State Practice of Asian Countries in International Law

Korea

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MUNICIPAL LAW – TREATIES – CIVIL PROCEDURE LAW

DECISION OF SUPREME COURT CONCERNING THE “JUDGMENT EXECUTION”

Supreme Court Decision 2015Da207747 (decided on 28 January 2016)

Facts of the case

The plaintiff in this case is a U.S. national who works in the horse breeding industry in Kentucky, U.S. On 6 April 2007, he concluded a sales agreement to purchase a purebred mare named First Violin for USD150,000 with the defendant who runs a stud farm in Korea. But, on 14 April 2007, Dominican, born by the mare in this case, won a horse racing competition held in the U.S. Promptly, the defendant maintained that First Violin's market price is over one million U.S. dollars after the competition, and notified the plaintiff that the mare is not for sale. The plaintiff filed a lawsuit for breach of contract and claimed compensation for damage before the Woodford Circuit Court (Kentucky; hereafter the U.S. court) on 3 November 2008. On 27 August 2010, the U.S. court ordered the defendant to pay USD639,044 for damages as well as litigation costs, etc. As the defendant did not appeal, the judgment was then finalized. The defendant, however, filed a lawsuit before a Korean court.

Issues presented

1) The procedure of serving the defendant who is domiciled in Korea did not comply with the procedure set under the U.S. law for the litigation in the U.S., and 2) the recognition of the U.S. court ruling violated “sound morals and other social order” of Korea based on the Article 217 of the Civil Procedure Act of Korea, as the amount of damages was excessive.

Judgment

The Court dismissed all appeals based on the following reasoning:

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...[T]hus, for a local government that freely loans property that is to be returned only after an indefinite period, it can be seen that just by being liable for the ordinary reinstatement, it has achieved to a considerable degree the legislative purpose of sharing the duty of national defense as originally intended by the Management and Disposal Act. As such, it is reasonable to interpret the scope of exemption from the obligation to reinstate under Article 6(2) of the Management and Disposal Act as being restricted to the scope of purpose of the free loan, i.e., the reinstatement of the ordinary status quo. Extending the interpretation beyond this line to obligate the local government to reinstate all the consequences of environmental contamination not originally anticipated, would be difficult to accept in terms of the legislative purport of the Management and Disposal Act, which centers on the certainty and expeditiousness of loan, as well as in terms of equity...

Comment

Overall, if a defeated defendant would be seen as having the opportunity to defend his actual interests in a foreign court proceeding, the court considered the defendant is deemed to have responded to the lawsuit as prescribed under Article 217(1)2 of the Civil Procedure Act. In addition, the court ruled that whether the recognition of the final judgment rendered by a foreign court etc. violates good morals or other social order of Korea or not should be decided based on the impact of the final ruling etc. on basic moral beliefs and social order which Korean laws aim to preserve and protect.

HUMAN RIGHTS – TREATIES – REFUGEE

DECISION OF SUPREME COURT DECISION ON THE “REVOCATION OF DISPOSITION OF REFUGEE STATUS NON-RECOGNITION”

Supreme Court Decision 2013Dui4269 (decided on 10 March 2016)

Facts of the case

The plaintiff is a national of the People's Republic of Bangladesh, who joined anti-government activities of the Parbattya Chattogram Jana Samhati Samiti (hereafter JSS) and the United People's Democratic Front (hereafter UPDF) as a member of the indigenous Jumma tribe of the Chittagong Hill Tracts of Bangladesh. He entered Korea on 7 September 2007 and applied to the defendant (Minister of Justice, Republic of Korea) for recognition of refugee status

on the grounds of a well-founded fear of being persecuted for reasons of race, political orientation, etc., if he were to go back to Bangladesh. But, the defendant rejected the application following the determination that the plaintiff's grounds for refugee recognition do not constitute a well-founded fear of being persecuted stipulated in Article 1 of the Refugee Convention. Then, the plaintiff brought a lawsuit seeking revocation of the disposition.

Issues presented

This case deals with 1) the method of assessing the credibility of a statement by a refugee applicant and the requirements for recognizing it; and 2) the method of proving the authenticity of a foreign official document submitted by a refugee applicant.

Judgment

The court ruled that it is difficult to recognize the credibility of the plaintiff's statement on the actuality or possibility of persecution based on the following reasoning:

[A] statement shall: 1) contain concrete facts to such an extent as to sufficiently recognize the refugee applicant's allegations on the face of the statement; 2) without any omission of material facts; 3) have consistency and persuasive power, standing alone; and 4) conform to the contents of other evidence.

