

연구논문

Comparative Analysis of Unjust Enrichment as a Governing Law in International Arbitration Between The U.S. and Korea

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I. Introduction

The method of finding the laws in the common law countries is significantly different from that in French civil code countries. The former usually derives the laws from the previous court decisions and applies the derived rules to the current case, called inductive, while the latter prescribes the laws beforehand and then applies the prescribed rule to the current case, called deductive. Such dichotomy in comparative legal research seems to be most recognizable and common. Accordingly, the mainstream of comparative legal research would come from comparison of common laws with civil codes.

As the U.S. contract law has its original foundation on the English common law, Korea also succeeded to Japanese and German contract laws. Accordingly, comparison of the U.S. law with the law of Korea will be naturally thought as one of the ways to contrast the system of common laws with the system of civil codes.

Among numerous topics in the law of contracts, unjust enrichment will be investigated for both countries and contrasted with each other to find some similarities and differences. In Chapter II, general legal principles regarding unjust enrichment in the U.S. and Korea will be explored. In Chapter III, comparison will be attempted to find out similarities and differences in the legal principles of unjust enrichment between the two countries, based on the descriptions in Chapter II. In Chapter IV, it will be investigated how the legal principle of unjust enrichment will play as a governing law in international arbitration between the U.S. and Korea, followed by some suggestions in Chapter V.

II. Unjust Enrichment

In this chapter, the basic principles of unjust enrichment in both the U.S. and Korea will be explored with respect to the characteristics of unjust enrichment, elements to establish unjust enrichment and the legal effects.

1. The U.S.

(1) Characteristics of Unjust Enrichment¹⁾

The definition of unjust enrichment has been provided that a benefit is unjustly retained at the loss of another, or money or property of another is unjustly retained against the fundamental principles of justice or equity and good conscience.²⁾ If a person is found unjustly enriched, he or she will be responsible for paying back the unjustly enriched amount to the other party. Accordingly, the term 'unjust enrichment' imitates a contract so that one party may recover damage from another.³⁾ Although there is no contractual relationship, unjust enrichment presents a restitution for the amount of the benefit retained on the grounds of fairness and justice.⁴⁾ The term, enrichment, implies that a party unjustly retains a benefit offered by the other party. In addition, the term 'unjust' is to describe the circumstances that "it would be

1) 66 Am Jur 2d 9.

2) Mehl v. Norton, 201 Minn. 203 205 (1937).

3) Amoco Production Co. v. EM Nominee Partnership Co., 2 P.3d 534 541(Wyo. 2000).

4) Forrest Associates v. Passamaquoddy Tribes, 2000 ME 195 209 (Me. 2000).

morally wrong for one party to be allowed to enrich itself at the expense of another.”⁵⁾ Whether a party is unjustly enriched or not should not be decided in a particular setting of an independent relationship but it should be considered in a broad context and ‘human setting’ of the business relationship between the parties.⁶⁾

Unjust enrichment may occur when the defendant utilizes something belonging to the plaintiff in order to save his or her properties, leading to business profit.⁷⁾ Accordingly, it is necessary to examine the broad factuality of the circumstances including the parties and the conduct,⁸⁾ because unjust enrichment is “an equitable doctrine” and a basis for “broad flexible remedy”⁹⁾.

(2) Elements to Establish Unjust Enrichment¹⁰⁾

In *Schroeder v. Buchholz*,¹¹⁾ five elements to establish unjust enrichment were provided: “(1) an enrichment; (2) an impoverishment; (3) a connection between the enrichment and the impoverishment; (4) the absence of a justification for the enrichment and impoverishment; and (5) the absence of a remedy provided by law.” Some different elements were suggested in *Media Services Group, Inc. v. Bay Cities Communications, Inc.*¹²⁾ that “(1) the plaintiff has conferred a benefit on

5) *Gallinger v. North Star Hosp. Mut. Assur., Ltd.*, 64 F.3d 422 426 (8th Cir. 1995).

