특정한 사항에 관하여 재판 관할 또는 재판의 승인 또는 집행을 규율하는 조약을 적용하는 데 영향을 미치지 아니한다. 이 항은 체약국이 이 항에 따라 조약에 관한 선언을 한 경우에만 적용된다. 그러한 선언의 경우 전속적 관할합의가 그러한 선언을 한 체약국의 법원들 또는 하나 또는 둘 이상의 특정한 법원들을 지정하는 때에는 다른 체약국들은 충돌되는 범위 내에서는 그 특정한 사항에 대하여 이 협약을 적용할 의무가 없다.

6. 이 협약은 다음의 경우 이 협약의 전 또는 후에 체결되었던 간에 이 협약의 당사자인 지역경제통합기구의 규칙의 적용에 영향을 미치지 아니한다.

가) 당사자의 어느 누구도 지역경제통합기구의 회원국이 아닌 체약국에 거주하지 않는 경우

나) 지역경제통합기구의 회원국들간에서 재판의 승인 또는 집행에 관하여

제V장 최종조항

제 27조 서명, 비준, 수락 및 승인 또는 가입

1. 이 협약은 모든 국가들의 서명을 위하여 개방된다.
2. 이 협약은 서명국에 의한 비준, 수락 또는 승인을 조건으로 한다.
3. 이 협약은 모든 국가들의 가입을 위하여 개방된다.
4. 비준서, 수락서, 승인서 및 가입서는 협약의 수탁자인 네덜란드 외무부에기탁되어야 한다.

제 28조 불통일법체계에 관한 선언

1. 어느 국가가 이 협약에서 다루어지는 사항에 관하여 상이한 법체계가 적용되는 둘 이상의 영토적 단위를 가지는 경우에는 서명·비준·수락·승인 또는 가입시에 이 협약이 그의 모든 영토적 단위에 미치는지 또는 하나에만 또는 둘 이상의 영토적 단위에만 미치는지를 선언할 수 있고, 언제든지 다른 선언을 제출함으로써 이 선언을 변경할 수 있다.
2. 모든 그러한 선언은 수탁자에게 통지되어야 하고 협약이 적용되는 영토적 단위를 명시하여야 한다.
3. 어느 국가가 이 조에 따른 선언을 하지 않는 경우 이 협약은 그 국가의 모든 영토적 단위에 미친다.
4. 이 조는 지역경제통합기구에는 적용되지 아니한다.

제 29조 지역경제통합기구

1. 주권국가들만에 의해 구성되고 이 협약에 의하여 규율되는 사항의 일부 또는 전부에 대하여 권한을 가지는 지역경제통합기구는 유사하게 이 협약에 서명, 수락, 승인 또는 가입할 수 있다. 그 경우 그 지역경제통합기구는 이 협약에 의하여 규율되는 사항에 대하여 권한을 가지는 범위 내에서 체약국의 권리와 의무를 가진다.
2. 지역경제통합기구는 서명, 수락, 승인 또는 가입시에 이 협약에 의하여 규율되는 사항들 중 어느 사항에 관하여 그 기구의 회

원국들이 기구에게 권한을 이전하였는지를 명시하여 서면으로 수탁자에게 통지하여야 한다. 지역경제통합기구는, 이 항에 따른 최근의 통지에 명시된 바에 따른 권한의 배분에 관한 모든 변경을 즉시 수탁자에게 통지하여야 한다.

3. 이 협약의 발효의 목적상 지역경제통합기구가 기탁한 문서는 지역경제통합 기구가 제30조에 따라 그의 회원국들이 이 협약의 당사자가 되지 않을 것이라고 선언하지 않는 한 산입되지 아니한다.
4. 이 협약에서 “체약국” 또는 “국가”에 대한 모든 언급은 적절한 경우 협약의 당사자인 지역경제통합기구에 대하여 동등하게 적용된다.

