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An Analysis of Choice-of-Law Rules in Tort Claims for Illegal Cartel Conduct: With Focus on Seoul Central District Court Decision 2014Gahap504385*

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Abstract

The Seoul Central District Court made a long-awaited ruling on a tort claim resulting from a cartel of thin-film-transistor liquid-crystal display product manufacturers. This article illustrates that the ruling seems to have given insufficient consideration to laws and jurisprudence surrounding the extraterritorial application of Korea's Monopoly Regulation and Fair Trade Act and the determination of applicable law. This article provides a comprehensive theoretical overview of extraterritorial application in general, damage liabilities in the case of illegal cartel conduct as defined by Korea's Monopoly Regulation and Fair Trade Act, and choice-of-law rules according to Korea's Private International Law Act. This article argues that in the case of illegal cartel conduct, the logical and equitable way to interpret articles of Korea's Private International Law Act about applicable law in cases of tort is to do so in a way that bypasses the principles of party autonomy, accessory connection, and the location of the common principal place of business, instead returning to the principle of lex loci delicti commissi. This article discusses how the principle of lex loci delicti commissi can be applied to illegal cartel conduct, namely how one could identify a place of conduct and a place where the results emerged in illegal cartel conduct. It argues that the principal place of business of a tort victim constitutes both the place of conduct and the place where the results emerge in illegal cartel conduct.

Keywords: fair trade law, illegal cartel conduct, extraterritorial application, choice-of-law rules, Korea's Monopoly Regulation and Fair Trade Act, Korea's Private International Law Act

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I. Introduction

There has been ample academic discussion regarding the imposition of administrative sanctions via the extraterritorial application clause stipulated in Article 3[1] of the Monopoly Regulation and Fair Trade Act (hereinafter, "KFTA") of the Republic of Korea (hereinafter, "Korea"). However, there seems to be a lack of common understanding regarding civil liabilities resulting from violations of the KFTA, namely illegal cartel conduct. While some views support that the Article of the KFTA pertaining to extraterritorial application also applies in the case of civil liabilities, others have pointed out that Korea's Private International Law Act (hereinafter, "KPILA") should be applied and that the aforementioned Article plays only a supplementary role. Moreover, as a prerequisite for the extraterritorial application question, there is a lack of discussion regarding the determination of applicable law in the case of illegal cartel conduct, namely regarding the interpretation of KPILA articles stipulating choice-of-law principles.

Amid this lack of discussion and understanding, the Seoul Central District Court recently ruled on a claim for damages as a result of illegal cartel conduct. While the authors agree with the conclusion reached by the Court, the ruling left a void for further discussion regarding the jurisprudence regarding the determination of governing law and the application of the KFTA in tort claims for illegal cartel conduct.

This article provides a theoretical overview to fill the aforementioned void and puts forth arguments regarding the following questions: (i) the extraterritorial application of the KFTA in civil cases, (ii) the interpretation of choice-of-law rules, as stipulated in Article 52[2] of the KPILA, in illegal

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1) This Act shall apply even to an act conducted overseas if such act affects the domestic market.

2) (1) A tort shall be governed by the law of the place where it is committed or the consequences thereof occur.

(2) Where the habitual residences of the tortfeasor and the injured party are in the same country while a tort is committed, the law of such country shall govern, notwithstanding paragraph (1).

(3) Where a tort violates an existing legal relationship between the tortfeasor and the injured party, the law applicable to such legal relationship shall govern, notwithstanding paragraphs (1) and (2).

cartel conduct, and (iii) the identification of the place of conduct and the place where the results emerged of illegal cartel conduct tort.

II. Extraterritorial Application and Its Limitations

A. General Theory of Extraterritorial Application

Extraterritorial application refers to the jurisdiction and enforcement of a country's laws beyond its territorial boundaries to foreign entities' acts, despite the general norm of international law that domestic law is applied based on the territoriality principle or the nationality principle.[3)] Through extraterritorial application, a country's legal authority to regulate and impose penalties on foreign entities is extended outside its borders. It also enables domestic courts to exercise jurisdiction over conduct that is partially or even entirely committed outside the country's territory. In short, the norms of state sovereignty based on traditional international law theories partially yield to a country's strong imperatives that make use of extraterritorial application as a means to achieve national goals.

As international commerce has expanded, it has become difficult for countries to achieve national policy goals unless their domestic competition laws and regulations are applied beyond the traditional domain of national sovereignty. Progress has been made in various forms: While countries such as the United States have implemented extraterritorial application by interpreting existing provisions, others have enacted explicit statutory provisions. Currently, extraterritorial application is widely recognized in the domain of competition law, as it is considered a useful tool for handling

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(4) In cases of application of a foreign law under paragraphs (1) through (3), the right to claim compensation for damage resulting from a tort shall not be recognized, where the nature of such right is not evidently for the purpose of payment of due compensation to the injured party or where such right is exercised beyond the scope essentially necessary for the payment of due compensation to the injured party.

3) Kwang Hyun Suk & Sun Seop Jung, *Gugjejabonsijangbeobui seolonjeog gochal [An Introductory Study on the International Capital Market Regulations]*, 11(2) Korean J. Sec. L. 27, 32-33 (2010) (In Korean); Sun Hee Lee, *Oegug saeobjaui yaggwane daehan simsa mich jibhaeng [The Review of the Contractual Terms and Conditions of a Foreign Operator]*, 41 J. Korean Competition L. 211, 225 (2020) (In Korean).

inbound competitive harm. For example, the antitrust regulations of the European Union (EU) grant extraterritorial reach in cases of anticompetitive behavior that affects the EU market. Specifically, these policies allow the EU to investigate and penalize business entities from outside the EU that engage in activities that impact market competition within the EU. Meanwhile, Asian countries, such as Japan, have adopted similar legislative measures, such as the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade. This Act prohibits anticompetitive practices, such as cartels and the abuse of market dominance. It can be stated that a global consensus was built on the necessity of enforcing competition law on certain private transactions, especially those that involve cartels.[4)]

B. The Effects Doctrine as a Basis for Extraterritorial Application

Various theoretical suggestions serve as the basis for justifying the extraterritorial application of competition law. The *place of implementation theory* centers on whether the breach substantially occurred within the territory of the implementing state, whereas the *uniformity of business theory* regards the conduct of subsidiaries instructed by the parent company as the conduct of the parent company. The *justification of jurisdiction theory* requires authorities to conduct a fair comparison of domestic and foreign interests to decide upon the necessity and feasibility of extraterritorial application.[5)] One theoretical legal base of extraterritorial application is the *Effects Doctrine*, which is a variation of the territoriality principle. The *Effects Doctrine* creates an important basis for extra-territorial application of local law. The Doctrine, which is part of international public law, broadens the application of local laws under some conditions to actions and individuals outside its territory, which have affected it. In essence, jurisdiction against foreign nationals becomes feasible when their activities have an impact on domestic markets.

The first country to elaborate on the concept and carry out the exercise

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4) Se In Lee, *Gugjekaleutel jejaeui gugjejeog sulyeomhyeonsang [Global Convergence in Enforcement against International Cartel]*, 17(3) Ewha. L. J. 377, 378 (2013) (In Korean).

5) Sang Yeop Koo, *Gugjekaleutel yeogoe hyeongsajibhaeng bangbeoblone daehan sogo [Criminal Enforcement against International Cartels]*, 144 Int'l Trade L. 9, 14-15 (2019) (In Korean).

of extraterritorial jurisdiction was the United States, where a legal justification was needed for the Federal Trade Commission (USFTC) to intervene in private transactions that may harm competition in the domestic market. With landmark cases, such as below in this paragraph, the USFTC invoked the *Effects Doctrine* as legal grounds to apply competition law to non-American businesses. Even before the advent and settling of the *Effects Doctrine*, the case law of U.S. courts showed inconsistency in the legal meaning of *effect.* In *U.S. v. General Electric Co.*, the U. S. Supreme Court required that the effects be "direct and substantial,"[6] while in *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, the effects were required to be "direct or substantial."[7] In developing a legal basis for the extraterritorial application of the U.S. competition legislation for the *Alcoa* case, Judge Learned Hand stated that acts of foreign nationals outside the territorial jurisdiction of the United States can be assumed to be within the subject matter jurisdiction of U.S. courts "if they were intended to affect imports and did affect them."[8] This led to the adoption of the *intent-effects* test by the U.S. courts, which soon settled as the standard of extraterritorial application in the U.S. and other countries.[9]

C. Korea's Jurisprudence on Extraterritorial Application

1. The KFTA and Extraterritorial Application

Korea has also enacted several laws that provide a base for extraterritorial

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6) United States v. General Electric Co., 82 F. Supp. 753 (D.N.J. 1949).

7) Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92, 102-03 (C.D. Cal. 1971).

8) United States v. Aluminum Co. of America, 148 F.2d 416, 444 (2nd Cir. 1945).

9) The content of the *intent effect test* is as follows: (i) There must be both an intent to and an effect on United State imports or exports for application of the Sherman Act; (ii) if there is an effect but no intent, then there is no Sherman Act jurisdiction because of the international complications likely to arise which in turn make it safe to assume that Congress certainly did not intend the act to cover them; and (iii) if there is an intent but no effect, it was held that the Sherman Act does not apply. At the same time, however, it had been stated that there need be no actual intent to violate the antitrust laws. In fact, a foreigner might violate these laws without fully understanding them or, in an extreme situation, without even knowing they exist. For further details, *see* Samie, N. *The Doctrine of "Effects" and the Extraterritorial Application of Antitrust Laws,* 14 U. Miami Inter-Am. L. Rev. 23 (1982).

application. Laws that directly stipulate extraterritorial application include the KFTA, the Financial Investment Services and Capital Markets Act (hereinafter, "KCMA") and the Foreign Exchange Transactions Act (hereinafter, "KFETA"). Specifically, Article 2 of the KCMA deals with applicability to activities conducted abroad, stating that "Any activities conducted in a foreign country the effects of which extend to the territory of the Republic of Korea shall be governed by this Act."[10] Subparagraph 2 of Article 2(1) of the KFETA similarly states that the KFETA shall apply to "Transactions, payments or receipts between the Republic of Korea and any foreign country, or other acts related thereto including those which are performed in any foreign country and which have an effect in the Republic of Korea."[11]

In Korea, extraterritorial application has been most rigorously discussed in the realm of fair trade. Extraterritorial application to foreign anticompetitive action started with the Korea Fair Trade Commission (hereinafter, "KFTC") making disposition on the *graphite electrode case* in 2000, followed by the Seoul High Court's decision based on the *Effects Doctrine*. Subsequently, in 2005, Article 2-2 was introduced in the KFTA, stipulating that "In cases where any act conducted abroad affects the domestic market, this Act shall apply to such act." Equivalent to Article 2-2 above, the KFTA currently addresses extraterritorial application in Article 3, stipulating that the KFTA applies to acts committed abroad if the acts affect Korea's domestic market.[12] Korea's Supreme Court provided further clarification on the meaning of "affects the domestic market" in the *airline international cartel* case, stipulating that (i) directness, (ii) substantiality, and (iii) reasonable predictability are the three elements that determine whether the domestic market is affected.[13]

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10) Jabonsijanggwa geumyungtujaeobe gwanhan beobnyul [Financial Investment Services and Capital Markets Act] art. 2 (S. Kor.).

11) Oegukwangeoraebeop [Foreign Exchange Transactions Act] art. 2 (S. Kor.).

12) The amendment from Article 2-2 to Article 3 was enacted on Dec. 30th, 2021, by Act No. 17799.

13) Daebeobwon [S. Ct.], May 16, 2014, 2012Du13689 (S. Kor.).

2. Case Analysis

There are several leading cases regarding the extraterritorial application of the KFTA, with 2004Du11275 being highlighted as the foremost example. The Seoul High Court and the Supreme Court reaffirmed the KFTC's decision to apply the KFTA to foreign business conduct, triggering a comprehensive discourse on the requirements for extraterritorial application.[14] The Supreme Court pointed out that (i) the purpose of the KFTA is to promote fair and free competition by regulating conduct such as illegal cartels, thereby encouraging creative business activities, and so on;[15] (ii) the KFTA does not limit the scope of "business entity" to domestic businesses;[16] and (iii) unfair practices of a foreign business that affects the domestic market necessitates the application of the KFTA, even if the practices mentioned did not take place in Korea.

The Court went on to conclude that even if a foreign business took part in a competition-limiting collusion outside Korea, the KFTA is still applicable if the collusion includes Korea's domestic market, and it affects that market.[17] In other words, the Court adopted the *Effects Doctrine* as the standard for the extraterritorial application of the KFTA.[18] The Supreme Court also held that even if a foreign entity took part in a collusion, the main purpose of which is to limit competition inside a foreign territory, if the subject of the

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14) Jee Hyun Choi, *Gongjeonggeoraebeop yeogoejeogyongui gijungwa beomwi: hanggonghwamurunim damhap pangyeoreul jungsimeuro [Standards of Extraterritorial Application of Competition Law: Case Study of Air Cargo Cartel]*, 15-1 Econ. L. 35, 38 (2016) (In Korean).

15) Dokjeomgyuje mit gongjeonggeoraee gwanhan beomnyul [Monopoly Regulation and Fair Trade Act] art. 1 (S. Kor.).

16) Dokjeomgyuje mit gongjeonggeoraee gwanhan beomnyul [Monopoly Regulation and Fair Trade Act] art. 2 (S. Kor.).

17) The impact on the domestic market was calculated by comparing the difference of price increase between companies that joined the agreement and those that did not. Specifically speaking, Korean companies in the industry imported 553,000,000 dollars' worth of graphite electrodes from the plaintiffs from May 1992 to February 1998. It was found that in this period the price of the electrodes imported from plaintiffs increased by about 48.8% from an average of $2,255 per ton in 1992 to an average of $3,356 per ton in 1997, while the price from companies excluded from the agreement only increased by about 9.1% from an average of $2,205 per ton in 1992 to an average of $2,407 per ton in 1997. For further details, see Seoul Godeungbeobwon [Seoul High Ct.] Feb. 19, 2014, 2002Nu6110 (S. Kor.).

18) Daebeobwon [S. Ct.], Mar. 24, 2006, 2004Du11275 (S. Kor.).

collusion includes the domestic market and thus has an effect on the domestic market, the KFTA can be applied to the extent that the collusion affects the domestic market. The ruling was supported by the affirmed fact that in the period in which the cartel operated, the price increase of graphite electrodes from Korea's companies that were involved in the collusion was much more significant than those companies that were not.

Another example is the 2012Du5466 case, where Korea's Supreme Court affirmed the lower court's ruling that the application of Article 2-2* of the KFTA is not limited to cases where a competition-limiting act is committed in the domestic market, or a limitation of competition occurs within the domestic market. That is, if an act includes the domestic market as its object and directly affects the domestic market, Article 2-2* is applicable. Meanwhile, it is worth noting that the lower court stipulated that the existence of collusion itself does not constitute a direct effect on the domestic market; the domestic market should be a part of the collusion at each stage of the production and distribution process.[19)]

In summary, Korea's Supreme Court held that Article 2-2* of the KFTA is evidently applicable where a competition-limiting act directly affects the domestic market. The KFTC upheld the standards established by the Court by ruling against six vitamin manufacturers having colluded and thus yielded an anticompetitive effect on the domestic market.[20)] The manufacturers were found guilty even though they agreed on the terms abroad and did not engage in direct commercial activity inside Korea since the products were distributed through separate domestic retailers. This case clearly demonstrates that although illegal action takes place outside Korea's territorial jurisdiction, the action in question is subject to Korean jurisprudence when the execution of the collusion or the effects of the action take place inside Korea.[21)]

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19) Seoul Godeungbeobwon [Seoul High Ct.] Jan. 19, 2012, 2010Nu45943 (S. Kor.).

20) Roche, BASF, Aventis, Solvay, Eisai, and Daiichi were held responsible for agreeing on allotting market share and increased pricing according to region.

21) The KFTC found that the manufacturers in question control up to 75% of the Korean vitamin market, hence decided that the market share was large enough for the collusion to have influenced the Korean market by ticking up vitamin prices in Korea.

