仲裁研究, 第 18 卷 第 2 號
2008년 8월 1일 발행, pp.129-148

논문접수일 2008. 6. 13
게재확정일 2008. 7. 18

Determinants of Forum Non Conveniens on International Contract Negotiation : U.S. Court′s Judicial Precedent

국제거래 계약협상 분쟁시 부적정관할지 판단요인 : 미국법원 판례 기준

崔 昌 桓*
Chang-Hwan Choi

〈Contents〉

Ⅰ. Introduction
Ⅱ. Forum Non Conveniens
Ⅲ. Court's Criteria
Ⅳ. Conclusion

Key Words : Contract negotiation, Forum non conveniens, International trade, Jurisdiction

* Manager in KAMCO / Ph.D Josepna@empas.com

Ⅰ. Introduction

Forum non conveniens is a discretionary power of mostly common law courts to refuse to hear a proceeding that has been brought before it.[1] The courts will refuse to take jurisdiction over matters where there is a more appropriate forum available to the parties. It is an important organizing principle in the field of conflict of laws. The underlying principles, such as basing respect given to foreign courts on reciprocal respect or comity, also apply in civil law systems. The legal concept of forum non conveniens is not exclusive to common law nations. Although not a common law jurisdiction, many countries also have similar power.

As the number of international trade and transactions are increasing very fast, this environment change would likely to bring about lots of international conflicts between the Korean companies and foreign investors in the various fields. As a result, there is an increasing probability of lawsuits filed by the foreign investment companies or mutual funds, it is a important matter to know what is the meaning of jurisdiction and governing law or something. Recently, some studies(e.g.,Yun 1994, Bae 2006) have been published for the analysis of forum non conveniens to predict that international conflicts, particularly between parties with very different cultures, would exhibit arguable forum shopping. Nevertheless, academic researchers have seldom addressed the way to cope with international lawsuits by using the forum non conveniens doctrine.

Here, we begin to consider these issues by analyzing case studies in the international lawsuit between Korea's corporate and USA's one, deriving from international sale contract and present the effective ways to choose right jurisdiction to take an advantage of relevant one. Therefore, the lessons from the results thereof enable us to suggest strategies to enhance in the international lawsuits of contracts not only sale, but also international trade.

This paper is organized as follows. The introductory section has so far described the background and objective of this thesis. The next section reviews an overall transaction. The third section discuses the legal aspect of forum non conveniens. The last section summarize the result of the analysis and suggests measures to enhance performance when engaged in international lawsuit.

1) It is meaning for inconvenient forum or inappropriate forum by Latin word.
http://legal-dictionary.thefreedictionary.com

Ⅱ. Forum Non Conveniens

1. Principle of Forum Non Conveniens in USA

The doctrine of forum non conveniens permits a US court to decline to exercise its judicial jurisdiction if the court would be a seriously inconvenient forum and if an adequate alternative forum exists. In all cases in which the doctrine comes into play, it presupposes at least two forums in which the defendant is amenable to process, the doctrine furnishes criteria for choice between them.

The doctrine can never apply if there is absence of jurisdiction or mistake of venue. The forum non conveniens determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion.[2] The Supreme Court of the United States has repeatedly reaffirmed the doctrine of forum non conveniens even though it has no direct federal statutory or constitutional foundation.

〈Table 1〉 Criteria to judge the jurisdiction based on Forum Non Conveniens

1. Is there an available adequate Alternative Forum ?
2. Private Interest factors strongly favor dismissal ?
3. Public Interest factors strongly favor dismissal ?

Source : Supreme court decision of Gulf Oil v. Gilbert, 330 U.S. 501, 508 (1947)

In 1946, in Gulf Oil Corp. v. Gilbert, the Supreme Court was presented with the issue of whether a United States District Court, with jurisdiction based on diversity, had inherent power to dismiss a suit pursuant to the doctrine of forum non conveniens.[3] Forum non conveniens has long been an accepted principle in admiralty in the United States. The principle was first applied to a non-admiralty matter by the Supreme Court in Gulf Oil Corp. v. Gilbert, where the theory of the private and public interests was enunciated.

2) http://www.state.gov/www/global/legal_affairs
3) See Gulf Oil v. Gilbert, 330 U.S. 501, 508 (1947)

〈Table 2〉 Detailed standard to judge the jurisdiction

	Detailed Standard
Private interests	◆ Relative ease of access to sources of proof ◆ Availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses ◆ Possibility of view of the premises ◆ Enforceability of a judgment ◆ Relative advantages and obstacles to fair trial by choice of an inconvenient forum, 'vex', 'harass' or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy
Public interest	◆ Avoiding congested centers of litigation ◆ Benefit of publicity of the trial in the seat of the conflict ◆ Choice of the proper place to study questions of foreign law ◆ Avoidance of conflicts of law

Source : Summary of The Supreme Court's decisions in Gulf Oil v. Gilbert, 330 U.S.(1947)

The Supreme Court's decisions in both Gilbert and Piper describe a doctrine of forum non conveniens that entails a discretionary balancing of private and public interest factors[4] and prescribes an extremely deferential standard of review. Such factors are utilized by and have been expanded upon by the lower courts.[5] The abuse of discretion standard of review results in very few reversals of a trial court's forum non conveniens decision.[6]

2. Transaction and dispute

(1) Transaction process

Hanbo, one of Korea's largest steelmakers, collapsed with debts of over $7 billion. It filed

4) A defendant must show compelling evidence in order to disturb the choice of forum. The burden of proof is on the defendant: Strategic Value Master Fund, Ltd. v. Cargill Fin. Serv. Corp., 421 F.2d 741, 754 (S.D.N.Y. 2006).