제 30조 회원국이 없는 지역경제통합기구의 가입

1. 지역경제통합기구는 서명, 수락, 승인 또는 가입시에 이 협약이 규율하는 모든 사항들에 대하여 기구가 권한을 행사한다는 것과 그의 회원국들은 이 협약의 당사자가 되지 않을 것이나 기구의 서명·수락·승인 또는 가입에 의하여 구속된다는 것을 선언할 수 있다.
2. 제1항에 따라 지역경제통합기구가 선언을 한 경우에는 이 협약에서 “체약국” 또는 “국가”에 대한 모든 언급은, 적절한 경우 기구의 회원국에 대하여 동등하게 적용된다.

제 31조 발효

1. 이 협약은 제27조에 언급된 둘째의 비준서, 수락서, 승인서 또는 가입서의 기탁 후 3개월이 경과한 때의 다음 달의 초일에 발효한다.
2. 그 이후에는 이 협약은 다음 각호에 따라 발효한다.
 - 가) 후에 이 협약을 비준, 수락, 승인 또는 가입한 각 국가 또는 각 지역경제통합기구에 대하여는 비준서, 수락서, 승인서 또는 가입서의 기탁 후 3개월이 경과한 때의 다음 달의 초일에 발효한다.
 - 나) 이 협약이 제28조 제1항에 따라 미치게 된 영토적 단위에 대하여는 그 조에 언급된 선언의 통지 후 3개월이 경과한 때의 다음 달의 초일에 발효한다.

제 32조 선언

1. 제19조, 제20조, 제21조, 제22조 및 제26조에 언급된 선언은 서명, 비준, 수락, 승인 또는 가입시 또는 그 후 언제든지 할 수 있고, 언제든지 변경되거나 철회될 수 있다.
2. 선언, 변경 및 철회는 수탁자에게 통지되어야 한다.
3. 서명, 비준, 수락, 승인 또는 가입시에 한 선언은 관계된 국가에 대하여 이 협약의 발효와 동시에 발효한다.
4. 그 후에 한 선언과 모든 선언의 변경 또는 철회는 수탁자가 통지를 수령한 날로부터 3개월이 경과한 때의 다음 달의 초일에 발효한다.
5. 제19조, 제20조, 제21조 및 제26조에 따른 선언은 그의 발효 전에 체결된 전속적 관할합의에는 적용되지 아니한다.

제 33조 폐기통고

1. 이 협약은 수탁자에 대한 서면 통지에 의하여 폐기될 수 있다. 폐기통고는 이 협약이 적용되는 불통일법체계의 일부 영토적 단위들에 제한될 수 있다.
2. 폐기통고는 수탁자가 통지를 수령한 날 후 12개월이 경과한 때의 다음 달 초일에 발효한다. 다만 당해 통지서에 폐기통고의 효력발생을 위한 보다 장기의 기간이 명시된 경우에는 수탁자가 통지를 수령한 날 후 그러한 장기의 기간이 경과한 때에 발효한다.

제 34조 수탁자에 의한 통지

수탁자는 헤이그국제사법회의의 회원국들 그리고 제27조, 제29조와 제30조에 따라 서명, 비준, 수락 및 승인 또는 가입한 다른 국가들 및 지역경제통합기구들에게 다음 각호의 사항을 통지해야 한다.

- 가) 제27조, 제29조와 제30조에 언급된 서명, 비준, 수락, 승인 및 가입
- 나) 제31조에 따라 이 협약이 발효하는 날
- 다) 제19조, 제20조, 제21조, 제22조, 제26조, 제28조, 제29조와 제30조에 언급된 통지, 선언과 선언의 변경 및 철회
- 라) 제33조에 언급된 폐기통고

이상의 증거로서 정당한 권한을 위임받은 하기 서명자는 이 협약에 서명하였다. 2005년 6월 30일 헤이그에서 동등하게 정본인 영어 및 불어로 본서 1통을 작성하였다. 본서는 네덜란드 정부보관소에 기탁하고 그 인증등본은 외교경로를 통하여 제20차 회기 현재 헤이그 국제사법회의의 각 회원국과 그 회기에 참석한 각 국가에 송부된다.