D. Legal Basis on Which the KFTA Is Applied

The liability for compensation stipulated in Article 109 of the KFTA is civil liability resulting from a violation of Article 40 of the same Act.[22] A business entity engaging in conduct that unfairly restricts competition jointly with other business entities (hereinafter, "illegal cartel conduct") by contract, agreement, resolution, or any other method shall be liable to compensate for the damage. The issue of applicable law arises when illegal cartel conduct, such as determining, maintaining, or changing prices, includes a foreign element(s), such as taking place in countries other than Korea.

Here, the legal basis on which the KFTA is applied becomes problematic. The two possible perspectives are as follows: The first view is that to apply Article 109 of the KFTA to an act conducted in a foreign country, the applicable law should be decided according to the KPILA. The logic of the first perspective is developed under the analysis that unlike administrative sanctions or criminal punishment enforced by countries, claims for damages from tort have a private law character, and therefore it is reasonable to apply to Article 109 of the KPILA. The second viewpoint emphasizes the importance of assessing whether illegal cartel conduct meets the criteria for extraterritorial application outlined in Article 3 of the KFTA. This view demonstrates that this Article is a special choice-of-law rule, and it is therefore applied directly to an act satisfying those requirements. Consequently, from this perspective, the KPILA is irrelevant to determining the applicable law

22) Article 56 (Liability for Damages), Paragraph 1 of the KFTA stipulates that "If an enterpriser or an enterprisers' organization violates the provisions of this Act, and thereby gives a person any damage, he or the organization shall be liable for compensation of such damage to the person: Provided, That the same shall not apply to a case where the enterpriser or the enterprisers' organization verifies that he or it violates the provisions of this Act without any deliberation or any negligence." "The provisions of this act" mentioned above clearly includes and therefore is intrinsically connected Article 19 (Prohibition of Unfair Collaborative Acts) of the KFTA, which in its Paragraph 1 provides that "No enterpriser shall agree with other enterprisers by contract, agreement, resolution, or any other means, to jointly engage in an act falling under any of the following subparagraphs, which unfairly restrict competition (hereinafter referred to as "unfair collaborative act") or allow any other enterpriser to perform such unfair collaborative act: …"

since the KFTA independently determines the applicable law based on its own terms.[23)]

This paper finds the first perspective more compelling. The determination of applicable law for illegal cartel conduct should follow the general choice-of-law principles for torts outlined in the KPILA. The first seems more plausible when considering the importance of assessing the applicability of individual provisions along with their respective purposes. This is especially crucial in areas where administrative regulation, criminal punishment, and civil liability all matter, but a fine line needs to be drawn when applying each. Cases of fair-trade obligation violations are one of the typical areas where the three kinds of provisions collectively serve to enhance the efficacy of the regulation. In cases that include foreign elements, it is not always imperative for these three provisions to adhere to the same principle to achieve the regulatory objectives set forth by the KFTA.

Notably, there are quite a few differences among the three regarding the justification of extraterritorial applications. For example, Lee argued that the extraterritorial application of administrative regulation and criminal punishment provisions is rooted in the principle of territoriality; it is distinctly modified by the *Effects Doctrine*. He added that the extraterritorial application of civil liability provisions even differs from the others in that it determines the governing law in cases of a private law nature.[24)] In conclusion, it would be more appropriate to take the first viewpoint and utilize the rules of private international law, such as Article 109 of the KPILA, unlike the administrative and criminal provisions in the KFTA.

III. The Case in Question: 2014Gahap504385

A. Factual Background

The case in question, 2014Gahap504385, is a claim of compensation for

23) Jong Hyeok Lee, *Extraterritorial Application Clause in the Korean Capital Markets Law and Its Implications to the Choice-of-Law Rules for Prospectus Liability: Focusing on the Comparison with the Extraterritorial Application of Administrative Regulation and Criminal Punishment*, 22(1) J. KOREAN L. 43, 51-52 (2023).

24) *Id.* at 50-51.

damages that resulted from the defendants allegedly engaging in illegal cartel conduct.[25] The defendants are corporations based in Taiwan that manufacture and supply thin-film-transistor liquid-crystal display products (hereinafter, "TFT-LCD products") and are business entities, as defined by Article 2 of the KFTA.[26] The plaintiffs are corporations that acquired TFT-LCD products from the defendants. The TFT-LCD industry is an oligopoly of several major suppliers based in East Asian countries such as Korea, Japan, and Taiwan, with said major suppliers controlling 85~90% of the market. Two of the defendants are among the top ten TFT-LCD suppliers by market share.

The defendants periodically held multilateral and bilateral meetings to share supply plans and demand forecasts, forming a mutual understanding of the market circumstances and pricing plans of each corporation. Information exchanged included pricing, production capacities, manufacturing facility expansion plans, and customer demand. Based on this understanding, the defendants reached an agreement regarding the prices of principal products, the limitation of global production volume and the sharing of production facilities. The defendants would also use the information exchanged to surveil and enforce compliance with the above agreement.

The aforementioned meetings were held across regions where major suppliers were based, such as Korea, Taiwan, and Japan, and regions where major purchasers of TFT-LCD products were based, such as Europe and the United States. For instance, the defendants held multilateral meetings in Taiwan while simultaneously holding bilateral meetings in Korea. While some of the meetings, such as the multilateral meetings in Taiwan (known colloquially among the parties as the 'crystal meetings'), were held periodically, most were held in response to upcoming pricing negotiations

25) Seoul Jungangjibangbeobwon [Seoul Central Dist. Ct.], Nov. 23, 2023, 2014Gahap504385 (S. Kor.).

26) Article 2, Paragraph 1 of the KFTA stipulates that: The term "business entity" means an entity that engages in manufacturing business, service business, or other business; in such cases, executive officers, employees (referring to persons continuously engaging in the business of the company, other than executive officers; hereinafter, the same shall apply), agents, and other persons who act for the benefit of the business entity shall be deemed business entities for purposes of applying provisions concerning trade associations.

with purchasing corporations or cyclical fluctuations of the market.[27]

B. The Ruling

The Seoul Central District Court found that the applicable law in this civil liability case is the Korean Civil Act (hereinafter, "KCA") and the KFTA. The Court stated the following articles as relevant to this case: (i) Article 32(1)* of the KPILA[28] and (ii) Article 3 of the KFTA.[29] The Court reached the aforementioned conclusion based on the following findings. First, while the defendants asserted that the parties had agreed that either the law of the United States or Singapore would be applied should a dispute arise, the defendants—upon whom the burden of proof rests—failed to provide evidence to support the existence of such an agreement. Second, while the defendants asserted that the plaintiffs refused to provide copies of relevant contracts, given that the defendants themselves were no longer in possession of the above contracts, it could not be hastily concluded that the plaintiffs intentionally refused to provide the contracts. Third, as the plaintiffs are a single enterprise group comprising a parent company and its overseas production operations, the place where the results emerged regarding the plaintiffs' claimed damages is Korea (i.e., the location of the plaintiff's parent-company head office). Fourth, the KFTC had already applied the KFTA and ruled that the illegal cartel conduct in question was in violation of relevant KFTA provisions and consecutively imposed

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27) Gongjeonggeoraewiwonhoe [Korea Fair Trade Commission], Dec. 1, 2011, Decision 2011-212 (S. Kor.).

28) The equivalent article currently in effect at the time of writing is as follows: A tort shall be governed by the law of the place where it is committed or the consequences thereof occur. Gukjesabeob [Private International Law Act] art. 52 para. 1 (S. Kor.).

29) Both the KFTA and the KPILA have undergone several amendments. This essay will refer to all relevant provisions as they are in effect at the time in writing, except when specified otherwise in court rulings and when discussing older legislation in particular; legal texts cited in their previous form before being amended into the current form will be marked with an "*". The defendants' illegal cartel conducts spanned September 14th, 2001 through December 31st, 2006. The KPILA was amended in July 2011, January 2016, and July 2022 respectively; Articles 32-33 were amended to Articles 52-53 in its 2022 amendment, with the content unchanged. The extraterritoriality article of the KFTA first came into effect in in April 1st, 2005 as Article 2-2 and was replaced by Article 3 (unchanged until time of writing) as of December 30th, 2021.

penalty surcharges and corrective orders.