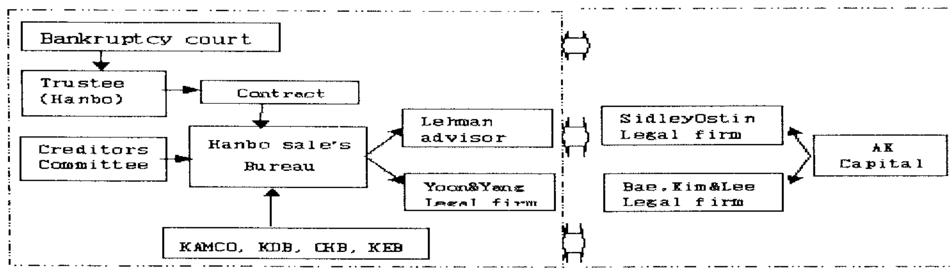
5) In New York, for example, there is a strong presumption in favor of the plaintiff's choice of forum. See Gulf Oil v. Gilbert, 330 U.S. 501, 508 (1947); R. Maganlal & Co., 942 F.2d 164, 167 (2nd Cir. 1991); WIWA v. Royal Dutch Petroleum Co., 226 F.3d 88, 101 (2d Cir. 2000); and Maran Coal Corp. V. Societe Generale de Surveillance S.A., No. 92 CIV 8728, 1993 US.Dist. LEXIS 12160 at S.D.N.Y. September 2, 1993.

6) The court must also consider the defendant's vast resources compared with the plaintiff's limited resources as an aggrieved individual: See Guidi v. Inter Continental Hotels Corp., 95 CIV 9006, 2003 U.S.Dist. LEXIS 85972 (S.D.N.Y. November 29, 2007), and WIWA: defendants have not demonstrated that these costs [of shipping documents and witnesses] are excessively burdensome, especially in view of defendant's vast resources.

for reorganization in the Bankruptcy Division of the Seoul Central District Court[7] in Seoul, Korea (the "Bankruptcy Court") in January 1997. It has been extensively publicized in Korea and is a matter of great national interest. The attempted sale of the Hanbo(Seller) assets to AK Capital(Plaintiff) was conducted by a large team consisting of creditor[8] representatives, the sales manager and legal advisors[9].

Plaintiff is a sophisticated investment consortium formed for the sole purpose of acquiring, managing and operating Seller's assets. It engaged more than 25 different consultants and advisors[10] in connection with the Seller transaction.

〈Figure 1〉 Negotiation structure (Seller & AK Capital)



Source : Choi, "A Case Study on the International Arbitration," arbitration journal,2006. p.31.

In 2001, after beginning the second round of bidding[11] for Seller's assets. Plaintiff was ultimately selected as the winning bidder in this round. AK Capital, although registered in Delaware as a limited liability company, was formed for the sole purpose of acquiring Seller's assets and has its principal place of business in Korea.

The entire two-year commercial transaction from initial bidding through termination took place in Korea. During the transaction, Plaintiff and Seller signed several agreements, culminating in a sale and purchase agreement for Seller's assets.

---

7) The Bankruptcy Court played a central role in the transaction. Once Seller's reorganization petition was approved, the Bankruptcy Court assumed final authority over Seller's affairs, including the disposition of its assets.

8) KAMCO is a Korean government agency charged with aiding Korean banks and financial institutions that are in danger of collapse because of large volumes of bad loans.

9) Lehman Brothers Korea ("LBK") was engaged as the sales manager for the transaction. Yoon & Yang, a prominent Korean law firm, was engaged as primary legal counsel to the creditors.

10) Throughout the transaction, Plaintiff was assisted by two of Korea's most prominent law firms Bae, Kim & Lee and Kim, Choi & Lim and prominent international law firm Sidley Austin Brown & Wood LLP.

11) In June 2001, LB Korea distributed bidding instructions to various investors, including AK Capital, inviting them to bid on Hanbo's assets. AK Capital was selected as one of several investors to be invited to submit a binding bid.

〈Table 3〉 sale process

ㅇ 2001. 07. 27 : Distributed Information Memorandum
ㅇ 2001. 11. 30 : Bidding of 2 bidder's
ㅇ 2002. 03. 26 : Sign of MOU between AK and Seller
ㅇ 2002. 04. 15 : In-depth Due Diligence of AK started
ㅇ 2002. 06~11 : Negotiation regarding price adjustment and Terms
ㅇ 2003. 02. 12 : SPA execution
ㅇ 2003. 11. 19 : Terminated

Source : Choi, "A Case Study on the International Arbitration," arbitration journal,2006. p.33.

Each agreement was executed in Korea and had a governing law provision specifying Korean law. Each had a forum selection clause specifying either Korean courts or arbitration in Hong Kong[12]. At no time did the parties ever contemplate a litigation arising out of the transaction in New York. They then negotiated and entered into a Memorandum of Understanding (MOU) setting forth the procedures for the bidding process.

There were extensive discussions among the Bankruptcy Court, the Trustee, LB Korea and the creditors regarding the amount of the Earnest Money Deposit (EMD) that the winning bidder would be required to pay all of which occurred in Korea. In December 2001, Plaintiff was selected as the winning bidder subject to certain conditions and to the approval of the Bankruptcy Court. The Bankruptcy Court approved the Final MOU on March 25, 2002. Over the course of the next nine months, Plaintiff conducted further due diligence in Korea regarding Seller's assets, negotiated the final Sale and Purchase Agreement, and attempted to obtain financing for the purchase. In December 2002, the parties submitted their draft Sale and Purchase Agreement (SPA), which set forth the final terms governing the closing of the transaction, to the Bankruptcy Court for approval. The SPA required Plaintiff to pay an EMD of $10 million, consistent with the Binding Bid instructions and MOU.[13]

On February 12, 2003, Plaintiff and Seller executed the SPA in Korea. Under the SPA,

12) KAMCO was not a party to any agreement with AK Capital and had limited involvement in the transaction. There were very few direct communications between KAMCO and AK Capital during the transaction.

