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The Forum of Necessity Doctrine in Comparative Private International Law

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Abstract: In judicial practice, conflicts often arise over jurisdictional issues in foreign-related civil proceedings. The forum of necessity doctrine arises where the courts of two or more countries decline jurisdiction over the same foreign-related civil action, whereby the courts of one country may extend the jurisdiction of its own courts to receive and hear the relevant action based on some connection with that country. This doctrine is intended to protect the legitimate litigation rights of the parties. This article focuses on the legal framework of the forum of necessity doctrine, comparing the legislative statuses in China, Japan, Korea and Europe, and making suggestions for improvement.

1. Introduction

Along with the frequent and in-depth international civil legal activities, foreign-related civil litigation has been increasing. And in the foreign-related civil litigation, the issue of jurisdiction is crucial. Due to the different provisions of foreign-related civil litigation jurisdiction and their own shortcomings, conflicts of jurisdiction often arise in judicial practice. For example, a Belgian woman named Anne and a Turkish woman named Paula got married in Rotterdam, the Netherlands. Two years after the marriage, they decide to move to Austria. After living together in Austria for a period of time, their relationship came to a standstill and they decided to divorce. The Dutch courts have never had jurisdiction over cases of dissolution of marriage between same-sex couples, and there are no special courts for such cases. At the same time, Austria does not recognize marriages between same-sex couples, so it is not possible to dissolve a marriage through litigation in Austria. In this case, what legal remedies do the two women have to resolve their problems?

The case in which the courts of two or more countries refuse jurisdiction over the same foreign-related civil litigation is known as a negative conflict in the conflict of jurisdiction in foreign-related civil litigation. This can cause the parties to lose their litigation rights and deny judicial protection of their legitimate interests. In order to avoid this phenomenon, the court of a country may extend the jurisdiction of its own court to receive and hear the relevant litigation based on some connection with the home country, and the forum of necessity doctrine is thus derived.

This article focuses on the legal framework of the forum of necessity doctrine, comparing the legislative statuses in China, Japan, Korea and Europe, and making suggestions for improvement.

2. Overview

2.1 Definition and purpose

The forum of necessity (forum necessitatis), also known as the forum of convenience (forum conveniens), is a complementary and exceptional international adjudicative jurisdiction set in the case of negative conflict of international adjudicative jurisdiction, and its purpose is to eliminate the jurisdictional negative conflict may result in the denial of justice, thus avoiding the result that the rights of the parties cannot be guaranteed. Considered theoretically, domestic courts always have adjudicative jurisdiction when a foreign proceeding is impossible or presumably impossible for de jure or de facto reasons and there is a need to protect rights. Considered in terms of legislative policy, a state establishes the necessary jurisdiction to protect the legal rights and interests of its own persons located outside its territory and to prevent situations in which its own persons have no access to judicial remedies in foreign countries.

Among them, the forum of necessity is a concept mostly adopted by civil law countries, while the corresponding the forum of convenience is a common law concept in the United States and England.

2.2. Examples

Many countries have established the forum of necessity or a doctrine that serves the same legislative purpose.

For example, while Article 4(2) of the Italian Private International Law Reform Act of 1995 provides that a choice of court or arbitration agreement may limit the jurisdiction of any Italian court, such limitation does not become legally binding when the case cannot be heard in a foreign court or arbitration body or is denied jurisdiction.

Article.3136 of the Québec Civil Code also adopts this principle, it says" even though a Québec authority has no jurisdiction to hear a dispute, it may nevertheless hear it provided the dispute has a sufficient connection with Québec, if proceedings abroad prove impossible or the institution of proceedings abroad cannot reasonably be required."

Art. 11 of the Belgium code 2004 has similar provisions, "Nothwithstanding the other provisions of the present statute, the Belgians courts will exceptionally have jurisdiction when the matter presents close connections with Belgium and proceedings seem impossible or when it would be unreasonable to demand that the action be brought abroad."

2.3. Conditions

The exercise of this principle needs to meet three conditions: firstly, the parties have no access to local courts. Secondly, the parties have no access to foreign courts. Thirdly, there must be sufficient connection between the case and the forum.

The second point "No access to foreign courts" contains two situations. The first one is an objective impossibility caused by the state of war, earthquake, etc., to proceed abroad if the only State having jurisdiction has no workable judiciary system. The second one is a subjective impossibility for the party to reasonably ask the plaintiff to proceed abroad if the only state's jurisdiction has no workable judiciary system. For example, the cost of going abroad is too high or the outcome of justice abroad is unfavorable to oneself.