6) *McGrath v. Hilding*, 41 N.Y.2d 625 629 (1977).

7) *Cross v. Berg Lumber Co.*, 7 P.3d 922 934 (Wyo.2000).

8) *Crowell v. Danforth*, 222 Conn. 150 158 (1992).

9) *Salzman v. Bachrach*, 996 P.2d 1263 1268 (Colo. 2000); *Meany v. Connecticut Hosp. Asn, Inc.*, 250 Conn. 500 512(1999).

10) 66 Am Jur 2d 12.

11) *Schroeder v. Buchholz*, 2001 ND 36 51 (N.D. 2001).

12) *Media Services Group, Inc. v. Bay Cities Communications, Inc.*, 237 F.3d 1326 1330 (11th Cir. 2001).

the defendant; (2) the defendant has knowledge of the benefit; (3) the defendant has accepted or retained the benefit conferred; (4) the circumstances are such that it would be inequitable for the defendant to retain the benefit without paying fair value." In the meantime, in *Shaw v. Smith*¹³, more concise description on the elements of unjust enrichment was offered as following: "(1) valuable services were provided to the defendant; (2) which were used and enjoyed by the defendant; (3) under circumstances which reasonably notified the defendant that the plaintiff expected payment; and (4) without payment the defendant would be unjustly enriched."

The most common element of those described above is whether the enrichment of the defendant is unjust. It seems that unjustness is most important in determination of unjust enrichment. "No person is unjustly enriched unless the benefit is unjustly retained."¹⁴ The defendant needs not to provide restitution for the creation of "a rather slim possibility that the party may receive some benefit in the future."¹⁵

Although not equally important to unjustness, certain benefit conferred to the defendant with knowledge is also important criterion in determining whether unjust enrichment occurred. While unjustness is likely to be judged in terms of equity, benefit conferred should be evaluated employing more objective criteria, since it can usually estimated with money. A benefit held by the defendant must occur at the expense of the plaintiff for establishment of unjust enrichment. Accordingly, restitution can not be made under the theory of unjust enrichment when the benefit is provided "as an incident of a plaintiff's having acted primarily for his or her own benefit."¹⁶

13) *Shaw v. Smith*, 964 P.2d 428 437(Wyo. 1998).

14) *Buell v. Orion State Bank*, 327 Mich. 43 56 (1950).

15) *Anderson v. Tuboscope Vetco, Inc.*, 9 P.3d 1013 1019 (Alaska 2000).

16) *Berry & Gould, P.A. v. Berry*, 360 Md. 142 157 (2000).

Another issue related with the nature of benefit may arise when the benefit is conferred voluntarily or without request from the defendant. If a benefit is given without expectation of reimbursement, it shall not be protected under the principle of unjust enrichment.¹⁷⁾ Accordingly, a gratuitous benefit conferred as a gift, will not be considered as unjust enrichment.¹⁸⁾ In addition, a person who officiously provides a benefit to another is not eligible for restitution due to the lack of unjust enrichment.¹⁹⁾ The term "officious volunteers" may be interpreted as "those who introduce themselves into matters which do not concern them and do something which they are neither legally nor ethically bound to do."²⁰⁾

However, in situation where such voluntary action is taken for a necessary protection of interests of the defendant or third parties, restitution may be acknowledged.²¹⁾ There could be many instances which restitution can be accepted for services rendered or things provided without the recipient's consent or knowledge. For instance, when a person whose consciousness has been lost due to car accident is sent to a hospital and treated by the doctor, he or she will not be able to avoid from restitution by the hospital.

(3) Legal Effect (Restitution)

If a person is unjustly enriched, he or she will be responsible for restitution.²²⁾ Accordingly, "unjust enrichment is a prerequisite for the

17) *Brady v. State*, 965 P.2d 14 (1999).

18) *Liautaud v. Liautaud*, 221 F.3d 981 988 (7th Cir. 2000).

19) Officiousness means interference in the affair of others not justified by the circumstances under which the interference takes place, 66 Am Jur 2d 14.