IV. KFTA Violation by Cartels and Relevant Civil Liabilities

A. Illegal Cartel Conduct and Tort Claims

1. Definitions and Relevant KFTA Clauses

Illegal cartel conduct refers to acts that unfairly restrict competition by agreeing to fix prices, allocate markets, and adjust shipments in collusion with other business entities to avoid competition (as prescribed in Article 40(1) of the KFTA). Simply put, it is an agreement between businesses not to compete. The rationale for its regulation lies in the nature of the conduct in which competitors agree to refrain from competition to maximize their profits. Regulation is required since competitors agreeing to act as a single monopolist in practice leads to unfair regulation of the quantity of supply and sets a monopoly price.

The actions of these cartels are described as a detrimental force to the market economy, as they inflict significant damage on the economy without contributing to any improvement in efficiency. Cartels deter businesses from innovating and introducing new products and technologies, compelling consumers to purchase inferior-quality goods at elevated prices without alternative options. Furthermore, the presence of cartels has negative consequences for the national economy by stifling technological innovation and impeding potential growth in production capacity. Therefore, it has become a norm for countries to apply antitrust laws to foreign entities' conduct when it affects domestic markets. Recently, cartel regulation has been introduced even in countries with small economies, and now more than sixty countries recognize the extraterritorial application of competition law. Also, international institutes such as the OECD are stressing reducing *hard-core* cartels, which are commonly defined as anticompetition agreements by competitors to fix prices, restrict output, submit collusive tenders, or divide or share markets.

As for Korea, unfair collaborative practices among business operators are regulated to prevent unfair competition and promote fair market competition under the KFTA. Article 40 of the KFTA specifically addresses

unfair collaborative practices, aiming to prevent unfair competition among business operators. Cartels are generally categorized into eight types under Article 40(1) of the KFTA, which stipulates that "No business entity shall agree to engage in any of the following conduct that unfairly restricts competition jointly with other business entities by contract, agreement, resolution or any other method, or causes other business entities to do so," and the illegal cartel conduct includes "determining, maintaining, or changing prices (Subparagraph 1)" and "imposing limitations on production, delivery, transportation, or transactions of goods or on transactions of services (Subparagraph 3)."[30] The former type of violation refers to situations in which business entities agree either directly or indirectly to raise, lower, or maintain prices. For example, detergent manufacturers fixing ex-factory prices in collusion through an agreement falls under this category. The latter refers to cases where business entities jointly agree to impose limitations on the terms and conditions for the production, delivery, transportation, and transaction of goods or services. Flour mills agreeing on the total volume of supply and allocating the volume among themselves based on a sales or production quota system would be an example of this type of conduct.

2. Requirements Stipulated in the KFTA

The legal elements required for the establishment of illegal cartel conduct under Article 40 of the KFTA can be analyzed as follows: (i) 2 or more enterprisers colluding with each other (plurality), (ii) agreement in any form, (iii) restriction or prevention of competition (anticompetitive effects), and (iv) unfairness or illegality.[31] The first required element is that there must be two or more enterprises jointly pursuing a conduct. Here, the term "enterpriser" is defined in Article 2 of the KFTA as a person who conducts a manufacturing business, service business, or any other business. Any

30) Dokjeomgyuje mit gongjeonggeoraee gwanhan beomnyul [Monopoly Regulation and Fair Trade Act] art. 40 (S. Kor.).

31) Though the clause has gone through mild changes and is now translated in different terms, this does not amount to any effective change. Therefore, in this essay, analysis based on current legislation will be included. For further details regarding the required legal elements, *see* Jae Goo Lee, Gongjeonggeolaebeob: Iron, Haeseolgwa Salye [Fair Trade Law: Theory, Commentary, and Cases] 333-334, 345, 370 (7th ed. 2023) (In Korean).

executive, employee, agent, or any other person who acts in the interest of the enterpriser is deemed an enterprise in application of the provisions for enterprisers' organizations. It is generally interpreted that the other undertakings are in horizontal competition as participants in cartel conduct.

The second element required is that a specific agreement to engage in concerted action between businesses must exist. An agreement to recognize improper concerted action includes not only explicit agreements, such as contracts, agreements, conventions, resolutions, MOUs, etc. but also implicit ones, such as tacit agreements between businesses. Once an agreement exists, illegal cartel conduct can be established, even if no action is performed afterward.

The third element is the outcome side of an unfair collaborative act, which is the restriction or prevention of competition. Market competition must be substantially lessened in a given field of trade as a result of cartel conduct. This is more of a matter of factual judgment as to whether the conduct in question affects or is likely to affect competition in the market, while the fourth element is a matter of normative judgment as to whether the act should be prohibited. In other words, even if competitive restrictiveness is recognized by a court or the KFTC, unfairness and illegality should be independently determined by weighing the punishment against the effects of increasing efficiency, promoting competition, or the existence of justifiable reasons.

Regarding the last element, unfairness or illegality, the KFTC's examination of the illegality of cartel conduct begins with an analysis of the nature of concerted action. If it is obvious that only the effect of restricting competition is created by the nature of an action, such as price determination, it can be judged as an unfair joint action without examining the specific competition restriction unless there are special circumstances. Still, a high-level analysis of the market situation, including (i) market structure, (ii) transaction type, and (iii) degree of competition related to the concerted action, is required. However, if the nature of the concerted activity triggers the occurrence of both competition-restricting and efficiency-enhancing effects (e.g., joint research and joint standard development, respectively), both effects shall be comprehensively examined to determine the illegality of the concerted activity.

B. The Regulatory Triad Against Cartel Regulation Violations

Those who violate cartel regulations may face three consequences: (i) administrative sanctions, (ii) criminal penalties, and (iii) civil liabilities. First, companies that participate in illegal cartel activity may be subject to administrative sanctions, such as remedial orders and fines. The KFTC has the authority to instruct a violator to cease the violation, make public the corrective measures imposed, or undertake other actions necessary to rectify the infringement. The KFTC can levy a penalty surcharge on the violator, capped at a certain percentage of the relevant reported sales of goods or services during the violation period. However, in cases where no sales were made or it is impractical to calculate sales, the KFTC may impose a penalty surcharge.

Next, as for a criminal penalty, an individual or corporation may face prosecution and a penalty of imprisonment or a fine if the KFTC initiates a criminal charge against the violator. Failure to comply with a corrective measure or cease-and-desist order may result in imprisonment or a fine applicable to both corporate entities and individuals. Lastly, violators could face civil liabilities. As stipulated in Article 109 of the KFTA, private enforcement refers to the realization of competition norms through the judicial process, and the damages claims system within this context is like the KFTC's imposition of fines in terms of being a monetary remedy. However, while the KFTC's imposition of fines aims to sanction violative conduct and does not necessarily presuppose the occurrence of actual harm, the damages claim system is oriented toward compensating for the losses incurred by the victim. Since 2000, the number of civil lawsuits has gradually increased. Famous cases include damage actions against military oil bid rigging, LPG price fixing, and air cargo price fixing.

C. Civil Liability as a Tortious Act

Established theories and case law in Korea show that liability for damages under Article 56 of the KFTA is characterized as a tort. There are three objective elements of tort liability: an illegal act, damage, and causation. A tort usually causes damage to its direct opponent, but it may not cause

damage to the direct opponent and may cause more harm to the market or trade order, depending on the situation. Considering the goals outlined in Article 1 of the KFTA, particularly the promotion of fair competition and the encouragement of creative entrepreneurial activities, provides a rationale for determining the nature of tort liability. Tort liability under Article 750 of the KCA, the specific requirements are (i) intent or negligence, (ii) illegality, (iii) the ability to be held liable, (iv) the occurrence of damage, and (v) the causal relationship between the occurrence of damage and the illegal act, and all five elements must be met.[32] Because Article 750 of the KCA is the general basis for the right to claim damages for tortious acts, similar requirements must also be met in the case of liability for damages ruled under Article 109 of the KFTA, which guarantees the right to claim damages for tortious acts.

However, under Article 109 of the KFTA, the burden of proof for intentionality or negligence is different from the burden of proof for damages under Article 750 of the KCA, as it is transferred to the offending business or business organization to prove that they have no intentionality or negligence. The liability for damages for violation of the KFTA is different in many respects from the liability for general torts. Compared to the general tort liability ruled by the KCA, liability for damages for violations of competition law is a relatively new type of tort related to the competitive order of the market; the competitive situation in the relevant market is considered.

