Activity Based Jurisdiction in the Proposed Hague Judgments Convention A Japanese Perspective (summary)

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The making of the proposed Hague Judgments Convention demonstrates the divergence in jurisdictional approaches between the United States and European Union countries. The U.S. approach is characterized by concepts such as "doingbusiness" and "transaction of business" within the state. In contrast, the E.U. approach is characterized by the principles of defendant's domicile, place of performance, place of tort, and place where some establishment is situated. This is consistent with the EU Regulation (Brussels Regulation) on jurisdiction and the recognition and enforcement of judgments.

This difference in approaches between an activity based and a fixed based approach to jurisdiction seemed to have been reconciled in the Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, adopted by the Special Commission on 30 October 1999 (hereinafter referred to as "the 1999 Preliminary Draft"). However, the U.S. criticism directed against the Preliminary Draft Convention subsequently reopened the debate. This in turn resulted in the much regressed and complicated Interim Text prepared after the Diplomatic Conference of 2001 (hereinafter referred to as "the 2001 Interim Text").

This Article analyzes the U.S. jurisdictional law to see if the proposed rules contained in the 1999 Preliminary Draft are so inconsistent with U.S. law that the U.S. should be unable to accept it. It then explores the possible options for reaching an agreement from the view point of Japanese jurisdictional rules.

At the insistence of the United States, the 2001 Interim Text reintroduced, without consent, two types of activity based jurisdiction.

First, as to contracts, Alternative A of Article 6 provides in pertinent part: a plaintiff may bring an action in contract in the courts of the State

a) in which the defendant has conducted frequent [and] [or] significant ac-

tivity; or
b) into whichthe defendant has directed frequent [and] [or] significant activ
ity

provided that the claim is based on a contract directly related to that activity.

It is true that Alternative A may cover most cases that are covered by "transaction of business" types of state long-arm statutes. Read together with the proviso, Alternative A likely satisfies the due process requirement of the U.S. Constitution as proclaimed by the minimum contacts test in the Supreme Court's International Shoe. It is also in conformity with the contract case of McGee which only required that "the suit was based on a contract which had substantial connection" with the forum state. Thus, non resident defendants such as Burger King's licensees may only be haled into a Florida court if they satisfied the condition of indent b)and directed"frequent [and] [or] significant activity" to Florida.
"Frequent [and] [or] significant activity" introduced in the proposed Convention, however, is not synonymous with "transaction of business." Introducing a new or similar term necessarily runs the risk of becoming a false friend. That is, it may create unpredictability ~~to~~ for the parties to contracts and may produce inconsistent interpretations among the courts of the contracting states of the proposed Convention.
The principle of activity as drafted in Alternative A of Article 6 is in contrast to the principle of place of performance, which is expressed in Alternative B. Alternative B provides:

A plaintiff may bring an action in contract in the courts of a State in which -

a) in matters relating to the supply of goods, the goods were supplied in whole or in part;
b) in matters relating to the provision of services, the services were provided in whole or in part;

As it appears, Alternative B is narrower in scope than a traditional rule of jurisdiction which adopts the principle of the place of performance. For example, article 5, paragraph 1 of the E.U. Regulation defines the place of performance as the place in a Member State"where, under the contract, the goods were delivered or should have been delivered"or"where, under the contract, the services wereprovided or should have been provided." This is much more restrictive than the Japanese rule for the place of performance (see article 5 (l) of the Code of Civil Procedure) .

Because Alternative B is restrictive in scope, exercise of jurisdiction according to this rule may well be within the limits of due process. On the other hand, it would prevent exercise of jurisdiction permitted by many states' long-arm statutes over a non-domiciliary who"contracts anywhere to supply goods or services in the State" as to a cause of action arising from such contract-related activity.

It is thus proposed that Alternative B be modified to permit a state to exercise jurisdiction when that state is the place where, under the contract, the goods or services should have been delivered or provided. This modified version would keep intact those state long-arm statutes that provide for jurisdiction for the act of contracting anywhere to provide goods or services within the forum. After all, from the view point of U.S. law, it is not a provision in the convention or in the state long-arm statute that invokes constitutional concerns. Rather, it is the assertion of jurisdiction based on that provision that must pass muster under the test of due process. In the same vein, it is redundant to add to the proviso of Alternative A of Article 6 words such as: "and the overall connection of the defen dant to that State makes it reasonable that the defendant be subject to suit in that State." The jurisdictional rules in the proposed Convention would lose most of their predictability and legal certainty if they are drafted like a constitutional test.

Second, a similar proposal for activity based jurisdiction was made by the United States in relation to Article 10 concerning torts. The proposal has the same frequent or significant activity component, claim-activity relationship, and a reasonableness test as Alternative A of Article 6 does. As a jurisdictional rule in
a multilateral convention, however, this is unnecessarily broad in scope and is highly unpredictable. As a result, it would require an international tribunal to

substantiate the abstract terms and harmonize interpretation.