13) After reviewing the draft SPA, the Bankruptcy Court determined on its own initiative that the EMD of $10 million was insufficient. The Bankruptcy Court's inclination was to require an AEMD of about $28 million, which, with the EMD, would be 10% of the purchase price. The Bankruptcy Court's decision appeared to be a result of a recent amendment to the Court's guidelines providing that purchasers should pay EMDs of 10% of the purchase price and its increasing concern that AK Capital was not a credible purchaser. On January 16, 2003, the Bankruptcy Court agreed to reduce the AEMD from about $28 million to KRW 20 billion (about $17 million).

Plaintiff was required to deposit the balance of the purchase price by November 18, 2003. On that date, however, Plaintiff conceded that it was still substantially short of the purchase price. Moreover, it did not have sufficient documentation even for the financing it claimed to have obtained.

Plaintiff did not deposit the balance of the purchase price on November 18, 2003. On November 19, 2003, Seller's Korean counsel notified Plaintiff that the SPA was officially terminated.[14]

(2) Dispute

On March 17, 2004, Plaintiff filed its derivative complaint[15] alleging fraud, conspiracy, and tortious interference against KAMCO(Dependant) in New York State Court. Dependant removed the action to this Federal Court on April 5, 2004 and had also made motion to dismiss for Plaintiff's lawsuit, based on the Forum Non Conveniens, with standard verdict of U.S. court.

Ⅲ. Court′s Criteria

As this dispute is so firmly centered in Korea and lacks any material connection to New York, this case also should be dismissed for forum non conveniens. Under well-established federal law, a court should dismiss a complaint on the ground of forum non conveniens where there is an available adequate alternative forum and, bearing in mind the degree of deference that should be afforded the plaintiff's choice of forum, the balancing of public and private factors indicates that the alternative forum is the more convenient location for trial.[16]

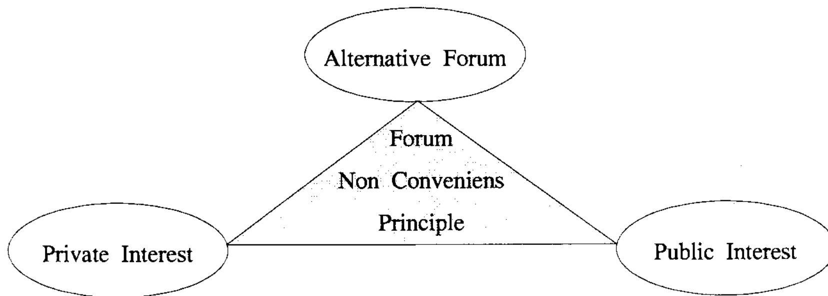
---

14) Plaintiff therefore requested extension, however, the Bankruptcy Court refused to grant Plaintiff 's request, noting that Plaintiff had not provided sufficient proof of its ability to obtain the necessary financing for closing.

15) In its first cause of action for fraud, Plaintiff alleges that KAMCO induced Plaintiff to bid for Seller's assets by falsely representing. In its second cause of action for conspiracy, Plaintiff claims that KAMCO conspired with the Trustee to prevent Plaintiff from being able to close on the Sale and Purchase Agreement, while, obtaining and keeping as much of the Deposits paid by Plaintiff as possible. In its third cause of action for tortious interference, Plaintiff claims that KAMCO and the Trustee engaged in the conduct described above to interfere with Plaintiff 's ability to perform its obligations under the SPA.

16) Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 n.22 (1981); Norex Petroleum Ltd. v. Access Indus., Inc., 304 F. Supp. 2d 570, 57576 (S.D.N.Y. 2004).

〈Figure 2〉 Model for determinant of forum non conveniens in U.S.A.



Source : writer's summary of doctrine of forum non conveniens in U.S.A.

Private interest factors of convenience and access to critical evidence strongly favor dismissing this case in favor of an action in Korea. And important public interest factors, such as the excessive burdens on this court and the effrontery posed by this action to the sovereignty of the Korean government and its court system, mandate that this action not be allowed to continue a moment longer than necessary.

1. Alternative Forum

According to dependant argument, Korea provides an adequate alternative forum, as several United States courts have previously held. Plaintiff's choice of forum is based on tactical advantages that courts accord little deference. Korea is an available and adequate alternative forum for litigating this dispute. Ordinarily, a foreign forum is deemed available when the defendant is amenable to process in the other jurisdiction.[17] The well-developed Korean judicial system provides an adequate forum to adjudicate Plaintiff's tort claims, as several U.S. courts have held[18]. Korean courts are independent from the executive and legislative branches of the Korean government, can guarantee Plaintiff a fair and public trial, and are composed of full-time judges who are impartial, experienced and extremely well-qualified. In fact, this dispute would be adjudicated in a division of the Korean courts specialized in handling cases in which one of the parties is foreign. Plaintiff could prosecute this same derivative action and obtain an adequate monetary remedy on behalf of Plaintiff in Korean courts. Alternatively, Plaintiff could assert these claims on its own behalf in a Korean court.[19]

---

17) Piper, 454 U.S. at 254 n.22.

18) See Yang v. M/V Minas Leo, No. 9415168, 1996 WL 32161, at *2 (9th Cir. 1996); LTX Corp. v. Daewoo Corp., 979 F. Supp. 51 (D. Mass. 1997); S. Slater & Son v. Leder Mode Co., Ltd., No. C-91-1295 RFP, 1991 U.S. Dist. LEXIS 16252, at *11-12 (N.D. Cal., Oct. 31, 1991).