D. The Duality of Claims for Damages from Illegal Cartel Conduct and Its Implication on Extraterritorial Application

Civil liabilities from illegal cartel conduct possess an ambivalent character that provides a special context for the discussion of the conflict of laws. The reason why the conditions required of victims to claim damages for illegal cartel conduct are less stringent than those of a normal tort claim is because of the public interest in restoring justice to those committing illegal cartel

32) Article 750 of the KCA provides that "Any person who causes losses to or inflicts injuries on another person by an unlawful act, intentionally or negligently, shall be bound to make compensation for damages arising therefrom."

conduct and restricting competition in the market. This public nature of claims for damages is what differentiates such claims from general claims for damages based on tort from Article 750 of the KCA. A recent development supporting this view is the amendment of the KFTA in 2018, which expands the extent of claims for damages up to three times the actual injury. This clause is not applied to those under the protection of the leniency policy that alleviates administrative penalties for parties confessing to and assisting in the investigation of illegal cartel conduct. These changes represent the public nature of the provision regarding reparation for damages in Korean competition law. Allowing excess rewards for tort claims for illegal cartel conduct leads not only to redemption of unjust enrichment but also discourages companies from committing such tortious acts. Thus, the provision displays a highly public nature.

However, it is also important to remember that claims for damages from tort are innately of a private nature, even if the claims based on illegal cartel conduct see important deviations from normal tort claims, such as a change of the party bearing the burden of proof, and the possibility of excess compensation. Recent developments in academia stress the need to differentiate the function of claims for damages and administrative/criminal punishment to remedy different problems: that of civil liability to the injured party and that of accountability to manipulating the market and undermining competition.[33] Such a private nature of the claim fundamentally bears the difference between claims based on civil liability and those based on administrative regulations and criminal charges; this is illustrated in Part II. D., which elaborates on the legitimacy of deviating from the extraterritorial application clause. The different nature of claims for damages points to the use of choice-of-law rules for tort in applying KFTA provisions to extraterritorial activities instead of the extraterritorial application clause of Article 3 of the KFTA.

Before the amendment in 2001, which strengthened the administrative nature of penalties, the fundamental purpose of imposing penalties was said to be the redemption of unjust enrichment from conduct obstructing the market. The imposition of penalties was conducted in consideration of

33) In Kwon Lee, *Budanggonddonghaengwiui Hapnijeok Gyujee Daehan Ilgo [A Study on the Reasonable Regulation of Illegal Cartel Conduct]*, 16(1) J. OF REGULATION STUDIES (2007) (In Korean).

the relevant revenue of the dispute because of the notion that the penalties function as a method to remedy unjust enrichment. The Supreme Court also ruled likewise on this matter before the amendment above by stating that "penalties are imposed to deprive parties of unjust economic profit", especially for illegal cartel behavior.[34] However, scholars argue that the structure of legal regulation must transform to introduce claims for damages as the main form of claiming compensation from the tort of the enriched party. It is reasonable to say that the true remedy for unjust enrichment on the part of the perpetrator is restoring what has been inflicted on the injured party.

Mindful of such developments, it is imperative to recognize the duality of the claims for damages in question. While it serves as a private means of remedy by nature, the public aspect of the right to claim such damages functions as a well-served indicator in deciding whether the application of a certain principle of choice-of-law rules is against such public objectives. This approach is well illustrated in the exclusion of the Principle of Party Autonomy in Part V.B.

V. Choice-of-Law Rules: Theory and Application

A. Choice-of-Law Rules for Tort According to the KPILA

When litigating a private dispute with an international character in a Korean court, the decision of what law is applicable is made based on interpretation of the KPILA. In the context of claims for damages for tort from illegal cartel conduct, the decision of applicable law is to be made via the private international law of the state exercising jurisdiction rather than the extraterritorial application clause of the relevant law (in our case, Article 3 of the KFTA, as demonstrated in Part III.D). Choice-of-law rules in the KPILA are of the utmost importance in deciding the applicable law of the dispute in claims for damages for tort from illegal cartel conduct. The KPILA states four choice-of-law rules in Articles 52 and 53 for tort. It is

34) Daebeobwon [S. Ct.], Oct. 27, 2004, 2002Du6842 (S. Kor.).

[Private International Law Act] (Law No. 18670, enacted July 5, 2022)[35]

Article 52 (Torts)

(1) A tort shall be governed by the law of the place where it is committed or the consequences thereof occur.

(2) Where the habitual residences of the tortfeasor and the injured party are in the same country while a tort is committed, the law of such country shall govern, notwithstanding paragraph (1).

(3) Where a tort violates an existing legal relationship between the tortfeasor and the injured party, the law applicable to such legal relationship shall govern, notwithstanding paragraphs (1) and (2).

(4) In cases of application of a foreign law under paragraphs (1) through (3), the right to claim compensation for damage resulting from a tort shall not be recognized, where the nature of such right is not evidently for the purpose of payment of due compensation to the injured party or where such right is exercised beyond the scope essentially necessary for the payment of due compensation to the injured party.

Article 53 (Ex Post Facto Agreement on Applicable Law)

Notwithstanding Articles 50 through 52, the parties may choose, by agreement, the law of the Republic of Korea as the applicable law after the occurrence of management of affairs, unjust enrichment, or torts: *Provided*, That the right of a third party shall not be affected thereby.

worth noting how the articles are structured, as the structure is important in its application.[36]

Article 53 states that, notwithstanding Articles 50 through 52, the parties may choose Korean law as the applicable law after the action in question has been taken: this is the principle of party autonomy, which gives parties

35) Gukjesabeob [Private International Law Act] art. 52-53 (S. Kor.).

36) *See* Jong Hyeok Lee, *New Developments in Korean International Private Law*, *in* Private International Law in East Asia: From Imitation to Innovation and Exportation 107, Exportation 116-117 (Olivier Gaillard and Krista N. Schefer eds., 2024).

the right to override all other choice-of-law rules, including all such rules in Article 53.

Article 52(3) states that, notwithstanding Paragraphs 1 and 2, if a tort violates an existing legal relationship between the tortfeasor and the injured party, the law governing the relationship qualifies as the applicable law for the dispute. This, dubbed the principle of accessory connection, explicitly overrides Articles 52(1) and (2), meaning that the principle of the location of common habitual residence—Article 52(2) and the principle of *lex loci delicti commissi* (Article 52(1))—are inapplicable in disputes where the parties have predetermined the law governing the relationship.[37]

Article 52(2) states that if the habitual residence of the tortfeasor and that of the injured party are in the same country for the duration of the tortious act, the law of such a country shall be applied, notwithstanding Article 52(1). That is, if the parties happen to be situated in the same country, choice-of-law principles point to that country's law as the most relevant applicable law of the case, regardless of where the conduct took place and where its consequences materialized.

Article 52(1) states the most basic principle of choice-of-law rules, the principle of *lex loci delicti commissi*, means the law of the place of the tort. This means that the law of the place of conduct or the law of the place where the results emerged may be applied to the dispute.

As can be seen from the structure of the articles in the KPILA, the order of the principles applied in the case of a conflict of laws is in reverse: paragraphs in Article 52 function as exception clauses for the paragraphs above it, and Article 53 functions as an exception for Article 52. As will be explained in detail below, the principles are not applied without exception; the nature of the dispute is assessed when deciding the applicability of the principles, and the existence of aspects different from regular tort claims may lead to different conclusions when determining the applicable law.

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37) The principle of *lex loci delicti commissi* here is presented as encompassing the meaning of "law of the place of conduct' as well as 'law of the place where the results emerged". While there is literature acknowledging the difference and referring only to one of the two—mainly the Rome II Regulation—this article presents the term to refer to both concepts to coincide with what is stipulated by the KPILA.

B. Principle of Party Autonomy

The principle of party autonomy is applied when the parties choose to resort to a certain applicable law after the occurrence of the tort. This principle is the most prioritized principle that overrides all other principles stipulated in Article 52 of the KPILA. However, civil liability for illegal cartel conduct is not of an absolutely private nature, as elaborated in Part IV. D. One important point of the provision regarding the right to claim damages in the case of collusion is that it is grounded in the objectives of (i) promoting good economic practice; (ii) preventing businesses from colluding; and (iii) restoring market justice. This public objective has become even more evident with the amendment of the KFTA in 2018, with Article 109 increasing the extent of claims for damages to three times the amount of injury.