In the case described at the beginning of the paper, the two women were unable to bring their petition for dissolution of their same-sex marriage before the court of the place of settlement, i.e. the Austrian court, because the court of the place of settlement does not recognize the validity of the

same-sex marriage relationship, and before the court of the place of conclusion of the marriage, i.e. the Dutch court, because the court of the place of conclusion of the marriage does not have overriding jurisdiction over such cases and does not have an exclusive court with jurisdiction over such cases.

In order to solve the embarrassment of having nowhere to resort and to effectively protect the rights of the two women, perhaps the courts in both places (Netherlands, Austria), as well as the courts in the country of nationality of the two women (Belgium, Turkey), could extend their jurisdiction to cover such cases, receive and hear them based on their connection to the case. In fact, the Netherlands is planning to introduce legislation that would give domestic courts jurisdiction over such divorce cases of same-sex couples based on the forum of necessity doctrines. This is not only for the sake of solving this case, but also to prevent such embarrassing situations from happening again in the future. [1]

3. Applications in different countries(areas)

3.1. Applications in China

To a certain extent, China's regulations on the jurisdiction of foreign-related civil litigation reflect the principle of the necessary court. Article 13 of the Supreme People's Court interpretation of the Civil Procedure Law(2015) stipulates that: "An overseas Chinese couple who celebrated their marriage in China but have settled down abroad, may bring their divorce dispute before the People's Court located in either party's last residence in China in case that the State where they've settled down declined the jurisdiction over it on the ground that divorce disputes shall be exclusively subject to the jurisdiction of the loci celebrationis." Article 14 of the Supreme People's Court interpretation of the Civil Procedure Law(2015) also provides that: "An overseas Chinese couple who celebrated their marriage abroad and have settled down abroad, may bring their divorce dispute before the People's Court located in either party's last residence in China in case that the State where they've settled down declined the jurisdiction over it on the ground that divorce disputes shall be exclusively subject to the jurisdiction of their country." These two provisions for the settlement of overseas Chinese to provide convenient conditions for the settlement of marital disputes, is conducive to the protection of the interests of overseas Chinese settled abroad, reflecting the forum of necessity doctrine in the coordination of foreign-related civil jurisdiction.

3.2. Applications in South Korea

A doctrine similar to that of the forum of necessity is found in the Korean Private Foreign Law of 1962, expressed as "substantial connection". The Korean Grand Court cited the principle of "substantial connection" in its decision No. 2003DA29555 of 1995. In principle, the defendant's domicile doctrine is used in the jurisdiction of family cases, which requires that the defendant has a domicile in Korea, but as an exception, if the defendant's whereabouts are unknown or other similar circumstances exist, the defendant may not be considered to have wrongfully violated his or her interests, and refusal to adjudicate in such cases would constitute a denial of legal protection to the foreigner and thus violate the principle of justice. In such cases (although not domiciled in Korea), the jurisdiction of the Korean courts may be recognized.

The 2001 comprehensive revision of Korean private international law set a general standard for foreign litigation jurisdiction. The newly created Article 2 of the PIL reflects the relevant elements of the "substantial connection" principle introduced by the Supreme Court. The representative case is the frozen mackerel case in 2008. The defendant's counter-claim in China was dismissed when direct evidence of the mackerel no longer existed and five years had passed since the defendant

harvested and disposed of the mackerel. If the jurisdiction of the Korean court is denied, the rights of the parties will not be remedied. In this case, the Korean court was considering that it would be wrong to deny jurisdiction if the provisions of domestic law on jurisdiction were applied to foreign litigation jurisdiction as it was, and that the special nature of international jurisdiction should be considered based on the jurisdictional provisions in domestic law.[2]

3.3. Applications in Japan

Before the revision of the Civil Procedure Law in 2012, Japan generally decided whether to take jurisdiction over foreign cases based on the principle of "justice and reasonableness" established by the Supreme Court of Japan in a 1981 precedent.

Japan's 2012 Civil Procedure Law absorbed the civil law jurisdiction system, mainly in the form of a special jurisdiction system for the weak, but it does not contain the forum of necessity doctrines.[3] On the contrary, the provisions of special circumstances, which are followed in Japan's 2012 Civil Procedure Law, reflect the limitation of the jurisdiction of Japanese courts and can be regarded as the Japanese forum of non conveniens doctrine.

