

Construction of a System of Reciprocal Recognition of Civil Case Jurisdiction among China, Japan and ROK

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ABSTRACT

The aim of the paper is to offer advice about setting on investigating feasibility of a legal system about the reciprocal recognition of civil case jurisdiction among East Asia region. The present conditions for the recognition of foreign jurisdiction in East Asia states are on the whole similar and this is an advantage for the construction of a unified mechanism. This paper gives three selected models of reciprocal recognition of civil case jurisdiction, which are bilateral judicial assistance treaty, regional multilateral treaties and soften the principle of reciprocity.

Keywords: Recognition and Execution; Foreign Jurisdiction; Principle of Reciprocity

1. Introduction

In the 10 anniversary of cooperation, the second summit among the People's Republic of China, Japan and the republic of Korea was held on October 10, 2009 in Beijing, China. After the meeting, "The tenth anniversary of the China, Japan and South Korea cooperation joint declaration" was published, which read that: "The three countries are committed to the long-term goal—construct the East Asian community on the base of the principle of open, transparent, and inclusive, committed to the regional cooperation, strengthen communicate and coordinate in regional and international affairs day by day." For the first time the programmatic document pointed out the direction for East Asia cooperation between the three Kingdoms, *i.e.* construct East Asian community. In the background of constructing an East Asian community, it is critical to strengthen cooperation in judicial among the East Asia countries, as economic and trade, finance, investment, logistics, intellectual property rights and other fields of cooperation are inseparable from the judicial cooperation.

The reciprocal recognition of civil case jurisdiction is an important part of judicial cooperation. Once one country recognizes the civil case of other countries, the judgment of other countries will have some effects on the country. International law does not stipulate that one country has the obligation of recognizing and executing foreign jurisdiction. But in fact, out of the need to interact with each other, most of countries recognize the civil case jurisdiction of other countries in a certain range. It is hard to imagine that countries will not reciprocally rec-

ognize civil case jurisdiction of other countries. Then a country's divorce judgment will not be admitted in other countries, and then the parties must be charged in other countries, otherwise maybe commit bigamy. So exists in the other legal relation. From the point of view of the parties or the state judicial resources, it is tremendous loss and waste. Therefore, even though any country has not completely recognized and enforced foreign jurisdiction, but did in different scope and way.

To construct the East Asian community, it is bound to break the "prisoners' dilemma" in the mutual recognition and enforcement of civil case jurisdiction. In this paper the foreign jurisdiction of recognition and execution as the key point, trying to set on investigating feasibility of a legal system about the reciprocal recognition of civil case jurisdiction among East Asia region.

The straight matter is made of three parts. Part 1 introduces the principle of principle of reciprocal recognition and the urgency and necessity of construction of a system of reciprocal recognition. In Part 2 I clarify three selected model of reciprocal recognition of civil case Jurisdiction, which are bilateral judicial assistance treaty, regional multilateral treaties and soften the principle of reciprocity. Part 3 is on the conclusions and prospect, as shows the blueprint of the beautiful future in our East Asia.

2. Principle of Reciprocal Recognition and Convict's Dilemma

2.1. Principle of Reciprocal Recognition

In accordance with the sovereignty principle of interna-

tional law, a country's case jurisdiction acts as its laws enacted by the legislature, which is only effective in its own territory. If the jurisdiction would come into effect in other countries, then it must get the consent of the other countries, which is called "recognition"; if to be carried out, it must get other countries' exequatur. Reciprocal recognition can save related national judicial cost, maintain the stability of the legal relationship, and promote the development of civil and commercial contacts. Therefore, nowadays most countries in the world have recognition and enforcement of foreign civil case jurisdiction. However it is different in the range and conditions of the recognition and enforcement [1]. To sum up, Chinese, Japonic and South Korean laws on the recognition of foreign civil case jurisdiction generally prescribe the following: 1) A case judgment made by the court which has jurisdiction over it; 2) The judgment must have be effective; 3) It must be a fair trial process; 4) There is no litigation competition; 5) It does not violate the public order of the admitting country .Besides, the South Korean law adds an element, as is the foreign judgment must be applied to the law guided by private international law of South Korea [2].

In addition, the three countries' law also provides other special conditions on the recognition and enforcement, namely the principle of reciprocity. The so-called principle of reciprocity also is called "equivalence principle". It is considered as a basic principle of international law, and even is considered as an independent pillar of international law.