Due to this public aspect of the right to claim damages, to fulfill the objectives of the provision of the KFTA, it is desirable to restrict parties from exercising autonomy in its entirety. Therefore, the principle of party autonomy is inappropriate for deciding the applicable law of the case.

C. Principle of Accessory Connection

The principle of accessory connection applies when a dispute stems from a preexisting relationship, most possibly by relying on a contract. The fact that a contract governs a relationship supports the argument that relevant damages were created in the course of carrying out actions according to the contract. However, in the case of illegal cartel conduct, the damage cannot be attributed to the performance of the contract. When a party is injured due to another party's illegal collusion, the damage is calculated as the amount of injury created from the gap between the actual price and the hypothetical price without the effect of collusion, *ceteris paribus*. The illegality, therefore, lies in the agreement and execution of actual collusion, not the contract itself.

A ruling from Korea's Supreme Court[38] supports this view, rejecting the

38) Daebeobwon [S. Ct.], May 11, 2017, 2015Da211128 (S. Kor.).

appeal against the Seoul High Court's decision[39] that the governing law for claims for damages from cartel behavior cannot be decided by Article 52(3) of the KPILA. The Court ruled that the KFTA constitutes a mandatory provision that applies even if a foreign law is designated as the applicable law of the relevant contractual relationship.

The dispute in question is different from disputes in which the tortious behavior is closely related to the relationship between parties; the principle of accessory connection is best applied when the illegality of the tort is dependent upon the performance or negligence of contractual obligations. In the case of illegal cartel conduct, the tortious character of the tortfeasor's behavior stems from the agreement and its performance, which is not directly related to any contractual relationship. Moreover, the element that is deemed most crucial in determining the illegality of cartel behavior for administrative and criminal measures is also the existence of an agreement.[40] It can be concluded that even if there were to be a contractual relationship between the tortfeasor and the injured party, the contract was not at the center of the dispute.

D. Principle of the Location of Common Habitual Residence

Article 52(2) of the KPILA holds that notwithstanding the principle of *lex loci delicti commissi* stated in Article 52(1), if the habitual residences of the tortfeasor and the victim were in the same country at the time of the tort, the law of that country shall govern that tort. This principle is based on the reasoning that (i) given that the place of a tort is a more coincidental circumstance than a common habitual residence, the latter better reflects the expectations of the parties, and (ii) given that the parties of the tort are likely to pursue a lawsuit at the court of their common habitual residence, the principle benefits the parties and the court of their residence. However, because illegal cartel conduct is founded upon the intent of influencing the relevant market of a given country (or countries) and the agreements of the

39) Seoul Godeungbeobwon [Seoul High Ct.] Feb. 5, 2015, 2013Na2006955 (S. Kor.).

40) Sun Hee Lee, Dokjeomgyujebeobsang Budanghan Gongdonghaengwie Daehan Sonhaebaesangcheonggu [Damage Claims for Illegal Cartel Conduct in the Fair Trade Act], 22 (2013) (In Korean).

cartel are carried out in that specific country (or countries), the place of the tort is not incidental; on the contrary, as a cartel of a global nature could affect victims across multiple jurisdictions, the commonality–or the lack thereof–of the habitual residences of the tortfeasor and the victim is incidental. If victims of a given cartel are required to claim damages under different applicable laws due to the fact that some victims happened to share a habitual residence with the tortfeasor while others did not, this would result in an unfair inequality among the victims.[41)]

E. The Principle of Lex Loci Delicti Commissi

Article 52(1) of the KPILA holds that the law of the place where a tortious event occurred shall govern that tort. This is grounded on the principle of *lex loci delicti commissi*, but the KPILA explicitly stipulates that the place of the tortious event includes both the place of conduct (Handlungsort) and the place where the result arose (Erfolgsort).[42)]

As explained above, the principles of party autonomy and accessory connection are inapplicable to illegal cartel conduct. Moreover, as shown in Part V.D., the principle of the location of common habitual residence results in an inequitable choice of law among victims of a given cartel when applied to illegal cartel conduct. As such, a fair and reasonable way to interpret Article 52 would be to bypass Article 52(3) and return to the principle of Article 52(1). This interpretation is justified by the general exception clause of Article 21(1), which stipulates that the law of the country most closely related to a tort should be the applicable law.[43)]

Therefore, the principles of party autonomy, accessory connection, and location of common habitual residence cannot be applied to illegal cartel conduct because such conduct does not meet the prerequisites of application (in the case of the principle of party autonomy and the principle of

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41) *See* Lee, *supra* note 23, at 66.

42) *See* Lee, *supra* note 35, at 116.

43) The equivalent article in effect at the time before amendment is as follows: Where the applicable law designated under this Act is slightly related to the corresponding legal relationship and where the law of another country most closely related to such legal relationship obviously exists, the law of the other country shall govern. Gukjesabeob [Private International Law Act] art. 8 para. 1 (S. Kor.).

accessory connection) and because it would lead to an inequitable result that demands rectification (in the case of the principle of common habitual residence). Therefore, the applicable law of illegal cartel conduct must be determined solely based on the principle of *lex loci delicti commissi*, as stipulated in Article 52(1).

This conclusion, drawn from interpreting the KPILA, resonates with special provisions explicitly stated in, as well as the interpretation of, the Rome II Regulation, the EU's conflict-of-laws regime. Article 6(3)(a) of the Rome II Regulation states that "The law applicable to a non-contractual obligation arising out of a restriction of competition shall be the law of the country where the market is, or is likely to be, affected."[44] Illegal collusion is dealt with in paragraph 3(a), classified as the *restriction of competition*, as deliberated in Article 23 of the preamble.

Interpretation of the Rome II Regulations precludes the application of Articles 4(2) and 4(3) to conduct that yields restrictions on market competition. The principle of the location of common habitual residence and the principle of accessory connection are, therefore, inapplicable in European choice-of-law rules for tort claims from restricting competition. Article 6(4) also precludes the principle of party autonomy illustrated in Article 14 to tort resulting from unfair competition and restriction of competition. This supports the case of resorting to the principle of *lex loci delicti commissi* as evidence advocating the special character of tort from the restriction of competition. Because the nature of the dispute is not entirely private, the general principles of choice-of-law rules cannot be directly applied. It is imperative to consider the importance of the impact upon the relevant market in disputes regarding illegal cartel conduct; such consideration will act in favor of recognizing the impact of the illegal conduct upon markets in deciding the applicable law.

44) Regulation 864/2007, of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual obligations (Rome II), 2007 O.J. (L 199/40).

VI. Applicable Law in the Case of Cartels

A. Where Did It Really Happen? – Choice-of-Law Rules for Tort of Cartels

Article 52 of the KPILA provides the choice-of-law rules for tort in general, and paragraph 1 stipulates that "A tort shall be governed by the law of the place where it occurred." This *place* where the tortious event occurred is interpreted to include both (i) the place where the act was committed (hereinafter "place of conduct") and (ii) the place where the consequences took place (hereinafter, "place where the results emerged"). To further demonstrate, place of conduct refers to the place where the actor performed the specific intentional act that caused the damage. However, the place where the results emerged refers to the place where the damage was actually caused or where legal interests were violated. Here, only a direct violation is included, thus excluding the place of indirect and secondary consequences derived from direct violations.

It is common for the place of conduct and the place where the results emerged to be in the same country, but if they are in different countries, the problem of *distant tort* arises. Since the concept of place of tort in KPILA includes both the place of conduct and the place where the results emerged as illustrated above, it is questioned which should be prioritized. One of the principles for determining the applicable law in a distant tort case is the *principle of ubiquity*, which allows the victim of a tort to choose between the law of the place of conduct and the law of the place where the results emerged as the applicable law. Recently, Korea's Supreme Court explicitly recognized that when the place of action and the place of consequence are in more than one country, the victim of a tort may choose the law that is more favorable to him/her as the applicable law.[45)]

Furthermore, in cases of illegal acts conducted through actions online, such as unfair competition using the Internet, physical borders are meaningless. In this context, a *scattered tort* refers to a case in which the conduct that constitutes a single tort occurs in more than one country, or

45) Daebobwon [S. Ct], Oct. 27, 2004, 2009Da22549 (S. Kor.).

the consequences of a single tort occur in more than one country. There can be multiple places of conduct and multiple places of occurrence under this type of tort, and here, the question of where the specific place is located gains importance.