3.4. Applications in Europe

In cases of succession, international jurisdiction can only be exercised by the courts of the EU member states. The Rome IV Regulation on succession adopted by the EU legislator in 2012 provides in Article 11 for "necessary jurisdiction" in cases where the habitual residence of the decedent at the time of death is not in any of the Member States. The Rome IV Regulation on succession adopted by the EU legislator in 2012 provides for "forum necessitatis". In order to avoid a situation of "denial of justice", Article 11(1) provides that “Where no court of a Member State has jurisdiction pursuant to other provisions of this Regulation, the courts of a Member State may, on an exceptional basis, rule on the succession if proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the case is closely connected.” For example, if a civil war breaks out in that State, the courts of a Member State may, on an exceptional basis, rule on the succession if proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the case is closely connected. Paragraph 2 of the same article requires that the case must have a sufficient connection with the Member State of the court seised. The purpose of this paragraph is to avoid conflicts of jurisdiction, parallel proceedings and obstacles to the subsequent validity of judgments rendered in one Member State.[4]

4. Comparison

The above-mentioned provisions of Articles 13 and 14 of the Supreme People's Court interpretation of the Civil Procedure Law (2015) are inadequate and somewhat harsh to the extent that they do not fully reflect the principle of necessary courts.[5] Specifically, first, the principle is applied to too narrow an audience. It is only available to Chinese nationals in China, but not to foreigners in similar situations. Second, the principle is also too narrowly applied to cases. This principle is only applicable to marital disputes of Chinese nationals settled abroad, but not to all foreign-related civil and commercial disputes of Chinese citizens. Third, the conditions for the application of the doctrine are too vague and not clearly defined in the law. In general, China's forum of necessity doctrine is still at a preliminary stage, and the provisions are relatively rough and not detailed enough, which may cause controversies in the specific application, and there is still much room for improvement. In addition, China's forum of necessity expands the jurisdiction of Chinese courts, and the vagueness of its application conditions to a certain extent leads to the

jurisdiction of Chinese courts exceeding the necessary limits of foreign-related civil jurisdiction, which may conflict with the exclusive jurisdiction of other countries. While protecting the rights and interests of Chinese nationals, it is doubtful whether the judgment results can be recognized and enforced by foreign countries, which may actually lead to further complication of foreign-related civil disputes.

The provisions of international jurisdiction in Korea emerged relatively late (2001), but developed more rapidly and comprehensively based on reference to previous jurisprudence and doctrine. 2001 revision of private international law legislated previous jurisprudence and expanded the jurisdiction of foreign-related civil litigation based on reference to international conventions such as Convention on jurisdiction and the enforcement of judgments in civil and commercial matters. The revision of PIL in 2001 legislated the previous jurisprudence and expanded the jurisdiction of foreign-related civil litigation based on international conventions such as Convention on jurisdiction and the enforcement of judgments in civil and commercial matters. However, the Korean private international law legislation reflects a worrying tendency similar to that of China. Overemphasizing that the exercise of litigation jurisdiction is a matter of a nation's sovereignty, it has been overly cautious about waiving jurisdiction. Based on this idea, Korean courts consider the connection between the plaintiff and Korea as an element for judging substantial connection in most foreign-related civil litigation cases where the plaintiff is a Korean. If this point is always emphasized, then the result of forcing foreign defendants to respond in Korean courts will occur, thus potentially violating the fundamental concept of an international adjudicative jurisdiction system that effectively resolves international disputes and practices the concept of jurisdictional allocation.

On the contrary, Japan, the setting of the forum of necessity doctrine in this regard is almost blank, can be said to be relatively lagging behind. Considering the expansion of foreign civil litigation jurisdiction in recent years, resulting in the increase of foreign civil litigation by the Japanese courts, the Japanese legislators therefore take special circumstances to limit the provisions, which is somewhat reasonable. In fact, the expansion of foreign civil litigation jurisdiction is a common problem in China, Japan and Korea. However, if the Japanese legislator is considering limiting the jurisdiction of foreign-related civil litigation, it is likely to lead to the parties to litigate without a door to harm their interests.