〈Table 4〉 Issues of Alternative Forum

	Plaintiff	Dependant
Alternative Forum	◆ there has never been any case where a Korean court permitted a member of a limited liability company to pursue a derivative action against anyone other than a director	◆ The well-developed Korean judicial system provides an adequate forum to adjudicate Plaintiff's tort claims, as several U.S. courts have held

Source : writer's summary of parties' memorandum.

On the other hand, Plaintiff have raised concerns about the possibility that there has never been any case where a Korean court permitted a member of a limited liability company to pursue a derivative action against anyone other than a director. So, they argued U.S. court would be better forum than Korea's one.

2. Private Interest

In the dependant's side, the parties will be unable to obtain substantial critical evidence, and will incur inordinate expense and inconvenience, if forced to litigate in New York. They, however, could easily obtain all the evidence they need to litigate this case fully and fairly in Korea. As a result, the Gulf Oil "Private Interest" factors, all strongly favor dismissal of this case in favor of Korea.[20)]

The process of obtaining evidence from Dependant and Plaintiff alone will impose monumental burdens on the parties and their employees. All of the parties' material witnesses and relevant documents in their possession are located in Korea. The ten or more Dependant employees who were involved in the Hanbo transaction and have knowledge material to this dispute all reside in Korea. Documents relating to the transaction are all located in Korea, and

19) See PT United Can Co. Ltd. v. Crown Cork & Seal Co., Inc., 138 F.3d 65, 74 (2d Cir. 1998) (forum is adequate if the "underlying controversy expressed in plaintiff's complaint" can be litigated);In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December 1984, 809 F.2d 195 (2d Cir. 1987) (affirming dismissal of complaint for forum non conveniens, even though only the Indian government, and not the plaintiffs themselves, could assert claims in India); In re Lloyd's American Trust Fund Litigation, 954 F. Supp. 656, 673 (S.D.N.Y. 1997) ("The absence of a rule providing for class actions ... does not render the [foreign] forum inadequate.").

20) [1] the relative ease of access to sources of proof; [2] availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; [3] possibility of view of the premises, if view would be appropriate to the action; and [4] all other practical problems that make trial of a case easy, expeditious and inexpensive". Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1997)."

most of them are in Korean. Although the Complaint does not identify to whom Dependant's alleged fraudulent misrepresentations were made, it likely is the source of such allegations. Plaintiff is not known to have had any material involvement in the transaction and is unlikely even to be a witness at trial. Any relevant documents that Plaintiff has are almost certainly located in Korea.

〈Table 5〉 Issues of Private Interest

	Plaintiff	Dependant
Private Interest	◆ Unlike an action in the United States, which can be commenced with a $150 filing fee, "Korea has a non-refundable stamp tax system where a party must pay to the court a filing fee based on a percentage of the claim ◆ Non-refundable stamp tax could be the equivalent of about $6.5 million! ◆ May be forced to post $9.4 million in security	◆ Crucial non-party evidence would be virtually ◆ Possession of the Parties to this litigation would be much more easily accessible in a Korean litigation ◆ Inaccessible in this litigation but easily accessible in a Korean litigation ◆ Other practical problems render New York an inconvenient forum

Source : writer's summary of parties' memorandum.

As a result, obtaining evidence from the parties to this litigation will be unduly inconvenient, time-consuming and costly. The parties' representatives or their counsel would have to travel frequently between Korea and New York. Likewise, the parties' trial witnesses would have to travel to New York from Korea. The parties' documents would have to be collected in Korea and transmitted to New York.

By contrast, the parties easily could obtain from each other all this testimonial and documentary evidence if this case were litigated in Korea. These circumstances weigh heavily in favor of Korea as the more convenient forum. [21]

An even greater prejudice to the parties would be the practical inability to obtain in this litigation crucial evidence from numerous non-parties. Without that evidence, Dependant cannot present a complete, adequate defense to Plaintiffs' claims. There were several Korean

21) Aguinda v. Texaco, Inc., 303 F.3d 470, 479 (2d Cir. 2002) (dismissing for forum non conveniens partly because parties' records were located in foreign forum); Alfadda v. Fenn, 159 F.3d 41, 47-48 (2d Cir. 1998) (dismissing because all defendants and nearly all documentary evidence were located in France, and the cost of witnesses to attend the trial would be significantly lessened if the trial was held in France); Blanco v. Banco Industrial de Venezuela, S.A., 997 F.2d 974, 982-83 (2d Cir. 1993) (existence of foreign witnesses and documents in foreign language and location weigh heavily in favor of dismissal for forum non conveniens).

non-parties more substantially involved than Dependant in the Seller transaction, including Hanbo itself, the Trustee, LB Korea, and the parties' attorneys. Plaintiff sued Dependant solely because it was the only party involved in the transaction arguably subject to personal jurisdiction in New York. Dependant was not involved directly in many of the important events in this dispute. Its employees lack firsthand knowledge of many relevant facts, and its files contain far fewer relevant documents than these other sources.