The principle of reciprocity is considered as the condition of recognizing and enforcing the foreign case judgment by many countries. In particular, the principle of reciprocity includes two aspects of meaning: first of all, one country refuses to recognize and execute another's case jurisdiction, the country will also refuse to acknowledge its. Secondly, the conditions of recognition and enforcement must be equal with domestic conditions, that is, if in the same situation, one country's conditions on the recognition and enforcement of the foreign court's decision is consistent or more loose than its domestic own provisions, it will recognize and enforce the foreign judgments. Otherwise, the native will refuse to admit and enforce the foreign judgments [3].

China civil procedure law article 266 and 265, Japan civil procedure law article 118 and South Korea civil procedure law article 217 all provide the principle of reciprocity as the premise of recognition of foreign case jurisdiction.

2.2. The Urgency and Necessity of Construction of a System of Reciprocal Recognition

From what has been said above, it could be known that

China, South Korea and Japan all provide "the principle of reciprocity" in the civil procedure law. Therefore, if the three Kingdoms pushed "the principle of reciprocity" to extreme, a kind of game theory—"prisoner's dilemma" could be caused in the mutual recognition of civil case jurisdiction among the three countries. In international social interactions, the mutual recognition and enforcement of civil case jurisdiction between two countries is a typical example.

For example, in the case "a Japanese wuwei Huang applying Chinese court for recognition and enforcement of the Japanese jurisdiction", the Japanese made lending disputes with the Japanese Japan-China products Company, Ltd. [4] Hereby the Japanese applied to Dalian intermediate people's court, China for recognizing and enforcing the judgment made by Japan Yokohama District Court Tian Yuan branch, and seizure order and transfer of creditor's rights made by Japan Kumamoto District Court Tamara branch. Dalian Intermediate People's court rejected the request, in respect that Japan has neither concluded any international treaty on the mutual recognition and enforcement of case jurisdiction, nor set up reciprocal relationship.

Because of Chinese refusal in the above case, Osaka Cour, Japan in 2003 also refused to recognize a Chinese case judgment for the reason of lacking reciprocal relationship. According to the prisoner's dilemma theory, the two countries actually get into a kind of "mutual break" double scrapes, which both parties should have avoided. In the light of the game theory, the best choice is that both countries take the countermeasures of mutual cooperation to achieve a win-win.

The widely known "Shuqin Xia Case" could be used as an evidence of scathe resulting from the lack of reciprocal relationship. On the August 23, 2006 morning, Nanjing Xuanwu Court heard the case, in which the one party, Shuqin Xia, a survivor in the Nanjing massacre accused three Japanese defendants of infringing on her reputation. The court judged that the defendants infringed plaintiff's reputation, apologized for Xia and compensated for all the losses. However, although the Xia won in China, but the Japanese court would refuse to recognize and enforce Chinese jurisdiction. Finally, the Xia had got to charge to the Japanese court. On February 5, 2009 the Japan Supreme Court made a final judgment that the plaintiff won again. The case finally did succeed. Yet it is apparent that the plaintiff had to charge again and again at home and abroad, and it is a gratuitous waste of a body of work, a lot of time, money and other judicial resources, because the two countries had not built reciprocal relationship.

The "prisoner's dilemma" will become serious obstacles on the civil and commercial communication among East Asian countries. It is also not conducive to main-

taining the legitimate interests of all countries. Because of the financial crisis in 2008, a large number of South Korean enterprises in China unlawfully evacuated our country to welch. Therefore, Chinese General Office of the Ministry of Commerce, Ministry of foreign affairs, the Ministry of public security office, general office of the Ministry of Justice jointly issued "The unlawful pull-out of foreign investment from China stakeholders transnational investigation and litigation work instructions". It specified in the article 4: "Once the civil lawsuit brought by the Chinese party to our courts recovered, if the foreign party has no property for execution in China, the prevailing could request foreign jurisdictional court recognize and enforce the Chinese judgment according to the civil and commercial legal assistance treaty signed by China and other corresponding countries, or according to the relevant provisions of the losing party's foreign property seat legal." China and South Korea signed "a treaty about civil and commercial legal assistance between the People's Republic of China and South Korea" in 2003. The treaty became effective on April 27, 2005. Unfortunately, this treaty does not include the content about the mutual recognition and execution on the civil and commercial judgment. Besides, China and South Korea did not set up the reciprocal relations in practice. Thus even China's creditors recovered in Chinese court, it will be difficult to carry out the Chinese judgment in South Korea. The only choice is to charge again in Korea, which costs a lot of time and money. So few party will do.