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CONVENTION ON CHOICE OF COURT AGREEMENTS

(Concluded 30 June 2005)

The States Parties to the present Convention,
Desiring to promote international trade and investment through enhanced judicial co-operation,
Believing that such co-operation can be enhanced by uniform rules on jurisdiction and on recognition and enforcement of foreign judgments in civil or commercial matters,
Believing that such enhanced co-operation requires in particular an international legal regime that provides certainty and ensures the effectiveness of exclusive choice of court agreements between parties to commercial transactions and that governs the recognition and enforcement of judgments resulting from proceedings based on such agreements,
Have resolved to conclude this Convention and have agreed upon the following provisions –

chapter i – scope and definitions

Article 1

Scope

- (1) This Convention shall apply in international cases to exclusive choice of court agreements concluded in civil or commercial matters.
- (2) For the purposes of Chapter II, a case is international unless the parties are resident in the same Contracting State and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State.
- (3) For the purposes of Chapter III, a case is international where recognition or enforcement of a foreign judgment is sought.

Article 2

Exclusions from scope

- (1) This Convention shall not apply to exclusive choice of court agreements –
 - a) to which a natural person acting primarily for personal, family or household purposes (a consumer) is a party;
 - b) relating to contracts of employment, including collective agreements.
- (2) This Convention shall not apply to the following matters –
 - a) the status and legal capacity of natural persons;
 - b) maintenance obligations;
 - c) other family law matters, including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships;
 - d) wills and succession;

- e) insolvency, composition and analogous matters;
- f) the carriage of passengers and goods;
- g) marine pollution, limitation of liability for maritime claims, general average, and emergency towage and salvage
- h) anti-trust (competition) matters;
- i) liability for nuclear damage;
- j) claims for personal injury brought by or on behalf of natural persons;
- k) tort or delict claims for damage to tangible property that do not arise from a contractual relationship;
- l) rights in rem in immovable property, and tenancies of immovable property;
- m) the validity, nullity, or dissolution of legal persons, and the validity of decisions of their organs;
- n) the validity of intellectual property rights other than copyright and related rights;
- o) infringement of intellectual property rights other than copyright and related rights, except where infringement proceedings are brought for breach of a contract between the parties relating to such rights, or could have been brought for breach of that contract;
- p) the validity of entries in public registers.

(3) Notwithstanding paragraph 2, proceedings are not excluded from the scope of this Convention where a matter excluded under that paragraph arises merely as a preliminary question and not as an object of the proceedings. In particular, the mere fact that a matter excluded under paragraph 2 arises by way of defence does not exclude proceedings from the Convention, if that matter is not an object of the proceedings.

(4) This Convention shall not apply to arbitration and related proceedings.

(5) Proceedings are not excluded from the scope of this Convention by the mere fact that a State, including a government, a governmental agency or any person acting for a State, is a party thereto.

(6) Nothing in this Convention shall affect privileges and immunities of States or of international organisations, in respect of themselves and of their property.

Article 3

Exclusive choice of court agreements

For the purposes of this Convention –

- a) “exclusive choice of court agreement” means an agreement concluded by two or more parties that meets the requirements of paragraph c) and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts;
- b) a choice of court agreement which designates the courts of one Contracting State or one or more specific courts of one Contracting State shall be deemed to be exclusive unless the parties have expressly provided otherwise;
- c) an exclusive choice of court agreement must be concluded or documented –
 - i) in writing; or
 - ii) by any other means of communication which renders information accessible so as to be usable for subsequent reference;
- d) an exclusive choice of court agreement that forms part of a contract shall be treated as an agreement independent

of the other terms of the contract. The validity of the exclusive choice of court agreement cannot be contested solely on the ground that the contract is not valid.

Article 4

Other definitions

- (1) In this Convention, “judgment” means any decision on the merits given by a court, whatever it may be called, including a decree or order, and a determination of costs or expenses by the court (including an officer of the court), provided that the determination relates to a decision on the merits which may be recognised or enforced under this Convention. An interim measure of protection is not a judgment.
- (2) For the purposes of this Convention, an entity or person other than a natural person shall be considered to be resident in the State –
 - a) where it has its statutory seat;
 - b) under whose law it was incorporated or formed;
 - c) where it has its central administration; or
 - d) where it has its principal place of business.

chapter ii – jurisdiction

Article 5

Jurisdiction of the chosen court

- (1) The court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State.
- (2) A court that has jurisdiction under paragraph 1 shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State.
- (3) The preceding paragraphs shall not affect rules –
 - a) on jurisdiction related to subject matter or to the value of the claim;
 - b) on the internal allocation of jurisdiction among the courts of a Contracting State. However, where the chosen court has discretion as to whether to transfer a case, due consideration should be given to the choice of the parties.