The following is a brief summary of the non-parties, all of whom reside or have their principal place of business in Korea, from whom Dependant would need to obtain evidence in order to present a complete defense to Plaintiff's claims. There are more than 25 representatives from these non-parties who have knowledge material to Plaintiff's claims and Dependant's defenses, but whose testimony will not be available to the parties or this Court. These non-parties also collectively possess hundreds of thousands of pages of documents related to the Hanbo transaction and bankruptcy proceedings to which the parties in this litigation will not have access. A fuller itemization of these parties, their individual representatives, and their documents, is in other declaration,

〈Table 6〉 Issues of Parties

Parties	Content
The Trustee	◆ His testimony and documents in his possession would be critical to proving or refuting the existence of the alleged conspiracy between him and Dependant. Also, he was the primary conduit of communications between the Bankruptcy Court and the parties, and was the parties' primary spokesperson in Bankruptcy Court hearings regarding the AEMD and Plaintiff 's requests for extensions. He has unique, substantial information relating to those key factual issues.
The Bankruptcy Court's Management Committee	◆ This Committee consists of experienced financial advisors appointed by the Bankruptcy Court to assist with the Court's day-to-day functions and decision making. The Trustee had numerous communications with a member of the Management Committee assigned to the Seller proceeding regarding the AEMD and Plaintiff 's requests for extensions.
Plaintiff 's Korean Law Firms	◆ Plaintiff 's two leading Korean law firms, Bae, Kim & Lee, and Kim, Choi & Lim, participated substantially in the transaction. Attorneys from those firms likely have material testimony and documents relating to whether (and if so, how) Dependant made the misrepresentations alleged by Plaintiff, the extent to which such alleged misrepresentations induced Plaintiff to enter into the Seller transaction, the reasons why Plaintiff did not withdraw from the transaction upon having learned that such alleged misrepresentations were false, the processes by which the Bankruptcy Court ordered the AEMD and the conditions on Plaintiff's requests for extensions, and the reasons why Plaintiff was unable to obtain financing and close the transaction.

Lehman Brothers Korea	◆ Seller's and the creditors' investment advisor put together the transaction and was their principal contact with Plaintiff. It had most of the direct communications with Plaintiff throughout the transaction. Its representatives likely have material testimony and documents relating to the same issues (but from a different perspective) as Plaintiff's Korean law firms.
The Sales Bureau and Creditors Committees	◆ The Sales Bureau was created by the Trustee and Seller's creditors, with the Bankruptcy Court's approval, to manage the sale of Seller's assets. Representatives of the Sales Bureau and creditors committees were involved in every aspect of the Seller transaction, and have material testimony and documents relating to the entire transaction. Their members have material testimony and documents relating to the entire transaction, including, e.g., the process by which the initial EMD of $10 million was set, Dependant's involvement or lack thereof in setting the AEMD requirement, and the process by which Plaintiff obtained two extensions of its time to obtain financing and was denied a third.
Numerous Korean Financial Institutions	◆ The reasons why Plaintiff failed to obtain financing and defaulted under the SPA are central to this dispute. Testimony and documents from the Korean institutions from which Plaintiff sought financing will be critical to establishing whether, as Plaintiff contends, there was a conspiracy between the trustee and Dependant that prevented Plaintiff from obtaining financing, or whether, as Dependant contends, Plaintiff was responsible for its failure to obtain financing by insisting on unreasonable financial terms, behaving in a commercially unreasonable manner, and refusing to accommodate its potential lenders' reasonable conditions.

Source : writer's summary of parties' memorandum.

As a practical matter, all of the non-party evidence described above would be inaccessible to the parties to this litigation. Korea is not a signatory to the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. Nor have Korea and the United States entered into a bilateral treaty concerning the collection of evidence. The parties' only option would be to attempt to gather evidence using letters rogatory. That process, however, is rarely used in Korea, would likely yield no meaningful evidence, and would, in any event, entail unacceptable delays of perhaps more than a year.

Korean courts apparently do not have authority to compel document discovery or testimony from unwilling Korean witnesses in aid of letters rogatory; instead, cooperation is essentially voluntary. Id. Korean courts certainly could not compel a witness to travel to New York to testify or even to sit for a deposition in Korea.

As a result, the parties would have no reliable means of obtaining or presenting evidence from Korean non-party witnesses in this litigation, and certainly no recourse to live testimony at trial.

By contrast, the parties could obtain with relative ease relevant documents and testimony

from Korean witnesses in a Korean litigation. The parties could obtain discovery of relevant the transaction, there is no reason to believe that attorneys from either firm have any firsthand knowledge of, or documents relating to, the alleged misrepresentations made by Dependant or the alleged conspiracy between Dependant and the Trustee. Moreover, attorneys from these law firms did much of their work on the transaction while on site in Seoul. In any event, if this dispute were litigated in Korea, it would be relatively easy to obtain testimony and documents from these attorneys under 28 U.S.C. § 1781 et seq. (discovery in aid of foreign proceedings). The unavailability of such extensive, essential, non-party evidence is a compelling factor in favor of dismissal[22]. The inability to call live witnesses is especially prejudicial in this case because of the importance of judging credibility when evaluating fraud and conspiracy claim s.[23]

The remaining, overriding practical problem that the parties and this Court would face throughout this litigation is the inordinate amount of Korean-to-English translation that would be required. Most or all of the likely fact and expert witnesses in this case do not speak English fluently and would need to testify using a translator, thereby imposing an additional cost on the parties and the Court and diminishing the value of the testimony. Most of the relevant documents in this case are in Korean and would have to be translated if this case proceeds in the United States. Id. Such onerous translation requirements would impose "significant cost to the parties and delay to the court" and "militate strongly in favor" of dismissal for forum non conveniens.[24]

3. Public Interest

The adjudication by a New York Court of a case charging a Korean government agency and court-appointed Trustee with fraud and conspiracy, and challenging directly the decisions of a

22) See Reers v. Deutsche Bahn AG, No. 03 Civ. 5360 (MGG), 2004 WL 1229711, at *17 (S.D.N.Y., June 3, 2004) (dismissing because "evidence requiring the assistance of foreign courts would be both extensive and critical" but "costly and time consuming" to obtain); Usha, 2004 WL 540441, at *16-17 (where "[m[any third-party witnesses reside in India," which, like Korea, is not party to the Hague Convention, "litigating [Plaintiff's] claims in India . . increases the likelihood that the parties will have the benefit of as many witnesses with relevant information as possible").