B. Does a Place Where the Results Emerged Exist for Cartels?

Illegal cartel conduct may take place in many forms, but it does not inflict damage on any particular tangible property; it materializes in the form of a loss of profit for the injured party. The *result* of the tort consists of damages to the victim's nonphysical property, which is assessed based on the theory of difference. In other words, the difference in prices incurred at the expense of the victim (and the commensurate reduction of the victim's potential assets) as a result of the collusion in question constitutes the damage caused by said collusion. Seeing that the damage is not related to any tangible property, it can be classified as pure economic loss. There are varying theories on deciding the place where the results emerged for damages realized in the form of pure economic loss. This section delves into differing opinions about whether a place where the results emerged exists and, if so, where such a place could be identified.

1. A Nonexistent Place Where the Results Emerged?

There is persuasive argumentation concerning the place where the results emerged. When a tortious event takes place—such as violating obligations given in Articles 123 and 124 of the KCMA—if the tortious event incurs pure economic loss for the injured party, then the place where the results emerged does not exist.[46] This is argued under the premise that unlike tortious acts concerning tangible property, for which each component of damages can be directly associated with the property, acts concerning money and securities are difficult to determine where the loss physically originates.

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46) Jong Hyeok Lee, Gukjejabonsijangbeopsiron: Gukjejeok Jeunggwongongmobalhaengeseo Tujaseolmyeongseochaegimui Jungeobeop [A Preliminary Study on International Capital Markets Law: Applicable Law of Prospectus Liability in Cross-border Securities Offerings] 132 (2021) (In Korean).

However, the case of claims for damages for illegal cartel conduct must be treated differently from that of claims for damages for prospectus liability. Identifying a specific place where the results emerged is difficult for tort in prospectus liability because it involves cross-border remittances between accounts of different jurisdictions. Public offerings usually entail the investment of multiple investors. Lee's study delves into the potentially diverse location of the accounts of such investors, which may decide the place where the results emerged arbitrarily and turns to the conclusion that there does not exist a place where the results emerged. On the contrary, claims for damages for illegal cartel conduct do not involve multiple injured parties participating in litigation at the same time; thus, there is a practical benefit in identifying the place where the results emerged.

2. Possible Candidates for Place Where the Results Emerged

On the premise that it is important to determine the place of direct damage (the place of consequences) where the interests of the parties are in conflict in order to achieve a reasonable balance, it is more plausible to assume that there exists a place of consequences, unlike the case in KCMA mentioned above. Assuming that there exists a place where the results emerged, competing theories exist as to what this place specifically means: (i) the victim's principal place of business, (ii) the center of financial interests, which is usually the victim's principle place of business, or (iii) the place of the market.[47)]

One may first consider the assertion that the principal place of business of a victim should be automatically chosen as the place where the results emerged. However, as the victim's principal place of business is an incidental circumstance not directly related to the tort in question, especially when the victim is a multinational corporation working in multiple jurisdictions, it is inequitable that such a circumstance could influence whether a given action constitutes a tort. If so, what type of tort is it if the principal place of business of one victim of a given illegal cartel conduct is in the same country as the place of conduct while the principal place of business of another victim is not? The latter is a matter of distant tort while the former is not. Therefore,

47) *Id*. at 131.

the principal place of business of the victim cannot—or should not—determine the place where the results of illegal cartel conduct emerged.

Another possible candidate for the place where the results emerged is where the center of interest is located—that is, where the result of the action inflicts the most harm. The *result* of the tortious act is presented as pure economic damage in the form of damage to the property of the victim. In the case of illegal cartel conduct, the theory of difference is applied, and thus the damage manifests as a decrease in profits compared to an alternative situation without the tortious act. Considering that the impact of a decrease in profits ultimately affects the location of the victim's principal place of business, this can function as the place where the results emerged. Therefore, the place of that result should be determined based on the location of the victim's property (assets), where the interest of the victim is centered. In the case of corporations, this equates to the location of the business office that is most heavily involved in the transaction that inflicted an injury. However, if a local entity to which the injury occurs does not exist, the head offices of the victim may be identified as the principal place of business related to the tort claim, and the governing law chosen accordingly.

An alternative option for the place where the results emerged is the place of the market. This is a plausible consideration because the most important aspect of illegal cartels and the sanctions applied to their conduct is that they are a threat to the free market by restricting competition. Considering such public purposes of the tort claim, it is reasonable to argue that the place where the results emerged from the tort in question is the place where the market is located. For the case being dealt with, however, the market is not composed of customers who can be identified by their geographical location. The buyers of the market in question are composed of corporations that operate internationally, arranging contracts that buy intermediary goods from a foreign entity and utilizing them to create products that are sold in multiple markets. The victim in question bought TFT-LCD panels from the defendants not to use them in a single market; rather, the market for selling such intermediary goods is not limited to a certain country but is global in scope. It is impossible to decide upon a single place in the market; therefore, this prevents the place of the market from providing any meaningful guidance in deciding the governing law.

C. Does a Place of Conduct Exist for Cartels?

The place of conduct is another possible option in the problem of choice-of-law rules. Article 52(1) of the KPILA presents two options for determining applicable law in *lex loci delicti commissi*: the place where the tort is committed, or the place where the consequences of the tort occur. To determine whether a place of conduct exists and, if so, the place of conduct itself, it is necessary to define a common understanding of the term conduct, as it may be interpreted in two different ways.

1. Striking an Agreement as Conduct

One way of understanding the place of conduct in the case of cartels is to consider arriving at an agreement (or collusion) between the tortfeasors as the 'conduct' in question. For instance, in the case in question, because the defendants held meetings in Taiwan and Korea, these countries of physical conduct could be understood as the place of conduct of the tort.

Nevertheless, considering that (i) the essence of illegal cartel conduct is in the communication and alignment of the tortfeasors' intentions rather than the actual congregation itself; (ii) such communications can happen in a manner that is independent from physical locations (e.g., via telecommunication technologies); and (iii) various forms and types of communications can take place simultaneously across multiple physical locations (e.g., the meetings that were held in Taiwan and Korea in the case in question), the location of the entity that commands the intentions being communicated and aligned should be understood as the place of conduct. Therefore, from this perspective, the location of the head offices of a partaking corporation becomes the place of conduct in the case of illegal cartel conduct.

2. Carrying out the Agreement as Conduct

Another way of understanding the term conduct in defining the place of conduct for illegal cartel conduct is to question the most important element that establishes claims for damages for tort. Whereas the composition of illegal cartel behavior in the case of administrative penalties and criminal sanctions is determined by the existence of mutual consent to collude, a

party may bring forward claims for damages for tort only when it has sustained real damage as according to general conditions to claim damages.[48] Thus, the case for recognizing the place of conduct as the place where the behavior according to the agreement to collude was executed is persuasive.

Relevant cases from other jurisdictions support this view. The ÖFAB case from the European Court of Justice stated the place of conduct in a claim for damages from tort as the place in relation to actions conducted by the corporation and financial situations concerned with such actions. This interpretation is supportive of the view that conduct is closely related to action and that it is an integral element of tort from illegal cartel conduct.

Korea's Supreme Court has upheld this view by deciding whether an action constitutes illegal cartel conduct by focusing on whether there has been real action, and has used terms that relate to real action. It is true that the mere existence of agreement is enough to amount to illegal cartel conduct as punished by administrative penalties and criminal charges. However, the Top Court decides the existence of 'conduct' by being conscious of action itself. This perception is visible in rulings handling claims for damages for illegal cartel conduct. In its ruling accepting claims for damages for illegal cartel conduct in the flour market, the Supreme Court stated that "the action of restricting the production level of, and deciding, maintaining, and altering the price of flour is action that unfairly hinders competition in the flour producing, retailing market, and amounts to action violating items 1 and 3 of Article 19(1)* of the KFTA (amended to Article 40)."[49]

The court ruling on the case in question concerning the TFT-LCD market took a similar stand. The ruling states that the defendants *unfairly hindered competition in the TFT-LCD market by performing illegal cartel conduct* and cites factual information on the actual sales of TFT-LCDs.

3. Subconclusion: Place of Conduct

a. Place of the Market as a Place of Conduct

To specify the definition of the term 'conduct', it is instructive to return

48) Sun Hee Lee, Dogjeomgyujebeobsang Budanghan Gongdonghaengwie Daehan Sonhaebaesangcheonggu [Damage Claims for Illegal Cartel Conduct in the Fair Trade Act] 101 (2013) (In Korean).