20) *In re Estate of MacFarline*, 14 P.3d 551 561 (Okla. 2000).

21) Restatement First, Restitution 112.

enforcement of doctrine of restitution.”²³⁾ The term “restitution was used in the earlier common law to express the return or restoration of a specific thing or condition.”²⁴⁾ However, in recent times, the meaning of restitution has been interpreted far extensively to denote not only the recovery paying back some economic values to the deserved owner and its rightful owner and reestablishing to “the status quo”²⁵⁾, but also “compensation, reimbursement, indemnification, or reparation for benefits derived from, or for loss or injury caused to, another.”²⁶⁾

Such change in interpretation of restitution may reflect that the range of recovery of loss based on the doctrine of restitution has been broadened to the secondary effects caused by the unjustness of the defendant. In general, it seems that the restoration of benefit unjustly conferred to the defendant can be measured plainly; however, the further loss caused by unjust enrichment may be extremely subjective thus possibly overestimated, which will inequitably put the defendant in a substantially unstable position.

The legal basis of restitution is not upon statute or contract but upon equity, morals, justice, and good conscience.²⁷⁾ “Restitution is a legal remedy when it is sought in a lawsuit brought for breach of contract and an equitable remedy when it is sought in an equity case.”²⁸⁾ As seen in its definition in subsection (1) in this chapter, restitution due to unjust enrichment should fall into the category of the latter, an

22) *Ellis v. Smith Grading and Paving, Inc.*, 294 S.C. 470 473 (Ct. App. 1988).

23) *Id.*

24) 66 Am Jur 2d 1.

25) *Tull v. U.S.*, 481 U.S. 412 424 (1987).

26) *Lipinski v. Columbus Plaza, Inc.*, 4 Conn. Cir. Ct. 24 28 (1966).

27) *Rankin v. Emigh*, 218 U.S. 27 (1910).

28) *Health Cost Controls of Illinois, Inc. v. Washington*, 187 F.3d 703 710 (7th Cir. 1999).

equitable remedy, because it arises without contract.

The plaintiff may be recovered from unjust enrichment "either by the return of something which he formerly had or by the receipt of its equivalent in money."²⁹⁾ When the unjustly enriched defendant still keeps the things conferred from the plaintiff, there does not seem to exist any complications with respect to restoration to the former condition. However, if the tangible objects are somehow disposed by the defendant, he or she will have to be encountered with an evaluation process in monetary terms.

Another case in which the benefit conferred should be measured in monetary terms occurs when the benefit is accrued from services preformed, in which case the plaintiff is entitled to recover the 'reasonable value' of the services rendered.³⁰⁾ In both the goods and services unjustly conferred, the value to be recovered should be estimated on the basis of the reasonable or fair market price of them if they can not be restored into the original state or condition.³¹⁾

2. Korea

Legal principles in the area of unjust enrichment in Korea are expected to be basically compatible with those in the U.S. with some exceptions. In this section, Korea's unjust enrichment will be investigated with the same classification of the legal issues as in the previous section including the characteristics, the elements, and the legal effects.

29) *Shadle v. Borrusch*, 255 Iowa 1122 1129 (1963).

30) *In re Estate of Lutz*, 1997 ND 82 17 (N.D. 1997).

31) *J. Q. Office Equipment of Omaha, Inc. v. Sullivan*, 230 Neb. 397 402 (1988).

(1) Characteristics of Unjust Enrichment

According to Korea Civil Code, unjust enrichment is defined as benefit conferred in the form of property or services without proper legal causes.³²⁾ The person unjustly enriched due to such benefit is legally responsible for restoration and should naturally return it to the person who lost his or her property due to unjust enrichment.³³⁾ Unjust enrichment is a cause of obligation, which is formed as statutory rather than contractual.³⁴⁾ In addition to unjust enrichment, statutory obligation arises also from management of others' business³⁵⁾ and torts.³⁶⁾

There are two types of viewpoints in understanding the meaning of "without proper legal causes."³⁷⁾ One is to understand it in the uniform context, the other is to interpret it in case by case. The former viewpoint is in the mainstream and seeks its legal base from the equity concept of fairness and justness. On the other hand, the latter investigates the conditions of "without proper legal causes" in individual cases and decides whether there are proper legal causes or not.