23) Scottish Air Int'l, Inc. v. British Caledonian Group, PLC, 81 F.3d 1224, 1233 (2d Cir. 1996) (dismissing for forum non conveniens because "the live testimony of key witnesses was necessary where plaintiffs have alleged that the defendants had conspired to defraud them").

24) Blanco, 997 F.2d at 982; see also Base Metal Trading S.A. v. Russian Aluminum, 253 F. Supp. 2d 681, 712 (S.D.N.Y. 2003), aff'd, 2004 WL 928165 (2d Cir. Apr. 31, 2004) ("need for extensive document translation supports a finding that [the] forum is inconvenient").

Korean Bankruptcy Court, would be an affront to Korean's sovereignty and national interests. Korea has a compelling interest in adjudicating this dispute involving exclusively Korean government agencies, courts, commercial transactions and residents.

New York's only interest in such an action is in extending comity and deference to a foreign sovereign with a substantially greater interest in the case, rather than tying up its own judicial resources with a complicated foreign litigation rife with Korean witnesses, Korean documents, and the application of difficult Korean principles of law. The Gulf Oil public interest factors including administrative difficulties associated with court congestion, the unfairness of imposing jury duty on a community with no relation to the litigation, the interest in having localized controversies decided at home, and the avoidance of difficult conflict of laws problems and the application of foreign law . thus mandate dismissal of this case[25]. Important principles of international comity and foreign sovereignty compel immediate dismissal of this action.

〈Table 7〉 Issues of Public Interest

	Plaintiff	Dependant
Public Interest	◆ The administrative difficulties flowing from court congestion ◆ The local interest in having localized controversies decided at home; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action ◆ the avoidance of unnecessary problems in conflicts of law, or in the application of foreign law ◆ the unfairness of burdening citizens in an unrelated forum with jury duty.	◆ Korea Has a Far Greater Interest in Litigating This Dispute Than New York ◆ Adjudication of Plaintiff's Tort Claims will require the application of Korean Law

Source : writer's summary of parties' memorandum.

The Complaint implicitly challenges numerous decisions of the Korean Bankruptcy Court, most notably its imposition of the AEMD and its conditioning of Plaintiff's requested extensions on making the AEMD non-refundable. Because Plaintiff seeks to hold Dependant liable for those decisions, this Court will necessarily have to consider the propriety of the Bankruptcy Court's decisions under Korea law and explore the process by which they were

25) Gulf Oil, 330 U.S. at 508-509.

reached. That is not a proper role for this Court, and raises "considerations of comity [that] play an important role in the Court's forum non conveniens analysis" and counsel in favor of deferring to Korean courts to litigate this dispute.[26]

Likewise, the Complaint's claims of fraud and conspiracy directly against a Korean government agency and court-appointed Trustee for their conduct within Korea also impinge on Korean sovereignty. Moreover, Korea has a compelling interest in regulating a commercial transaction that occurred exclusively within its jurisdiction and was a matter of great national interest, that was explicitly governed by Korean law, that concerned the sale and purchase of real property and assets located in Korea, and that involved alleged acts causing injury to a company with its principal place of business in Korea.

New York has no interest in expending the substantial judicial resources required to litigate this case. Neither of the real parties in interest reside in New York and the events in dispute have no connection to New York[27]. Moreover, the lengthy and costly proceedings that would be required to take this case to judgment could well be in vain. Korean courts probably could not enforce any judgment entered against Dependant, because, under Korean law, this Court does not have competent jurisdiction over this dispute. The necessity of applying Korean law to the merits of this action weighs heavily in favor of dismissal for forum non conveniens[28]. The burden courts face in construing foreign law is particularly acute when dealing with the law of a civil law legal system such as Korea's.[29]

This case is plainly governed by Korean law. In tort cases, New York applies the law of the forum that, when considering the parties' domicile and the locus of the tort, has the greatest interest in applying its law to the issue in question.[30]

---

26) See Base Metal, 253 F. Supp. 2d at 708-709 (dismissing case requiring court to review decisions of foreign bankruptcy court).

27) See Base Metal, 253 F. Supp. 2d at 712 (this Court has no interest in litigating dispute where "all of the principal events" occurred in foreign forum).

28) See Pollox Holding, Ltd. v. Chase Manhattan Bank , 329 F.3d 64, 76 (2d Cir. 2003) (dismissing complaint for forum non conveniens "owing to the fact that the overwhelming majority of plaintiffs' claims necessitate the application of English law"); Norex, 304 F. Supp. 2d at 581 (need for "extensive application of Russian law . . . weighs in favor of the Russian forum").

29) Mercier v. Sheraton Int'l, Inc., 981 F.2d 1345, 1357 n. 10 (1st Cir. 1992) (noting "Western judges' general lack of familiarity with civil law principles" as a factor in favor of forum non conveniens dismissal).

30) GFL Advantage Fund, Ltd. v. Colkitt, No. 03 Civ. 1256 (JSM), 2003 WL 21459716, at *2-3 (S.D.N.Y. June 24, 2003) ("the state in which the tort took place has the greatest interest in regulating activities that take place within its jurisdiction"); United Feature Syndicate, Inc. v. Miller Features Syndicate, Inc., 216 F. Supp. 2d 198, 216 (S.D.N.Y. 2002) (applying Canadian law to fraudulent conveyance claim because Canada's "interests [1] in protecting the reasonable expectations of the parties who relied on it to govern their primary conduct and [2] in the admonitory effect that applying its law will have on similar conduct in the future assume critical importance").