Comment

In this case, the Supreme Court confirmed that the applicant should bear the burden of proving the existence of a well-founded fear of persecution. If there is special circumstance for applicant to collect evidence, he/she is not required to prove the entirety of the alleged facts by objective evidence. Rather the facts should be deemed to be proven when it is reasonable to recognize them based on the credibility of the totality of the statements. Furthermore, the court confirmed that in assessing the statement by a refugee applicant, the overall credibility of the statement shall not be denied for the mere reason of discovering slight inconsistencies in the details of the statement, or detecting some exaggeration. Rather, the overall credibility should be assessed focusing on the essential content of the statement and considering emotional shock from the experience of genuine persecution, unsound psychological condition due to applicant's distress, limitations in memory due to the passage of time, and different sense of language arising from a cultural and historical background, etc.

PRIVATE INTERNATIONAL LAW – TREATIES – JURISDICTION

DECISION OF SUPREME COURT CONCERNING THE “INSURANCE PROCEEDS”

*Supreme Court Decision 2015Da5194 (decided on 23 June 2016)**Facts of the case*

The plaintiff in this case is a Korean corporation in the trade business, and the defendant is an American corporation in the insurance business which has a branch office in Korea. The Plaintiff entered into a cargo insurance agreement with the Defendant in Korea under the terms of WAIOP (With Average Irrespective of Percentage). Under this agreement, the insured recovers for certain inherent maritime perils regardless of the type or scale of maritime loss, as provided under the Institute Cargo Clauses of the Institute of London Underwriters (now the International Underwriting Association of London). But at the same time, the insurance agreement included an “OnDeck Clause,” providing for the governing law, stating that “all questions of liability arising under this policy are to be governed by the laws and customs of England”; and with the provision that in the event the Plaintiff fails to notify the Defendant of the ondeck loading of insured cargos, the scope of coverage is to be limited to Free from Particular Average (FPA), under which general partial loss is not covered beyond “Washing Overboard.” The Plaintiff enlisted Global Cargo Solution Co., Ltd. for marine cargo shipping from the port of Shanghai, China, to the port of Iskenderun, Turkey. The shipment was involved in an accident in which one of the four cargo units, i.e., a boiler, went overboard off the coast of Oman. The Plaintiff filed suit, claiming: 1) the “OnDeck Clause” is subject to the duty of explanation under the Act on the Regulation of Terms and Conditions of Korea; 2) the Defendant failed to adequately explain the “OnDeck Clause” to the Plaintiff; and therefore, 3) WAIOP, instead of the “OnDeck Clause,” is applicable as the substance of the insurance contract.

Issues presented

In this case, one of the main issues is to decide, if the parties chose the governing law for only a part of the contract having foreign elements, the applicable law to other parts of contact for which the parties did not choose the governing law.

Judgment

The Court dismissed the appeal. This is because first, the “OnDeck Clause” is commonly included in English cargo clauses and is part of standard international terms and conditions in marine insurance market, which are generally

used by marine cargo insurers. And second, although it is erroneous for the lower court to have determined that the Act on the Regulation of Terms and Conditions of Korea does not apply to the instant insurance contract, it is ultimately justifiable for it to have determined that this Korean legislation does not apply to the “OnDeck Clause” on the ground that the Plaintiff was well aware of the content of the “OnDeck Clause.”

Comment

The Court ruled that by citing Article 25(1), 25(2) and 26(1) of the Act on Private International Law, the governing law of the part for which the parties did not choose the applicable law shall be the law of the country most closely connected with the contract. The Court highlighted that the instant governing law clause did not designate the governing law for the entirety of the insurance contract. Rather, it provided that the said contract would follow English laws and customs to the extent of the insurer’s “liability.” As such, as to those matters not pertaining to the insurer’s liability, the laws of Korea, having the closest connection with the instant insurance contract, shall be applicable.

HUMAN RIGHTS – MIGRATION – NATIONALITY ACT

DECISION OF SUPREME COURT CONCERNING THE “REVOCATION OF DISPOSITION DISAPPROVING EXTENSION OF SOJOURN PERIOD, ETC”

Supreme Court Decision 2015Du48846 (decided on 14 July 2016)

Facts of the case and Issues presented

On 25 July 2006, a Pakistani man (Non-Party) entered the Republic of Korea under D3 (Industrial Trainee) status. On 17 June 2007, his left forearm was amputated when his hand got sucked into a sawdust crusher. Following the accident, he underwent an operation to remove his left forearm, and experienced post-traumatic stress disorder (PTSD). On 2 August of the same year, this man applied for change in sojourn status on the grounds that he needed medical treatment and was issued permission to change his sojourn status to G1 (Miscellaneous) status. Following the application for naturalization on 8 February 2013 pursuant to Article 5 of the Nationality Act, he was issued permission to change his sojourn status to F1 status which is issued to a citizenship applicant and was granted extension of stay by 8 February 2015. On 4 September 2012, the Plaintiff (a Pakistani woman) and this man got married in Pakistan and registered their marriage. The Plaintiff entered the Republic of Korea under C3 status on 2 September 2013 and then applied for permission to change her

sojourn status to F1 status on October 24 of the same year in order to care for her husband.