3. Selected Model of Reciprocal Recognition of Civil Case Jurisdiction among China, Japan and ROK

3.1. Bilateral Judicial Assistance Treaty

For China, Japan and South Korea, the most effective way is to conclude bilateral judicial cooperation treaty to strengthen judicial cooperation in order to get out of the "prisoner's dilemma". So far, the bilateral judicial assistance agreement between China and Japan still has not come on. Owing to historical factors, big difference exists in the reciprocal recognition of civil case jurisdiction between China and Japan, so it is hard to conclude a bilateral treaty on a short term. And, it is not reality that China and South Korea would reciprocally recognize or enforce the civil case jurisdiction by emending bilateral treaty to revise the judicial assistance. But we should keep optimistic, after all, by the end of June, 2009, China has already signed 107 treaties of judicial assistance with 63 countries, including more than 40 civil judicial assistance treaties. In East Asia, China has signed bilateral judicial assistance treaty with South Korea and Mongolia.

In addition, China and many countries, (such as France, Italy, Russia, Mongolia, Kyrgyzstan, and Tajikistan, Uz-

bekistan, etc) signed bilateral civil and commercial legal assistance treaty, which all includes the provisions of reciprocal recognition of civil case jurisdiction. The condition as follows: 1) According to the requested party's law, a case judgment made by the court which has jurisdiction over it; 2) According to the applicant party's law, the judgment must have be effective or with execution; 3) According to the applicant party's law, it must be a fair trial process, that is to say the party failed to appear in court has got legal summoned or proper agency; 4) There is no litigation competition; 5) It does not violate the public order of the admitting country. What is worth to draw lessons from is that China with France, Spain and other few countries concludes the judicatory agreement, which demands a party's judgment must be applied to the law guided by private international law of the requested party [5].

Unfortunately, the bilateral treaty on the judicial assistance between China and South Korea is not stated the mutual recognition or execution of the civil and commercial case judgment. China and Japan even have not signed any civil and commercial judicial assistance agreement so far. In view of so close economic and trade ties between China, Japan and South Korea, all shall put some differences aside. Since China and a lot of countries in Western Europe can achieve such agreements, what problems could not be solved among so close East Asian countries?

3.2. Regional Multilateral Treaties

In the long run, the solution is to sign a multilateral international treaties on the reciprocal recognition of civil case jurisdiction among China, Japan and South Korea. It can draw experience of negotiation from the "Brussels Convention" and the Hague Convention .

On September 27, 1968, Germany, France, Italy, Luxembourg, the Netherlands in Brussels signed the "Brussels Convention". Then European Union was established. It has been committed to make it uniform the recognition of the civil case judgment system in European countries. Finally on 2 October 1997 the Amsterdam treaty was passes, and "the judicial cooperation in civil field "was taken into the European Union's jurisdiction. On December 22, 2000 it passed the ordinance on civil and commercial cases jurisdiction and the recognition and enforcement of judgment (GVO), which replaced the 1968 "Brussels convention", and would become effective on March 1, 2002.

In 1971, Hague Conference on Private International Law passed the Convention on Recognition and Enforcement of Foreign Judgments in International Civil and Commercial Cases. But only three states including the Netherlands took part in the convention. And so far,

it did not take effect. Hague Conference on Private International Law has devoted to conclude a more extensive convention on recognition of civil and commercial case jurisdiction since 1992. Because of disagreements between the European nations and the USA, just June 30, 2005 Choice of Court Agreement Convention passed on June 30, 2005, after 10 years' efforts. This convention only applies to the international case with exclusive choice of court agreement in civil and commercial fields, not to cases about consumer contracts and employment contracts. China, Japan and South Korea all took an active part in the formulation of the convention, and signed the convention. Although East Asian countries did not officially ratify the convention, but they could make use of the experience in negotiation and specific regulations of the convention.

In fact, International Convention on Civil Liability for Oil Pollution Damage jointly joined by China, Japan and South Korea in the 1969 years has the terms about mutual recognition and enforcement of the other's judgment. Article 10 of the convention provides: "1) Any judgment given by a Court with jurisdiction in accordance with article 9 which is enforceable in the State of origin where it is no longer subject to ordinary forms of review, shall be recognised in any State Party, except: a) where the judgment was obtained by fraud; or b) where the defendant was not given reasonable notice and a fair opportunity to present his or her case. 2) A judgment recognised under paragraph 1 shall be enforceable in each State Party as soon as the formalities required in that State have been complied with. The formalities shall not permit the merits of the case to be re-opened." And according to the provisions of article 9 of the convention, the jurisdictional court is the contracting party court of "oil pollution damage incidents occurred seat" or of "take preventive measures to prevent or minimize pollution damage in such territory". This shows that it is not impossible to sign an international regional convention among China, Japan and South Korea such as Hague Choice of Court Agreement Convention.