The Rome IV Regulation on succession adopted by the EU legislator in 2012 is a real reform of EU private international law in the field of inheritance, which enhances the stability and predictability of the law and guarantees the litigation rights of the parties, and has a very strong significance for China's. It has a very strong significance for China's Law on the Application of Foreign-related Civil Legal Relations and other countries to improve the rules of private international law in the field of foreign-related inheritance.

5. Suggestions for improvements

In the author's opinion, it is necessary for China to strengthen the forum of necessity doctrine in the future legislation of foreign-related civil litigation jurisdiction in the field of private international law. The Supreme Court can expand the object and applicable cases of the principle through judicial interpretation: the Chinese court can exercise jurisdiction over the lawsuit filed by the plaintiff, if the lawsuit has sufficient connection with China when it is obvious that no other court can provide judicial relief. In addition, the conditions for the application of the principle should be further clarified. In this way, the rationality and effectiveness of the legislation will be enhanced and the negative conflict of jurisdiction in foreign-related civil cases will be overcome.

From a brief review and comparison of the attitudes and regulations of China, Japan and Korea

in respect of the forum of necessity doctrine, it can be seen that there are certain differences in the regulations and practices of the three countries in respect of jurisdiction in foreign-related civil cases. The legal provisions of China and Korea are able to take into account the litigation needs of the parties and adopt the principle of necessary forum to safeguard them, while the provisions of Japan in this regard are relatively backward and need to be remedied as soon as possible. In addition, the legislation and practice of China, Japan and Korea are also very different in respect of jurisdictional immunity not mentioned. The unification and harmonization of private international law generally involves the rules of jurisdiction, rules of application of law, rules of extraterritorial investigation and evidence, rules of extraterritorial service of documents and rules of extraterritorial recognition and enforcement of judgments. Among these contents, the unification or harmonization of jurisdictional rules is the most important, because the determination of jurisdiction is the first step in hearing foreign-related cases, and if the jurisdictional rules are not unified, it will cause the problem of parallel jurisdictional conflicts and affect the speedy hearing of foreign-related cases. In addition, when recognizing and executing foreign court judgments, courts of various countries regard the foreign court having jurisdiction as one of the basic conditions for recognizing and executing foreign court judgments, and if the rules of jurisdiction are not unified, it will also affect the recognition and execution of judgments, which will accordingly affect the stability of foreign-related civil and commercial legal relations, thus hindering the free flow of people, funds, services and goods among countries in the region, and ultimately affecting the The realization of regional integration. Therefore, the author believes that scholars of private international law in the three countries should first strengthen the communication on jurisdictional rules in international civil cases, such as jurisdictional rules in contract cases, jurisdictional rules in tort cases, jurisdictional rules in marriage and family cases, jurisdictional rules in inheritance cases, etc. Secondly, measures should be taken to coordinate the jurisdictional rules of international civil cases. Specifically, coordination can be carried out through domestic, bilateral and regional or multilateral channels. This is destined to be a difficult task, but as Professor Shi Guangxian points out, promoting the realization of the East Asian Community through judicial cooperation is a worthy and worthy cause to be continuously promoted.[6]

6. Conclusion

This paper outlines the legal framework of the forum of necessity doctrine, compares the legislative status in China, Japan, Korea and Europe, and makes suggestions for improvement.

In the practice of foreign civil litigation, the coordination of conflict of jurisdiction issues (especially negative conflicts) is a crucial matter. The forum of necessity doctrine may be one of the ways to resolve it. Its positive role is flexibly according to the contact of the case, the court has solved the exercise their litigation rights of the parties as a result of jurisdiction conflict cannot, expanded the country court of jurisdiction over foreign-related civil litigation cases, for the parties to provide the auxiliary channel, and a positive image of the symbol of a country's sovereignty.

However, this doctrine is not perfect. One of the application conditions, "the connection between a case and the court of a country" itself is very vague, leaving too much room for the discretion of legislators and judicators of various countries, resulting in low stability and predictability of the law. Moreover, the legal provisions on the principle of the necessary court are very different in different countries, and the contradictions need to be further coordinated and resolved. In East Asia, countries such as Korea and China may use this doctrine to expand their jurisdiction, or it may impair the exclusive jurisdiction of other countries, but it is not conducive to the settlement of the issue of jurisdiction in foreign-related civil proceedings.

Therefore, the legislators of various countries should learn from each other to perfect and

complement the establishment of the forum of necessity. This is also the inevitable way to coordinate foreign jurisdiction conflicts and foreign civil legal activities.

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