As discussed above, the statutory obligations come from not only unjust enrichment but also from other legal actions including the right of recourse on expenses occurred to lien,³⁸⁾ the right of recourse on expenses occurred to lessee³⁹⁾ and the right of recourse on expenses occurred from management of others' business.⁴⁰⁾ As a result, there may

32) KOREA CIVIL CODE, art. 741.

33) JOON HO KIM, LECTURE IN CIVIL CODE 1089 (Pubmoon Sa, 1999).

34) Id..

35) KOREA CIVIL CODE, art. 734.

36) KOREA CIVIL CODE, art. 750.

37) JOON HO KIM I, *supra* note 33, at 1089.

38) KOREA CIVIL CODE, art. 325.

39) KOREA CIVIL CODE, art. 617.

40) KOREA CIVIL CODE, art. 739.

be conflict of claims in one lawsuit when the plaintiff asserts such claims at the same time. In this case, the rights prescribed in the Civil Code for special purposes should be prioritized even when the legal action perfectly constitutes unjust enrichment.⁴¹⁾

(2) Elements to Establish Unjust Enrichment

According to the Civil Code,⁴²⁾ three elements are required to establish unjust enrichment. First, the defendant should be benefitted from property or services conferred by the plaintiff "benefit." Second, the benefit should cause the plaintiff to be harmed "causality." Third, the benefit should occur without any legal relationship between the two parties "no valid legal action involved." In this subsection, each of these elements will be investigated.

i. Benefit

Benefit includes not only increase in property but also savings occurred from the plaintiff' sacrifice. The benefit must be one that was conferred from services or property of others; however it does not matter how the defendant was benefitted. In other words, the method of conferment of the benefit is not important to establish unjust enrichment.⁴³⁾

The benefit should be "material" in order to be utilized as an element to establish unjust enrichment.⁴⁴⁾ Accordingly, even though the lessee has occupied the leased building for a certain period past the agreed term, such occupancy should not be interpreted as material if

41) JOON HO KIM, *supra* note 33, at 1090.

42) KOREA CIVIL CODE. art. 741.

43) [96 da 34009] Korea Supreme Court (1996).

44) [94 da 50526] Korea Supreme Court (1995).

the lessee has not practically used the building for acquisition of profits.⁴⁵⁾ The expected benefit unjustly conferred also can be recoverable; thus is entitled to be an element to establish unjust enrichment when the benefit is expected in the future and deemed to be unrecoverable in the future.⁴⁶⁾

ii. Causality

The benefit conferred to the defendant should cause the harm to be occurred to the plaintiff.⁴⁷⁾ If there has been no harm to the plaintiff caused by the benefit conferred to the defendant, unjust enrichment can not be established for restitution. It would be sufficient if the causal relationship is socially acceptable with common reasonableness. Therefore, the relationship does not have to be necessarily direct or firsthand; even indirect or secondhand causality may be accepted as an element of unjust enrichment. Accordingly, it can be said that the causality tends to be interpreted as broadly as possible to extensively protect the plaintiff.

iii. No Valid Legal Action

In order to establish unjust enrichment, there should be no valid legal action between the two parties. Once a valid legal action between two parties is formed, the benefit conferred will be no longer unjust or under the issue of unjust enrichment. Whether there exists a valid legal action is decided in case by case, which should be mainly judged in the context of equity.⁴⁸⁾

There are three types of unjust enrichment which may be triggered

45) Id..

46) [74 da 1184] Korea Supreme Court (1975).

47) KOREA CIVIL CODE, art. 741.

48) JOON HO KIM , supra note 33, at 1093.

by invalid legal actions⁴⁹⁾ The first type is that the defendant is unjustly enriched by the payment or services rendered by others. If such legal action is nullified or rescinded, the receiver of payment or services will be enriched without valid legal action.