In particular, the test of frequent or significant activity conducted within or directed towards the forum state fails to address an important condition for affirming torts jurisdiction. Namely, that the place of injury be located within the forum state. Many state long-arm statutes allow for the assertion of jurisdiction over a person who "commits a tortuous act without the state causing injury to person or property within the state." In both World-Wide Volkswagen and Asahi Metal, injury within the forum state was found to be a necessary but not a sufficient condition for upholding jurisdiction. In these products liability cases, the U.S. Supreme Court required purposeful activity directed toward the forum, in addition to injury within the forum.

Thus, the American proposal of activity based jurisdiction in matters of tort seems to step outside the scope of many state long-arm statutes and would not satisfy the due process requirements formulated by the U.S. Supreme Court. Rather, the European version of place of injury plus foreseeability test (see Article10, Paragraph 1 of the 1999Preliminary Draft) may well reflect the due process values expressed in WorldrWide Volkswagen and Asahi Metal.

As the foregoing discussion shows, the argument for the formal approach to activity based jurisdiction or real approach is not so persuasive as to outweigh the merits of predictability and legal certainty. Furthermore, the activity based jurisdiction in matters of contract and tort is hard to accept for Japan, because it tends to blur the distinction between the contract and tort related bases of jurisdiction (see article 5(1) and (9) of the Code of Civil Procedure).

Nonetheless, an alternative version of Article 9 of the 1999 Preliminary Draft, which is based on the U.S.'s real approach, would be acceptable to Japan, whose jurisdictional principles are more flexible than the rules contained in the E.U. regulation. Article 9, paragraph 1 provides that a plaintiff may bring an action in the courts of a State in which a branch, agency, or any other establishment of the defendant is situated, provided that the dispute relates directly to the activity of that branch, agency, or other establishment. This is a formal approach based on a fixed base (see Article 5, paragraph 5 of the E.U. regulation). However,Article 9 also suggests a real approach in its bracketed language that extends branch related jurisdiction to include a state "where the defendant has carried

on regular cdrriiriefcial activityby other means,"provided that the dispute relates directly to that regular conutierciai activity.

Under a legal system where courts exercise jurisdiction only when authorized by a fixed set of jurisdictional rules enacted by the legislature, it would be theoretically difficult to adopt an activity based approach to expand the accepted formal bases of jurisdiction. Japan's Supreme Court has made clear in recent cases the following principles: (l) It maybe reasonable to assert jurisdiction overa nonresident defendant when he has some legal relationship with Japan; (2) The reasonableness of such legal relationship is determined by the principle of natural reason(jdri); (3) If one of the bases of territorial jurisdiction provided in the Code of Civil Procedure is located in Japan, assertion of jurisdiction by Japanese courts is presumed to be reasonable; (4)However, if the court taking jurisdiction finds some special circumstances that run counter to the principle of natural reason, they may decline jurisdiction.

According to principles (3)and(4), assertion of jurisdiction must prima facie be authorized by the territorial jurisdiction of the Code of Civil Procedure, which must in turn be limited by the principle of natural reason. These principles give courts flexibility for declining jurisdiction but not for permitting jurisdiction. On the other hand, the only concern of principles (l) and (2), which precede the other two principles, is whether the defendant has such a legal relationship with Japan that makes the exercise of jurisdiction reasonable. It is thus suggested that this final test of reasonableness gives Japanese legal system the necessary flexibility to introduce a new basis of jurisdiction such as one based on "regular commercial activity* in Japan.

The activity based jurisdiction discussed above is intended as the basis of specificjurisdiction. In contrast,"doing business"is used by the courts of the United States as a general basis of jurisdiction. It is an elastic concept with a wide margin of uncertainty. Therefore, it has been criticized by other countries including Japan as the symbol of exorbitant jurisdiction of American courts. Doing business type of general jurisdiction is listed under Article 18, paragraph 2, subparagraph e)in the 2001 Interim Text as one of the prohibited grounds of jurisdiction. The U.S. proposed to delete this subparagraph.

Subparagraph e), however, does not "unconstitutionalize" the use of doing

business. It only prohibits its use for the purpose of general jurisdiction. Further, the Perkins case, in which the U.S. Supreme Court approved doing business type of general jurisdiction, may be consistent with the proposed Convention as the defendant's general forum (see the 2001 Interim Text, Article 3, paragraph 3 c)where it has its central administration; or d)where it has its principal place of business).

Even the well-known New York case Frummer v. Hilton Hotels International may be explained within the Convention plan as a consumer contract case based on his habitual residence.

In contrast, Article 18 paragraph 1 of the 2001 Interim Text (and ofthe 1999 preliminaryDraft)is intended as a general clause of prohibition of exorbitant jurisdiction. This proposed paragraph prohibits the application of a rule of jurisdiction

provided for under the national law of a Contracting State"if there is no substantial connection between that State and [either] the dispute [or the defendant]." Interestingly, the United States criticizes this clause as broad and vague, creating uncertainty in litigation when coupled with the illustrative list in paragraph 2. General tests such as minimum contacts or principle of reasonableness may be useful to provide a framework for decision-making in deternnining jurisdiction.

However, such a test of a general nature is not appropriate to be included in the proposed Convention, if not limited to the object and purpose provision, because it is too broad and vague to be applied by courts of different contracting states.