

【Grant-in-Aid for Scientific Research(S)】

Humanities and Social Sciences (Social sciences)



Title of Project : Private International Law (PIL) & Securities in Intellectual Property, applying a Law and Economics approach with the aim of developing and disseminating the methodology of PIL

Toshiyuki Kono

(Kyushu University, Graduate School of Law, Professor)

Research Area : International Law

Keyword : Private International Law

【Purpose and Background of the Research】

In order to solve cross-border disputes whose parties are private individuals or enterprises, the law applicable to these disputes should be determined. This is the traditional function of private international law. Its methodology to determine applicable laws in most countries, which includes Japan, stems from theories established in Germany in the 19th Century. The methodology has been elaborated since then, but the underlying concepts remain largely unchanged. In the 1950's and 1960's, harsh criticism against this methodology was raised by some American scholars and their followers. However, with the exception of this period, the methodology of private international law has not been discussed in great detail. Until very recently, little attention has been paid to the possible implication of a law and economics approach for private international law.

IP increasingly gains its importance as collateral within commercial transactions. IP financing could become a cross-border financing, for example, if IP is a foreign patent or if a party is a foreign company. Due to differences in both securities and IP laws, as well as difficulties in unifying these rules, private international law needs to be further developed in order to cope with possible disputes, since no specific private international law has yet offered a detailed consideration of this issue.

UNCITRAL realized the importance of IP finance and the necessity of specific private international law rules, and adopted several private international law instruments as a part of the Legislative Guide at its 43rd session in 2012. However, the adopted rules are a combination of two opposing positions and therefore represent something of a political compromise. New rules need to be developed from the viewpoint of how securities in IP could contribute to more innovation and creativity. The above mentioned outcome of the negotiations at UNCITRAL reveals that the conventional methodology has limits, particularly in coping with new situations. A law and economics approach could therefore be a useful tool to develop appropriate rules specifically for securities in IP.

【Research Methods】

Five types of transaction, which have the function as securities in IP, i.e. transfer, co-ownership, trust, pledge, and license will be the objectives of analysis. For each type of transaction and possible players, a model will be constituted based on game theory, concerning the appropriate choice of law, and it will be further elaborated. Concretely, in such a case that a party creates IP and another party uses this IP, what kind of choice of law rules would be most appropriate for the different players? Then what would be the situation, if a third party gets involved? How about the situation, if the number of third parties is plural? The usefulness of the obtained theoretical outcomes will be proven through surveys conducted for both supply and demand sides.

【Expected Research Achievements and Scientific Significance】

New private international law rules on securities in IP will be developed and proposed. The usefulness of a law and economics approach for private international law will be promoted. The outcome will be presented at international fora, which includes special lectures scheduled in 2013 at the International Law Academy in The Hague, the sessions of the newly established Committee on Private International Law and IP in the International Law Association, and intergovernmental organizations, including UNCITRAL.

【Publications Relevant to the Project】

Basedow J./ Kono T./ Metzger A. (eds.), Intellectual Property in the Global Arena, Mohr Siebeck, Tübingen, (2010), pp.404. (English)

Kono T. (ed.) Intellectual Property and Cross-Border Civil Litigation, Kobundo, Tokyo, (2010), pp.426. (Japanese)

【Term of Project】 FY2011-2015

【Budget Allocation】 54,500 Thousand Yen

【Homepage Address and Other Contact Information】

A special project website will be soon created and outcomes will be uploaded.