The second type is that the defendant is unjustly enriched by infringement of the plaintiff's property rights (e.g., intellectual property rights). In this type of unjust enrichment, the plaintiff may rely on either restitution or torts to recover his or her losses.

The third type is that the defendant is unjustly enriched by the expenses occurred to the plaintiff, whose action is not legally supposed to be taken. In this case, special rules on recovery of such expenses are prescribed by the Civil Code as previously exemplified in the previous section.⁵⁰⁾

(3) Legal Effect - Restitution

If unjust enrichment occurs to one party, the unjustly enriched party should return the conferred benefit to the counter party.⁵¹⁾ In the Civil Code system, the methods of recovery to the original condition are stipulated in two kinds.⁵²⁾ One is to return the original object to the rightful owner. The other is to compensate the plaintiff with the correspondent amount when impossible to restore with the original object (i.e. services rendered, goods used up, etc.) In this subsection, the two methods of recovery will be investigated separately.

i. Return of Original Object

When the defendant unjustly possesses the plaintiff's object, he or she

49) Id..

50) KOREA CIVIL CODE, art. 739.

51) KOREA CIVIL CODE, art. 741.

52) KOREA CIVIL CODE, art. 201 & art. 747.

should return it to the rightful owner.⁵³⁾ The scope of recovery depends on whether the unjustly enriched party has been benefitted in bona fides or not. First, when the defendant has possessed the object in bona fides and devalued it due to the occupancy, he or she is required only to recover the value of remainders to the plaintiff.⁵⁴⁾

When the defendant has maliciously possessed the object and devalued it due to the occupancy, he or she should not only return the value of remainders but also recover the disposed benefit or the devalued amount of the object to plaintiff.⁵⁵⁾

ii. Return of Corresponding Amount

When the unjustly enriched party can not return the original object to the lost party due to disposition, the benefitted party should compensate the lost party for the corresponding amount of the loss.⁵⁶⁾ Same as in Return of Original Object, this type of recovery also has the different scope of restoration depending on whether the unjustly enriched party has been benefitted in bona fides or not. The only difference is that the maximum of recovery is not the benefit conferred to the defendant but the damage actually occurred to the plaintiff.⁵⁷⁾ Accordingly, even when the unjustly enriched party is benefitted more than the loss of the plaintiff, he or she is not required to restore beyond the amount of the plaintiff's loss.

53) KOREA CIVIL CODE, art. 201.

54) KOREA CIVIL CODE, art. 202.

55) KOREA CIVIL CODE, art. 201.

56) KOREA CIVIL CODE, art. 747.

57) Id..

III. Comparison

To derive similarities and differences of unjust enrichment between the U.S. and Korea, the same structure as employed in Chapter II will be followed in this chapter. Therefore the basic criteria for comparison include characteristics of unjust enrichment, elements to establish unjust enrichment and the legal effects.

1. Characteristics of Unjust Enrichment

Based on the investigation conducted in Chapter II, several similarities may be derived with respect to the characteristics of unjust enrichment between the U.S. and Korea. First, both the U.S. and Korea have the same basis of legal rationales of unjust enrichment on equity and fairness. Unjust enrichment is not only considered in a broad context and human setting of the business relationship between the parties, but also is interpreted in a particular setting of an independent relationship. Second, unjust enrichment is applied to both tangible objects and intangible services as part of the benefit conferred. There does not seem to be any limitations on the conditions of benefit whether it is tangible or intangible, and replaceable or unreplaceable.

There do not seem to be significant differences in the legal characteristics of unjust enrichment between the two countries. The only difference would arise from the fact that the benefit denoted in the definition of unjust enrichment in the U.S. is required to be 'unjust' rather than 'without legal causes', which is a precondition for the benefit to be effective for unjust enrichment in Korea. As a result, the requirement of 'unjust' would be more rigid than the requirement of

'without legal causes' with respect to the applicability of unjust enrichment.