49) Daebeobwon [S. Ct.], Nov. 29, 2012, 2010Da93790 (S. Kor.).

to the basic nature of the claim for damages in question. As stressed in Part IV. D., while an important component of claims for damages for tort regarding illegal cartel conduct is the public objective to bring justice to wrongdoing, the essence of the provision is the objective to provide a remedy for injury done by a colluding entity. To facilitate the process of the private entity claiming damages, it is necessary to present the process as an innately private one. It is certain that a violation of competition law is considered tort, and claims for damages for illegal cartel conduct are a type of tort claim.[50)]

As explained above, a party may claim compensation based on real damages; when parties agree to collude but do not commit to such an agreement, there does not exist any damage to be claimed. Therefore, the most important element of the conduct of collusion in the context of private claims for damages is the execution of the agreement. The natural implication of this is that the term 'conduct' should be interpreted as carrying out the agreement. The place of conduct must be treated as the place where the agreement was implemented.

However, identifying a place where the agreement was implemented may be impossible in certain cases. Whereas it may be a viable option for most collusions, such as the most traditional type regarding price manipulation, there are other types of illegal cartel conduct in which a place of conduct is difficult to identify. For example, for collusion by exchanging business information or collusion in public auctions, it is difficult to identify the exact time and place at which the collusion was initiated. It is difficult to pinpoint a certain physical action as the 'conduct' for these types of collusions. Therefore, because the conduct of initiating an agreement to collude influences the state of competition in the market, it is fair to set the *lex mercatus* – the law of the marketplace – as the law of the place of conduct in cases where the action of collusion cannot be identified in material form.

This approach of choosing *lex mercatus* as the law of the place of conduct can be found in the legislation of other jurisdictions, mainly the Rome II Regulations, of which Article 6(3)(a) provides the governing law as the

50) 3 Chang Soo Yang, *Bulbeobhaengwibeobui Byeoncheongwa Ganeungseong [Developments and Possibilities in Tort Law], in* Minbeobyeongu [Study of Civil Law] 335 (1995) (In Korean).

"law of the country where the market is, or is likely to be, affected."[51)]

b. Interpreting the Place of the Market

Lee is instructive in his interpretation of the term *Place of the Market*. In the case of prospectus liability, the relevant provisions have the objective of protecting investors and ensuring order in the capital market. The justification for applying *lex mercatus* comes from the importance that the market holds in understanding and achieving the objective of the prospectus liability provision.[52)] Likewise, there exists a structural resemblance in the case of claims for damages for illegal cartel conduct: The provisions have the objective of providing remedies for those injured by market-distorting behavior, which ultimately aim to protect competition in the market and restore faith in the market for participants. This objective is expressly stated in Article 1 of the KFTA: the law aims to 'promote fair and free competition by regulating illegal cartel conduct and unfair trade practices, thereby encouraging creative business activities, protecting consumers, and promoting the balanced development of the national economy.' This emphasis on the market in the provisions provides ample grounds to choose the place of conduct as the place of the market.

Even if one were to settle upon the place of the market in deciding the place of conduct, there remains the problem of what specifically can be considered as the place of the market. In the case of illegal cartel conduct materializing into a hindrance to free market intervention in the transaction, the place of the market may be decided as (i) the principal place of business of the tortfeasor that intended the tortious act or (ii) the actual market where the transaction took place between the tortfeasor and the victim. For the case in question, the transaction between the tortfeasor and the victim takes the form of a mid-supply chain relationship in which the victim acquires intermediary goods from the tortfeasor. Such a transaction does not occur in a specifically limited area, which leads to the conclusion that in an international transaction regarding intermediary goods, the place of the market is decided as either the residence of the tortfeasor or the victim.

Therefore, there are mainly two possibilities in choosing the place of the

51) European Parliament and the Council, *supra* note 44, at 5.

52) Jong Hyeok Lee, *supra* note 46, at 160.

market: the principal place of business of either the victim or the tortfeasor. Of the two, presenting the principal place of business of the victim as the place of the market is relatively more persuasive. This is because the victim's principal place of business is the place that functions as the central location or hub of the damages wrought upon the interest of the victim, where the will of the tortfeasor to execute the agreement on collusion manifests as specific conduct that influences the interest of the victim. Also, the problem of predictability comes into play. Normal illegal cartel litigation consists of multiple tortfeasors and a single victim in which the victim claims damages for the tortious conduct of the colluding parties. Colluding is, by nature, an act conducted by multiple parties. Where the transaction is of an international character, there is a high possibility that the parties having agreed to and implemented the collusive agreement are not from a single country. Setting the principal place of business of the tortfeasor as the place of the market will result in a multiplicity of potentially applicable laws, increasing the instability of the legal status of the victim and placing him further away from reaching a remedy.

To prevent such an unfair situation, the victim's principal place of business is the more persuasive choice in determining the place of the market. Also, whereas setting the place of the market as the principal place of business of the victim may result in an unexpected variety of cartel litigation for the tortfeasor in cases where multiple victims spanning different jurisdictions claim damages for the same tortious act, the case in question deals with a single victim, which steers clear of such a problem. Therefore, the protection of confidence from the side of the tortfeasor is not problematic.

In conclusion, the place of conduct of the case in question can be decided by the place of the market, which shall be presented as the principal place of business of the victim.

D. Deciding the Applicable Law

In deciding the applicable law to the case in question according to the principle of *lex loci delicti commissi*, Article 52(1) of the KPILA allows for choosing between the place of conduct or the place where the results emerged in choice of law, as illustrated in Part V. E. Analysis presents the

principal place of business of the victim as the place where the results emerged (Part VI.B.), while a similar analysis of the place of conduct presents it as relying on the place of the market. A consideration of both the objective of the provision and the actual circumstance of the market, concludes that the principal place of business of a victim corresponds to the place of the market (Part VI. C.).

Therefore, as the two options both provide the option of choosing the law of the principal place of business as the applicable law, there is no need to contemplate the problem of distant tort or resort to the exemption clause of Article 21 of the KPILA.

VII. Conclusion

The choice-of-law question concerning claims for damages for tort from violation of the KFTA must be solved not through the invocation of the KFTA's extraterritorial application clause but through legislation dealing with choice-of-law rules about private legal relationships. This is because the Effects Doctrine underlying the extraterritorial application clause plays a different role for administrative regulation, criminal punishment, and civil liability; for private legal relationships, the decision to apply which law is made under a rather different frame of private international law. In the present case, the KPILA was applied.

From the rules of international private law stated in the KPILA, it can be deduced that the principle of *lex loci delicti commissi*, which states either the law of the place of conduct or the law of the place where the results emerged governs a dispute, is applicable in this case. Potential options for the Place where the results emerged and the Place of conduct, as specified in Article 52(1) of the KPILA, includes the principal place of business of the victim as the most prominent and relevant. From a wider viewpoint, it can be said that through this application of choice-of-law rules for tort claims, the objective of the Effects Doctrine—underlying the clause providing for extraterritorial application in the KFTA—can be accomplished.

Concerning the case in question, the court justifies the application of the KFTA by simply invoking Article 32(1)* of the KPILA, stating that the law of the place where the results emerged is applicable, and Article 3 of the

KFTA without specifying how the Article can be applied.[53)]

This essay argues otherwise; the invocation of the extraterritorial application clause of the KFTA is irrelevant. Also, choice-of-law rules in the KPILA must be applied with a more subtle approach. Taiwanese business entities engaged in tortious behavior while a Korean company sought remedy for damages in a Korean court under the KFTA. Because tortious acts of illegal cartel conduct do not satisfy the conditions for applying the principles specified in Articles 52(2), 52(3), and 53, the principle of the place of the tort specified in Article 52(1) of the KPILA is applied. The court may have concluded that the place of conduct and the place where the results emerged are the victim's principal place of business; therefore, Korean legislation on illegal cartel conduct may apply in the settlement of the dispute.

While more research is necessary to establish a common understanding of choice-of-law rules in claims for damage from tort in relation to administrative regulations and criminal punishment, the authors hope this study adds value to the much-needed analysis of the liability of illegal cartels.

53) *See* Seoul Jungangjibangbeobwon, s*upra* note 25, at 17.