Korea plainly has the strongest interest in applying its law to Plaintiff's tort claims. The domiciles of the parties in interest and the alleged tortious conduct are both centered exclusively in Korea. Any alleged injury would have been felt by Plaintiff in Korea, its principal place of business. Plaintiff was formed solely for the purpose of acquiring and operating the Seller assets in Korea, its earnest money deposits were paid and forfeited in Korea, and the ostensible benefit of its contract. profits from its management of the Seller facilities . would have been obtained in Korea. Moreover, the agreements that are the subject of Plaintiff's claims were executed by Plaintiff in Korea and explicitly governed by Korean law. New York, by contrast, has no interest in applying its law to Plaintiff's tort claims. Neither the parties in interest, the alleged tortious conduct nor the effects of such conduct have any meaningful nexus with New York. New York has no interest in regulating proceedings in Korean Bankruptcy Court, transactions for the sale of Korean property, or the conduct of Korean agencies and nationals in their own country. Nor does it have any interest in protecting the commercial interests of foreign parties that voluntarily transact business in a foreign state.

Ⅳ. Conclusion

Many parties of a international transactions do business all over the world, due to the globalization era. As the number of international trade and transactions are increasing very fast, this environment change would likely to bring about lots of international conflicts between the Korean companies and foreign investors in the various fields. On conflicts, the parties are eager to have their jurisdiction and governing law that will take an advantage of forum shopping. To prevent forum shopping, common law's countries have established the doctrine of forum non conveniens.

In this paper, case of U.S. court regarding dispute of international sale process was analyzed to find factors to be considered whether to grant or deny the appeal of forum non conveniens and have presented the methodology to determine the jurisdiction based on forum non conveniens by reviewing the U.S. Supreme court decision with explaining the case study. The doctrine of forum non conveniens permits a US court to decline to exercise its judicial jurisdiction if the court would be a seriously inconvenient forum and if an adequate alternative forum exists. According to U.S. Supreme court decision, there are three criteria to judge, (1) adequate alternative forum, (2) private interests, (3) public interests to determine whether court

would dismiss lawsuit based on forum non conveniens.

As a matter of fact, forum would be very crucial thing to have a great effect on the conflicts between foreign party and domestic one, so keep in mind the fact that you are trying to choose your jurisdiction court, using the doctrine of forum non conveniens as possible.

In practice, if you are given the governing law, jurisdiction of your country's court, then your losing risk will be decreasing dramatically for the international lawsuits filed by foreign counterpart regarding international trade, investment, and alliance.

Further, to apply the doctrine of forum non conveniens on case study, we would like to present the relevant strategies to cope with the lawsuits made by the counterpart, related with international trade or investment contract, resulting in reducing the risk of losing the case in U.S. court.

Reference

AK Capital, "Complaint, New York Court. 2004.

__________, "Declaration of plaintiff", New York Court, 2005.

Bae, Jung-Han, "A study on the application of Forum Non Conveniens in American Law," -Focused on the international Letter of Credit Transactions-, Trade Journal, Volume 31, Issue 3, 2006.

Bae, Jung-Han, "A study on the application of Jurisdiction in international contract;" The International Commerce Review, Volume 11, 1998.

Choi, Chang-Hwan, "A Case Study on the International Arbitration," arbitration journal, 2006.

KAMCO, "Corporate Sale Manual", 2001.

________, "Corporate restructuring", 2004.

________, Motion to Dismiss, 2004.

________, Reply to Motion to Dismiss, 2005.

Kim, Sang-Ho, "Case Studies on Claim and Arbitration Clauses Using in Trade Contracts", Journal of arbitration studies, Volume 12, Issue 2, 2002.

Korean Bankruptcy Court, "Review of Reorganization of Bankrupt Companies", 2000.

________________________, "Court M&A Guideline", 2001.

Lehman Brothers, "Seller's Information Memorandum", 2001.

Oh, Se-Young, "A Case Study on the Arbitration of Disputes arisen between the Parties

of Charter Party", Journal of arbitration studies, Volume 14, Issue 2, 2004.
PeterGillies, "Forum Non Conveniens in the context of international commercial arbitration," Macquarie Law WP2008-6, 2008. http://ssrn.com/abstract=1103344
William Tetley, "Jurisdiction clauses and forum non conveniens in the carriage of goods by sea," http://tetley.law.mcgill.ca
Winston anderson, "Forum Non Conveniens Checkmated', http://www.law.fsu.edu/Journals/transnational/vol102/Anderson.pdf
Yun, Jong-Jin, "international jurisdiction," Uam nonchong, Volume 11, Chongju University, 1994.
http://legal-dictionary.thefreedictionary.com
http://www.state.gov/www/global/legal_affairs