The Defendant (immigration office) investigated the circumstances of the Plaintiff and the husband and on 11 April 2014, following the investigation, disapproved the Plaintiff's application on the grounds that there were no extenuating circumstances for her to stay in Korea. The defendant pointed out the fact that 1) the husband (Non-Party) received a lump sum compensation for disability; 2) he did not appear to have been in a critical condition since he was able to manage on his own during that time; and 3) his wife did not have status of sojourn eligible for employment but was working on the side at home when she visited her husband in Korea. The lower court indicated that the Plaintiff applied for change in her sojourn status to care for her husband on the condition that her husband was qualified to be issued permission for naturalization. As the husband was not deemed qualified to apply for naturalization due to having failed to pass the required written exam on two occasions, the lower court ruled that the Plaintiff could not be expected to be issued permission to change sojourn status due to her standing and that there was no excess or abuse of discretionary power regarding such an instant disposition.

Judgment

The Supreme Court, however, reversed the judgment of the lower court with a reasoning that first, while legally staying in the Republic of Korea under D3 status, the husband's left forearm was amputated due to an occupational injury which left him seriously disabled; and second, as the possibility of the husband's condition worsening cannot be ruled out given that recurrent depressive disorder tends to cause additional stress, i.e., it is deemed necessary, from a humanitarian standpoint, to grant the Plaintiff to live with her husband during his legal sojourn period in Korea so that she can help him recover physically and emotionally. The Court seems to have carefully considered that he had approximately 10 months remaining to legally stay in Korea when the instant disposition was rendered and thus requiring her to maintain C3 status (the maximum stay per visit is only 90 days) is not rational even from a humanitarian perspective since it could hinder the Plaintiff's continuous care of her husband. The Court, therefore, maintained that the disadvantages likely to be imposed on the Plaintiff from the instant disposition trump the public interest to be gained. In the same vein, the instant disposition is against the principle of proportionality, thereby constituting an excess or abuse of discretionary power.

Comment

It seems that the Court recognized that even though the foreigner meets all the requirements stipulated under the relevant law, here the Article 24

(1) of the Immigration Control Act, the competent agency has discretion to determine whether or not to issue a permit in consideration of the foreigner's standing, purpose of stay, effect on public interest, etc. However, the Court emphasized that such a decision can constitute an excess or abuse of discretionary power if the competent agency commits a grave error on fact-finding or there is a violation of the principles of proportionality and equity.

TREATIES – INHERITANCE RIGHTS – SOUTH AND NORTH KOREAN FAMILY SPECIAL ACT

DECISION OF SUPREME COURT CONCERNING “RECOVERY OF INHERITED PROPERTY”

Supreme Court Decision 2014Da46648 (decided on 19 October 2016)

Facts of the case & issues presented

The main issue in this case is if a North Korean who was unable to inherit from a South Korean decedent, whether the right to claim inheritance recovery under Article 999(2) of the Civil Act expires on the lapse of ten years from the date of infringement of inheritance rights or not.

Judgment

The Court pointed out that even if there had been a need to take into account the North Korean residents in disputes pertaining to inheritance between South and North Korean residents, this is a matter to be addressed within the bounds of reasonable statutory interpretation. It is necessary to carefully consider the purport of the institution of the limitation period on the exercise of claim for inheritance recovery under the Civil Act, the legislative purpose of the South and North Korean Family Special Act and pertinent provisions. As the recovery of inheritance has clearly influenced not only the pertinent heirs, but also the rights of third parties who subsequently purchased the inherited property, the recognizing an exception to the limitation period significantly beyond one stipulated under the Civil Act can pose a risk of seriously agitating the stability of legal relationships. To avoid such a disruption, the Court emphasized that any recognition of exceptional cases on the limitation period for inheritance recovery should be accompanied with a specific stipulation of provisions on extension of the limitation period as an exception and the period of extension. In other words, recognition of exceptional cases with respect to the limitation period for inheritance recovery would necessitate a coherent legislative procedure. In this sense, the Article 11(1) of the South and North Korean Family Special Act presumes that

the limitation period under Article 999(2) of the Civil Act is applicable also to the legal relationship pertaining to the inheritance recovery claims by a North Korean resident who could not inherit from a South Korean decedent. Therefore, the Court ruled that for North Korean residents, just as for South Korean residents, the claim for inheritance recovery expires upon the lapse of ten years from the date of infringement of inheritance rights under Article 999(2) of the Civil Act.