Article 6

Obligations of a court not chosen

A court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies unless –

- a) the agreement is null and void under the law of the State of the chosen court;

-
- b) a party lacked the capacity to conclude the agreement under the law of the State of the court seised;
 - c) giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised;
 - d) for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed; or
 - e) the chosen court has decided not to hear the case.

Article 7

Interim measures of protection

Interim measures of protection are not governed by this Convention. This Convention neither requires nor precludes the grant, refusal or termination of interim measures of protection by a court of a Contracting State and does not affect whether or not a party may request or a court should grant, refuse or terminate such measures.

chapter iii – recognition and enforcement

Article 8

Recognition and enforcement

- (1) A judgment given by a court of a Contracting State designated in an exclusive choice of court agreement shall be recognised and enforced in other Contracting States in accordance with this Chapter. Recognition or enforcement may be refused only on the grounds specified in this Convention.
- (2) Without prejudice to such review as is necessary for the application of the provisions of this Chapter, there shall be no review of the merits of the judgment given by the court of origin. The court addressed shall be bound by the findings of fact on which the court of origin based its jurisdiction, unless the judgment was given by default.
- (3) A judgment shall be recognised only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin.
- (4) Recognition or enforcement may be postponed or refused if the judgment is the subject of review in the State of origin or if the time limit for seeking ordinary review has not expired. A refusal does not prevent a subsequent application for recognition or enforcement of the judgment.
- (5) This Article shall also apply to a judgment given by a court of a Contracting State pursuant to a transfer of the case from the chosen court in that Contracting State as permitted by Article 5, paragraph 3. However, where the chosen court had discretion as to whether to transfer the case to another court, recognition or enforcement of the judgment may be refused against a party who objected to the transfer in a timely manner in the State of origin.

Article 9

Refusal of recognition or enforcement

Recognition or enforcement may be refused if –

- a) the agreement was null and void under the law of the State of the chosen court, unless the chosen court has determined that the agreement is valid;
- b) a party lacked the capacity to conclude the agreement under the law of the requested State;
- c) the document which instituted the proceedings or an equivalent document, including the essential elements of the claim,
 - i) was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant entered an appearance and presented his case without contesting notification in the court of origin, provided that the law of the State of origin permitted notification to be contested; or
 - ii) was notified to the defendant in the requested State in a manner that is incompatible with fundamental principles of the requested State concerning service of documents;
- d) the judgment was obtained by fraud in connection with a matter of procedure;
- e) recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State;
- f) the judgment is inconsistent with a judgment given in the requested State in a dispute between the same parties; or
- g) the judgment is inconsistent with an earlier judgment given in another State between the same parties on the same cause of action, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested State.

Article 10

Preliminary questions

- (1) Where a matter excluded under Article 2, paragraph 2, or under Article 21, arose as a preliminary question, the ruling on that question shall not be recognised or enforced under this Convention.
- (2) Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment was based on a ruling on a matter excluded under Article 2, paragraph 2.
- (3) However, in the case of a ruling on the validity of an intellectual property right other than copyright or a related right, recognition or enforcement of a judgment may be refused or postponed under the preceding paragraph only where –
 - a) that ruling is inconsistent with a judgment or a decision of a competent authority on that matter given in the State under the law of which the intellectual property right arose; or
 - b) proceedings concerning the validity of the intellectual property right are pending in that State.
- (4) Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment was based on a ruling on a matter excluded pursuant to a declaration made by the requested State under Article 21.

Article 11

Damages

- (1) Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered.
- (2) The court addressed shall take into account whether and to what extent the damages awarded by the court of origin serve to cover costs and expenses relating to the proceedings.

Article 12

Judicial settlements (transactions judiciaires)

Judicial settlements (transactions judiciaires) which a court of a Contracting State designated in an exclusive choice of court agreement has approved, or which have been concluded before that court in the course of proceedings, and which are enforceable in the same manner as a judgment in the State of origin, shall be enforced under this Convention in the same manner as a judgment.