3.3. Soften the Principle of Reciprocity

From the most feasible measures to see, China, Japan and South Korea had better soon provide the other two countries the reciprocal treatment on precognition and enforcement of the civil case jurisdiction.

It suffers more and more criticism in the world that requesting reciprocal treatment on precognition and enforcement of the foreign civil case jurisdiction. Recent legislation and practice in many countries of the world are beginning to give up the requirements of mutual benefit.

In the United States, although the "Hilton V. Guyot

case" established the principle of reciprocity as early as in 1895, the principle had been critical since established. Now most states in the USA have abandoned the requirements of reciprocity, and no longer request reciprocity on the recognition and enforcement of foreign judgment. In particular, California Federal Appeals Court made a ruling on July 22, 2009, agreeing to implement the civil judgment made by Hubei Province High People's Court in China, asking the US Robinson helicopter Company Ltd make about \$650,000 compensation to Chinese Hubei Ggezhouba Sanlian Industrial Co., limited. It is the first case that the United States recognized and implemented Chinese court ruling, which is of historic meaning. In the present case, the USA court, according to the "uniform foreign money judgment recognition law", did not review Chinese law's mutual benefits to its courts [6].

In recent years, German scholars put forward "the principle of cooperative reciprocity", that is, as long as it can determine the foreign no precedents of refusing to acknowledge their courts, Germany would presume the existence of reciprocity. The court also put it into practice. In 2006, Berlin High Court recognized a civil judgment made by Wuxi Intermediate People's Court in China in accordance with the article 328 of German Civil Procedure Law. What is worth to pay close attention to is German court's explanation of the principle of reciprocity: "Because there no exists any international treaty on the mutual recognition of civil case jurisdiction between Germany and China, specific judicial practices act as the basis for such cases. If both parties only waits for the other party's first step, and then follows up to take its first step, finally mutual reciprocity will be never possible and could only be thought just, as is not lawmakers or law enforcers hope to see. In order to drive the case jurisdiction forward without the international treaty of mutual recognition the court's decision, what to consider is that when one party takes the first step, whether the other party will follow up or not. According to the development of international trade and economic now, China probably follows up"; "Chinese corresponding provisions in the law conform to the article 328, paragraph 1 of German Civil Procedure Law. Therefore Germany should not give suspicion on reciprocity".

Switzerland 1987 "the federal law on private international law" also completely gives up reciprocity, with the only exception of foreign bankruptcy. Venezuela 1998 "Private International Law and Belgium 2004 Private International Code no longer require the mutually beneficial relations.

4. Conclusions and Prospect

In East Asia, it has been a consensus among government

leaders to build an East Community. Against this background, we should learn from the European experience to reach at a multilateral agreement. Under the framework of East Asia community, the prospect of civil judicial cooperation among China, Japan and South Korea may follow the track.

Firstly, China, Japan, South Korea and other East Asian countries and regions could strengthen the negotiations on bilateral or multilateral free trade area, and at the same time, actively carry out the negotiations of civil and commercial legal co-operation. East Asian countries could as early as possible conclude an international treaty similar to the Brussels Convention. Now that China, Japan and South Korea have made it as a common goal to build an East Asian community, we ought to instantly make such an international treaty. Because China, Japan and South Korea all took part in the negotiating process of the Choice of Court Agreement Convention, we are rather experienced to conclude such an international treaty.

Secondly, East Asian countries could continue to negotiate the bilateral judicial assistance, before formally carrying out the international treaty. China, Japan and South should try to reach tacit understanding, lay the foundation for the international convention in the future. The conditions of recognition of foreign civil judgment are basically consistent in the East Asian countries, which is very favorable for negotiation on the judicial assistance.

Thirdly, it is imperative to reach a consensus action to cancel the reciprocal request on recognition and enforcement of civil case jurisdiction by the Supreme Court case or judicial interpretation.

In East Asia, it has been a consensus among government leaders to build an East Community. Against this background it is required to set on investigating feasibility

of a legal system about the reciprocal recognition of civil case jurisdiction among East Asia region. The present conditions for the recognition of foreign jurisdiction in East Asia states are on the whole similar and this is an advantage for the construction of a unified mechanism. But the East Asia Countries generally ask for most favored status, and this may give use to convicts' dilemma. For its solution, we should learn from the European experience to reach at a multilateral agreement. As a start, to reach a consensus action to cancel the reciprocal request on recognition and enforcement of civil case jurisdiction, and then negotiate the bilateral judicial assistance, finally East Asian countries could as early as possible conclude an international treaty.

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