2. Elements to Establish Unjust Enrichment

Several similarities of unjust enrichment between the U.S. and Korea may be derived from the descriptions of unjust enrichment. First, in both countries, the benefit conferred to the defendant must be unjust to be eligible for 'unjust enrichment', whose unjustness is interpreted in the context of equity or fairness.

Second, the party conferring benefit must be impoverished to establish unjust enrichment in both of the countries. If the party providing benefit is not impoverished by the conferment, he or she will not be eligible for unjust enrichment.

Third, the enrichment occurred to the defendant must have at least some causal relationship with the impoverishment experienced by the plaintiff. Accordingly, when the impoverishment of the plaintiff is not caused by the enrichment of the defendant, unjust enrichment will be established for restitution.

Two kinds of significant differences regarding elements to establish unjust enrichment can be derived from Chapter II. First, in the U.S. the defendant must have knowledge of the benefit in order for him or her to be unjustly enriched, while in Korea the defendant is under obligation of restitution whether or not he or she was aware of the benefit. This may reflect that restitution in Korea is more broadly applied than restitution in the U.S.

Second, in the U.S. the defendant needs not to provide restitution for the creation of a rather slim possibility that the party may receive some benefit in the future. However, in Korea, the plaintiff may claim

restitution for the benefit that is expected to occur to the defendant in the future, which may increase the opportunity for the plaintiff's loss to be recovered by unjust enrichment.

3. Legal Effect

In both of the countries, unjust enrichment would lead to restitution, which is the only legal effect caused thereby. The methods of restitution resulting from unjust enrichment include return of original object and return of corresponding amount.⁵⁸⁾ As noted previously, the corresponding amount of loss will be estimated in terms of reasonableness or fair market price in the U.S. and Korea. It may be said that any significant difference in the legal effects of unjust enrichment between the U.S. and Korea has not been emerged from the investigation in Chapter II.

IV. International Arbitration Between The U.S. and Korea

To resolve international disputes, several alternatives for dispute resolution have been offered, including arbitration, mediation, conciliation etc. Among all of the dispute resolution methods, international arbitration has been considered as having the most practical relevance in commercially oriented dispute resolution (i.e. international commerce).⁵⁹⁾

58) See *Shadle v. Borrusch*, 255 Iowa 1122 1129 (1963); *In re Estate of Lutz*, 1997 ND 82 17 (N.D. 1997); KOREA CIVIL CODE, art. 201 & 747.

1. Characteristics

As an alternative to litigation, international arbitration has been widely recommended for resolving disputes over violation of consumer privacy in international e commerce due to its unique advantages.⁶⁰⁾ The standardized procedure of dispute resolution throughout the world would be an additional advantage of international arbitration, making a significant contribution to overcoming the legislative and judicial differences between the U.S. and Korea.

One of the important attributes of international arbitration is the agreement⁶¹⁾ between the two parties to be bound by the arbitration award.⁶²⁾ Most international arbitrations are conducted pursuant to a contractual arbitration clause included in the principal (underlying) contract,⁶³⁾ which attempts to provide a procedure for resolving future conflict between the parties.

Considering the difficulties of international litigation due to the legal differences found between the U.S. and Korea, disputes over unjust

59) CHRISTIAN BUHRING-UHLE, *ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS* 261 (1996).

60) CHRISTIAN BUHRING UHLE, *supra* note 282, at 87 (International arbitration has been reported to be advantageous to dispute resolution in that: it ensures a competent tribunal, flexibility of the procedure, a reasonably predictable and legitimate decision by a tribunal, achieves final and enforceable awards, and excludes competing procedures practically on a worldwide scale).

61) *Id.*, at 43 (There are two types of arbitration agreements, the submission of future disputes through an arbitration clause that is included in or annexed to the principal contract, or the submission of an existing dispute to arbitration by means of a submission agreement).