Article 13

Documents to be produced

- (1) The party seeking recognition or applying for enforcement shall produce –
 - a) a complete and certified copy of the judgment;
 - b) the exclusive choice of court agreement, a certified copy thereof, or other evidence of its existence;
 - c) if the judgment was given by default, the original or a certified copy of a document establishing that the document which instituted the proceedings or an equivalent document was notified to the defaulting party;
 - d) any documents necessary to establish that the judgment has effect or, where applicable, is enforceable in the State of origin;
 - e) in the case referred to in Article 12, a certificate of a court of the State of origin that the judicial settlement or a part of it is enforceable in the same manner as a judgment in the State of origin.
- (2) If the terms of the judgment do not permit the court addressed to verify whether the conditions of this Chapter have been complied with, that court may require any necessary documents.
- (3) An application for recognition or enforcement may be accompanied by a document, issued by a court (including an officer of the court) of the State of origin, in the form recommended and published by the Hague Conference on Private International Law.
- (4) If the documents referred to in this Article are not in an official language of the requested State, they shall be accompanied by a certified translation into an official language, unless the law of the requested State provides otherwise.

Article 14

Procedure

The procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment, are governed by the law of the requested State unless this Convention provides otherwise. The court addressed shall act expeditiously.

Article 15

Severability

Recognition or enforcement of a severable part of a judgment shall be granted where recognition or enforcement of that part is applied for, or only part of the judgment is capable of being recognised or enforced under this Convention.

chapter iv – general clauses

Article 16

Transitional provisions

- (1) This Convention shall apply to exclusive choice of court agreements concluded after its entry into force for the State of the chosen court.
- (2) This Convention shall not apply to proceedings instituted before its entry into force for the State of the court seised.

Article 17

Contracts of insurance and reinsurance

- (1) Proceedings under a contract of insurance or reinsurance are not excluded from the scope of this Convention on the ground that the contract of insurance or reinsurance relates to a matter to which this Convention does not apply.
- (2) Recognition and enforcement of a judgment in respect of liability under the terms of a contract of insurance or reinsurance may not be limited or refused on the ground that the liability under that contract includes liability to indemnify the insured or reinsured in respect of –
 - a) a matter to which this Convention does not apply; or
 - b) an award of damages to which Article 11 might apply.

Article 18

No legalisation

All documents forwarded or delivered under this Convention shall be exempt from legalisation or any analogous formal-

ity, including an Apostille.

Article 19

Declarations limiting jurisdiction

A State may declare that its courts may refuse to determine disputes to which an exclusive choice of court agreement applies if, except for the location of the chosen court, there is no connection between that State and the parties or the dispute.

Article 20

Declarations limiting recognition and enforcement

A State may declare that its courts may refuse to recognise or enforce a judgment given by a court of another Contracting State if the parties were resident in the requested State, and the relationship of the parties and all other elements relevant to the dispute, other than the location of the chosen court, were connected only with the requested State.

Article 21

Declarations with respect to specific matters

- (1) Where a State has a strong interest in not applying this Convention to a specific matter, that State may declare that it will not apply the Convention to that matter. The State making such a declaration shall ensure that the declaration is no broader than necessary and that the specific matter excluded is clearly and precisely defined.
- (2) With regard to that matter, the Convention shall not apply –
 - a) in the Contracting State that made the declaration;
 - b) in other Contracting States, where an exclusive choice of court agreement designates the courts, or one or more specific courts, of the State that made the declaration.

Article 22

Reciprocal declarations on non-exclusive choice of court agreements

- (1) A Contracting State may declare that its courts will recognise and enforce judgments given by courts of other Contracting States designated in a choice of court agreement concluded by two or more parties that meets the requirements of Article 3, paragraph c), and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, a court or courts of one or more Contracting States (a non-exclusive choice of court agreement).
- (2) Where recognition or enforcement of a judgment given in a Contracting State that has made such a declaration is sought in another Contracting State that has made such a declaration, the judgment shall be recognised and enforced under this Convention, if –

- a) the court of origin was designated in a non-exclusive choice of court agreement;
- b) there exists neither a judgment given by any other court before which proceedings could be brought in accordance with the non-exclusive choice of court agreement, nor a proceeding pending between the same parties in any other such court on the same cause of action; and
- c) the court of origin was the court first seised.