* Federal Cases
Acito v. IMCERA Group, Inc., 47 F.3d 47 (2d Cir. 1995)
Aguinda v. Texaco, Inc., 303 F.3d 470 (2d Cir. 2002)
Antares Aircraft, L.P. v. Federal Republic of Nigeria, 948 F.2d 90 (2d Cir. 1991),
Blanco v. Banco Industrial de Venezuela, S.A., 997 F.2d 974 (2d Cir. 1993)
Burgos v. Airday, No. 00 Civ. 4288 (VM), 2001 WL 995342 (S.D.N.Y. Aug. 29, 2001)
Carey v. Bayerische Hypo-und Vereinsbank AG,No. 03-7819, 2004 WL 1194391 (2d Cir. June 1, 2004)
EIE Guam Corporation v. Long Term Credit Bank of Japan, Ltd., 322 F.3d 635 (9th Cir. 2003)
Emergent Capital Investment Management, L.L.C. v. Stonepath Group, Inc., 343 F.3d 189 (2d Cir. 2003)
Fields v. Merrill Lynch, Pierce, Fenner & Smith Inc., 301 F. Supp. 2d 259 (S.D.N.Y. 2004)
GFL Advantage Fund, Ltd. v. Colkitt, No. 03 Civ. 1256 (JSM), 2003 WL 21459716 (S.D.N.Y. June 24, 2003)
Glencore, Ltd. v. Chase Manhattan Bank , N.A., No. 92 Civ. 6214 (JFK), 1998 WL 74294 (S.D.N.Y. Feb. 20, 1998)
Granite Partners, L.P. v. Bear, Stearns & Company Inc., 17 F. Supp. 2d 275 (S.D.N.Y. 1998)
Gulf Oil Corporation v. Gilbert, 330 U.S. 501 (1997)
Koster v. Lumbermans Mutual Casualty Company, 330 U.S. 518 (1947)
LTX Corporation v. Daewoo Corporation, 979 F. Supp. 51 (D. Mass. 1997)
Levner v. Prince Alaweed Bin Talal Bin Abdulaziz Al Saud, 903 F. Supp. 452 (S.D.N.Y. 1994),

Lewis v. Rosenfeld, 138 F. Supp. 2d 466 (S.D.N.Y. 2001)

Mercier v. Sheraton International, Inc., 981 F.2d 1345 (1st Cir. 1992)

Norex Petroleum Ltd. v. Access Industries, Inc., 304 F. Supp. 2d 570 (S.D.N.Y. 2004)

PT United Can Company Ltd. v. Crown Cork & Seal Company, Inc., 138 F.3d 65 (2d Cir. 1998)

Piper Aircraft Company v. Reyno, 454 U.S. 235 (1981)

Pollox Holding, Ltd. v. Chase Manhattan Bank, 329 F.3d 64 (2d Cir. 2003)

Reers v. Deutsche Bahn AG, No. 03 Civ. 5360 (MGG), 2004 WL 1229711 (S.D.N.Y. June 3, 2004)

Ressler v. Liz Claiborne, Inc., 75 F. Supp. 2d 43 (E.D.N.Y. 1998)

Rey-Willis v. Citibank, N.A., No. 03 Civ. 2006 (SAS), 2004 WL 315267 (S.D.N.Y. Feb. 18, 2004)

S. Slater & Son v. Leder Mode Company, Ltd., No. C-91-1295 RFP, 1991 U.S. Dist. LEXIS 16252 (N.D. Cal., Oct. 31, 1991)

Saudi Arabia v. Nelson, 507 U.S. 349 (1993)

Scottish Air International, Inc. v. British Caledonian Group, PLC, 81 F.3d 1224 (2d Cir. 1996)

Stoner v. Walsh, 772 F. Supp. 790 (S.D.N.Y. 1991)

Transatlantic Shiffahrtskontor v. Shanghai Foreign Trade Corporation., 204 F.3d 384 (2d Cir. 2000)

U.S. ex rel Barmak v. Sutter Corporation, No. 95 Civ. 7637 (KTD), 2003 WL 21436213 (S.D.N.Y. June 20, 2003)

USX Corporation v. Adriatic Insurance Company, 345 F.3d 190 (3d Cir. 2003)

United Feature Syndicate, Inc. v. Miller Features Syndicate, Inc., 216 F. Supp. 2d 198 (S.D.N.Y. 2002)

Usha (India) Ltd. v. Honeywell International Inc., No. 03 Civ. 0494 (DC), 2004 WL 540441 (S.D.N.Y. Mar. 17, 2004)

Vanity Fair Mills, Inc. v. T. Eaton Company, 234 F.2d 633 (2d Cir. 1956)

Weinstein v. Appelbaum, 193 F. Supp. 2d 774 (S.D.N.Y. 2002)

Yang v. M/V Minas Leo, No. 94-15168, 1996 WL 32161 (9th Cir. 1996)

Levine v. Yokell, 258 A.D.2d 296, 685 N.Y.S.2d 196 (1st Dep't 1999)

국문요약

국제거래 계약협상 분쟁시 부적정관할지 판단요인 : 미국법원 판례 기준

崔 昌 桓

국제거래에서 분쟁이 소송으로 발전될 경우 당해 사안에 적용될 준거법의 결정문제와 어느 나라의 법원에서 재판을 받을 것인가에 대한 국제재판관할권의 문제가 빈번히 대두되고 있다. 소송을 제기하는 당사자들로서는 자신에게 유리한 재판결과를 얻을 수 있는 법이 준거법으로 선택될 가능성이 있는 국가의 법원에 소송을 제기하는 소위 '포럼 쇼핑(forum shopping)' 전략을 세우기도 한다. 이러한 포럼 쇼핑에 대응하기 위해 영미 판례법인 common law에서는 오래 전부터 forum non conveniens를 확립하였다.

본 논문에서는 forum non conveniens를 심리한 미국 대법원의 판단기준을 살펴보면 먼저, 적절한 대체관할지의 존재여부이며, 둘째 사적이익 부분에서 자국민이 현저하기 불리한 위치에 처하는지를 확인하고, 셋째 공적이익 부분에서 미국의 이익이 심각하게 침해되지는 않는지를 검토하여 판단하게 된다.

이러한 법리적 판단근거를 제시하고 이에 대한 적용사례를 분석하여 향후 무역거래를 포함한 일련의 국제계약에 있어 분쟁시 국내기업들이 미국법정에 재판받지 않고 국내법원으로 재판관할지를 선택할 수 있는 전략을 제시함으로써 패소가능성 등의 계약위험을 줄일 수 있을 것으로 판단된다.

주제어 : 거래협상, 불편관할지, 국제무역거래, 관할지