Comment

There is a dissenting opinion by five judges which maintained that if the Court interprets the South and North Korea Family Special Act to mean that even the inheritance claims of North Korean refugees who entered South Korea expire simply because ten years have lapsed from the date of infringement of inheritance rights, it is not accord with the spirit of the Constitution aspiring to both reach a consensus between South and North Koreans as a homogeneous nation and lay the foundation for peaceful reunification.

LEGISLATION AND ADMINISTRATIVE REGULATIONS

Act on Anti-Terrorism for the Protection of Citizens and Public Security (Enforcement 3 March 2016) (Act No. 14071, new enactment)

On 3 March 2016, the South Korean National Assembly passed the Act on Anti-Terrorism for the Protection of Citizens and Public Security, following strong criticism from non-governmental and human rights organizations, opposition political parties, and a week-long filibuster in parliament aimed at delaying the bill's adoption. Although virtually every State adopted new (or strengthened already existing) anti-terror legislation in the aftermath of 11 September, South Korea's Act had been stalled for 14 years. It was because the Act envisaged the expansion of the National Intelligence Service's (NIS) powers to survey and arrest not only terrorist suspects, but also dissenters of governmental policy more broadly.

The definition of "terror" in Article 2.1(a), unless strictly interpreted, can include any activity with a purpose to impede the exercise of the authority of the state, or local government. One such misinterpretation could include demonstrations against the State's or local government's policies. Furthermore, according to Article 2(3) of the Act, a "potential terrorist" includes anyone "who is reasonably believed to have prepared, conspired, propagated, or incited terrorism" without a clear reference on any legal process of assigning or delisting a potential terrorist. This is of particular concern, considering that the government has many times labeled peaceful protests as acts of terror and

a lack of a minimum safeguard for de-listing. As a point of reference, and for reasons of comparison, “incitement of terrorism” is defined by the Council of Europe’s Convention on the Prevention of Terrorism as “the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed” (Article 5 (1)).

Moreover, under Article 9 of the Act, once listed as a potential terrorist, the NIS can extensively collect personal information, including sensitive information and location data, wiretap, tail, or even apply financial sanctions. Considering that safeguards to manage and monitor such abuses of power are highly insufficient, this legislation may become a tool that facilitates illegal intervention into people’s privacy.

Similarly problematic is the broadness with which Article 12 defines “materials instigating or propagandizing terrorism.” Such breadth of definition means that it is at the discretion of the government which paintings, writings, and other forms of expression will be defined as terrorist propaganda. Although South Korea is not alone in its use of “vague terms of uncertain scope”, the former UN Secretary General has criticized the readiness with which the “glorification of terrorism” has become a frequent accusation, considering it to be an inappropriate restriction on expression.

North Korean Human Rights Act (entered into force on 3 March 2016, enforcement 4 September 2016, Act No. 14070)

According to the reports submitted by international organizations and other related organizations on human rights situation in North Korea, North Koreans are systemically repressed of their basic rights including civil and political rights as well as economic and social rights such as access to food, medicine and other necessities. The Act intends to protect and promote the full enjoyment of human rights and fundamental freedoms of North Koreans by laying the institutional foundation to draw up and carry out consistent and systematic North Korean human rights policies.

The purpose of this Act is to contribute to the protection and improvement of human rights of North Koreans by pursuing the right to liberty and right to life prescribed in the Universal Declaration of Human Rights and other international conventions on human rights (Article 1). In addition to efforts to protect and promote the human rights of North Koreans, the State shall also endeavor to improve North-South relations and to establish peace on the Korean Peninsula (Article 2). In order to provide advice on policies related to the improvement of human rights in North Korea, there is hereby established a North Korean Human Rights Advisory Committee in the Ministry of

Unification (Article 5). The Government shall promote inter-Korean human rights dialogue on important matters for the improvement of human rights in North Korea (Article 7). In providing North Korean authorities or agencies with any humanitarian assistance for North Koreans to promote human rights in North Korea, the State shall endeavor to ensure that the following matters are complied with: 1) Assistance shall be delivered transparently in accordance with internationally recognized delivery standards; and 2) Assistance shall be provided preferentially for vulnerable social groups, such as pregnant women and infants (Article 8). In order to investigate the actual status of human rights in North Korea and to engage in research, policy development, etc. related to the improvement of human rights in North Korea, including inter-Korean dialogue on human rights and humanitarian assistance, the Government shall establish a North Korean Human Rights Foundation. (Article 10 to Article 12) In order to collect and record information on the status of North Korean human rights and information for the improvement of human rights in North Korea, there is hereby established a Center for North Korean Human Rights Records in the Ministry of Unification (Article 13).