Article 23

Uniform interpretation

In the interpretation of this Convention, regard shall be had to its international character and to the need to promote uniformity in its application.

Article 24

Review of operation of the Convention

The Secretary General of the Hague Conference on Private International Law shall at regular intervals make arrangements for –

- a) review of the operation of this Convention, including any declarations; and
- b) consideration of whether any amendments to this Convention are desirable.

Article 25

Non-unified legal systems

- (1) In relation to a Contracting State in which two or more systems of law apply in different territorial units with regard to any matter dealt with in this Convention –
 - a) any reference to the law or procedure of a State shall be construed as referring, where appropriate, to the law or procedure in force in the relevant territorial unit;
 - b) any reference to residence in a State shall be construed as referring, where appropriate, to residence in the relevant territorial unit;
 - c) any reference to the court or courts of a State shall be construed as referring, where appropriate, to the court or courts in the relevant territorial unit;
 - d) any reference to a connection with a State shall be construed as referring, where appropriate, to a connection with the relevant territorial unit.
- (2) Notwithstanding the preceding paragraph, a Contracting State with two or more territorial units in which different systems of law apply shall not be bound to apply this Convention to situations which involve solely such different territorial units.
- (3) A court in a territorial unit of a Contracting State with two or more territorial units in which different systems of law apply shall not be bound to recognise or enforce a judgment from another Contracting State solely because the judgment has been recognised or enforced in another territorial unit of the same Contracting State under this Convention.

(4) This Article shall not apply to a Regional Economic Integration Organisation.

Article 26

Relationship with other international instruments

(1) This Convention shall be interpreted so far as possible to be compatible with other treaties in force for Contracting States, whether concluded before or after this Convention.

(2) This Convention shall not affect the application by a Contracting State of a treaty, whether concluded before or after this Convention, in cases where none of the parties is resident in a Contracting State that is not a Party to the treaty.

(3) This Convention shall not affect the application by a Contracting State of a treaty that was concluded before this Convention entered into force for that Contracting State, if applying this Convention would be inconsistent with the obligations of that Contracting State to any non-Contracting State. This paragraph shall also apply to treaties that revise or replace a treaty concluded before this Convention entered into force for that Contracting State, except to the extent that the revision or replacement creates new inconsistencies with this Convention.

(4) This Convention shall not affect the application by a Contracting State of a treaty, whether concluded before or after this Convention, for the purposes of obtaining recognition or enforcement of a judgment given by a court of a Contracting State that is also a Party to that treaty. However, the judgment shall not be recognised or enforced to a lesser extent than under this Convention.

(5) This Convention shall not affect the application by a Contracting State of a treaty which, in relation to a specific matter, governs jurisdiction or the recognition or enforcement of judgments, even if concluded after this Convention and even if all States concerned are Parties to this Convention. This paragraph shall apply only if the Contracting State has made a declaration in respect of the treaty under this paragraph. In the case of such a declaration, other Contracting States shall not be obliged to apply this Convention to that specific matter to the extent of any inconsistency, where an exclusive choice of court agreement designates the courts, or one or more specific courts, of the Contracting State that made the declaration.

(6) This Convention shall not affect the application of the rules of a Regional Economic Integration Organisation that is a Party to this Convention, whether adopted before or after this Convention –

- a) where none of the parties is resident in a Contracting State that is not a Member State of the Regional Economic Integration Organisation;
- b) as concerns the recognition or enforcement of judgments as between Member States of the Regional Economic Integration Organisation.

chapter v – final clauses

Article 27

Signature, ratification, acceptance, approval or accession

(1) This Convention is open for signature by all States.

- (2) This Convention is subject to ratification, acceptance or approval by the signatory States.
- (3) This Convention is open for accession by all States.
- (4) Instruments of ratification, acceptance, approval or accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention.

Article 28

Declarations with respect to non-unified legal systems

- (1) If a State has two or more territorial units in which different systems of law apply in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that the Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.
- (2) A declaration shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.
- (3) If a State makes no declaration under this Article, the Convention shall extend to all territorial units of that State.
- (4) This Article shall not apply to a Regional Economic Integration Organisation.

Article 29

Regional Economic Integration Organisations

- (1) A Regional Economic Integration Organisation which is constituted solely by sovereign States and has competence over some or all of the matters governed by this Convention may similarly sign, accept, approve or accede to this Convention. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that the Organisation has competence over matters governed by this Convention.
- (2) The Regional Economic Integration Organisation shall, at the time of signature, acceptance, approval or accession, notify the depositary in writing of the matters governed by this Convention in respect of which competence has been transferred to that Organisation by its Member States. The Organisation shall promptly notify the depositary in writing of any changes to its competence as specified in the most recent notice given under this paragraph.
- (3) For the purposes of the entry into force of this Convention, any instrument deposited by a Regional Economic Integration Organisation shall not be counted unless the Regional Economic Integration Organisation declares in accordance with Article 30 that its Member States will not be Parties to this Convention.
- (4) Any reference to a “Contracting State” or “State” in this Convention shall apply equally, where appropriate, to a Regional Economic Integration Organisation that is a Party to it.

Article 30

Accession by a Regional Economic Integration Organisation without its Member States

- (1) At the time of signature, acceptance, approval or accession, a Regional Economic Integration Organisation may declare that it exercises competence over all the matters governed by this Convention and that its Member States will not be Parties to this Convention but shall be bound by virtue of the signature, acceptance, approval or accession of the Organisation.
- (2) In the event that a declaration is made by a Regional Economic Integration Organisation in accordance with paragraph 1, any reference to a “Contracting State” or “State” in this Convention shall apply equally, where appropriate, to the Member States of the Organisation.

Article 31

Entry into force

- (1) This Convention shall enter into force on the first day of the month following the expiration of three months after the deposit of the second instrument of ratification, acceptance, approval or accession referred to in Article 27.
- (2) Thereafter this Convention shall enter into force –
 - a) for each State or Regional Economic Integration Organisation subsequently ratifying, accepting, approving or acceding to it, on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance, approval or accession;
 - b) for a territorial unit to which this Convention has been extended in accordance with Article 28, paragraph 1, on the first day of the month following the expiration of three months after the notification of the declaration referred to in that Article.

Article 32

Declarations

- (1) Declarations referred to in Articles 19, 20, 21, 22 and 26 may be made upon signature, ratification, acceptance, approval or accession or at any time thereafter, and may be modified or withdrawn at any time.
- (2) Declarations, modifications and withdrawals shall be notified to the depositary.
- (3) A declaration made at the time of signature, ratification, acceptance, approval or accession shall take effect simultaneously with the entry into force of this Convention for the State concerned.
- (4) A declaration made at a subsequent time, and any modification or withdrawal of a declaration, shall take effect on the first day of the month following the expiration of three months after the date on which the notification is received by the depositary.

(5) A declaration under Articles 19, 20, 21 and 26 shall not apply to exclusive choice of court agreements concluded before it takes effect.

Article 33

Denunciation

- (1) This Convention may be denounced by notification in writing to the depositary. The denunciation may be limited to certain territorial units of a non-unified legal system to which this Convention applies.
- (2) The denunciation shall take effect on the first day of the month following the expiration of twelve months after the date on which the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the date on which the notification is received by the depositary.

Article 34

Notifications by the depositary

The depositary shall notify the Members of the Hague Conference on Private International Law, and other States and Regional Economic Integration Organisations which have signed, ratified, accepted, approved or acceded in accordance with Articles 27, 29 and 30 of the following –

- a) the signatures, ratifications, acceptances, approvals and accessions referred to in Articles 27, 29 and 30;
- b) the date on which this Convention enters into force in accordance with Article 31;
- c) the notifications, declarations, modifications and withdrawals of declarations referred to in Articles 19, 20, 21, 22, 26, 28, 29 and 30;
- d) the denunciations referred to in Article 33.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on 30 June 2005, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the Member States of the Hague Conference on Private International Law as of the date of its Twentieth Session and to each State which participated in that Session.

HCCH Asia Pacific Week 2017

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