62) *Id.*

63) ALAN REDFERN & MARTIN HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 53 (2d ed. 1991).

enrichment can be efficiently resolved by international arbitration. Among the two types of arbitration agreements, the pre contractual agreement of arbitration is likely to be more efficient than the post contractual agreement, because in the pre contractual agreement, the dispute resolution process is stipulated in advance; thus it will save on the total time and costs of arbitration process. Otherwise a significant amount of time and costs may be wasted just negotiating the agreement to arbitrate.

2. Arbitration Institutions

The arbitration institutions available for resolution of disputes over unjust enrichment should be able to deal with commercial disputes, because unjust enrichment would mostly take place in commercial transactions. Although claims regarding unjust enrichment are not a primary substance of contract in e commerce and are partially related with tort, they are raised in the context of commerce. Therefore, it would be natural that such claims should be resolved by commercial arbitration institutions.

The commercial arbitration institution available to the disputes over unjust enrichment include the International Court of Arbitration of the International Chamber of Commerce (hereinafter "ICAICC")⁶⁴, the Commercial Arbitration and Mediation Center for the Americas of American Arbitration Association (hereinafter "CAMCA"),⁶⁵ and the

64) See, International Chamber Commerce, Rules of Arbitration (in force as from 1 January 1998), art. 1, cl.1., available at <http://www.iccwbo.org/court/englis/arbitration/rules.asp> (last visited May, 20, 2003).

65) See, Commercial Arbitration and Mediation Center for the Americas, Arbitration Rules, art. 1, cl.1., available at <http://www.adr.org> (last visited May 20, 2003).

Korean Commercial Arbitration Board (hereinafter "KCAB").⁶⁶⁾ Each of these arbitration institutions provides its own standard arbitration clauses⁶⁷⁾ in order to obviate confusions resulting from ambiguous wording in arbitration agreements. The procedure and the governing law of the arbitration are prescribed in each of the standard arbitration clauses by inserting it into the principal contract.

The claims that may be brought with respect to unjust enrichment and restitution thereof have a legal basis on the law of contract in the U.S. and Korea, in which case the forum state usually applies its own laws. If the parties attempt to resolve the dispute through litigation, the resolution process may be deadlocked by controversies triggered by

66) See, Korea Arbitration Act (last revised 2002), Supplementary Provision #3.

67) The standard ICC arbitration clause: "All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.", available at http://www.iccwbo.org/court/english/arbitration/model_clause.asp (last visited May 20, 2003). The CAMCA standard arbitration clause: Any dispute, controversy or claim arising out of or relating to this contract, or the breach thereof, shall be finally settled by arbitration administered by the Commercial Arbitration and Mediation Center for the Americas in accordance with its rules and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof, available at <http://www.adr.org> (last visited May 20, 2003). The KCAB standard arbitration clause: All disputes, controversies, or differences which may arise between the parties, out of or in relation to or in connection with this contract, or for the breach thereof, shall be finally settled by arbitration in Seoul, Korea in accordance with the Arbitration Rules of the Korean Commercial Arbitration Board and under the Laws of Korea. The award rendered by the arbitrator(s) shall be final and binding upon both parties concerned, available at http://www.kcab.or.kr/M2/M2_S6.asp last visited May 20, 2003).

choice of law and international jurisdiction issues, etc. Accordingly, international arbitration had better be put as a priority when selecting a method to resolve international disputes over unjust enrichment.

3. Unjust Enrichment as a Governing Law

It has been found that the U.S. requirement of unjust enrichment is more rigid than that of Korea, because the benefit denoted in the definition of unjust enrichment in the U.S. is required to be 'unjust' rather than 'without legal causes.'⁶⁸⁾ Proof of being unjust would demand more evidentiary facts, because it should be examined in terms of the awareness of the unjustly obtained benefit. Thus, in the U.S. the defendant must have knowledge of the benefit in order for him or her to be unjustly enriched, while in Korea the defendant is under obligation of restitution whether or not he or she was aware of the benefit. This may reflect that restitution in Korea is more broadly applicable than restitution in the U.S.

Another difference in the legal principle of unjust enrichment between the U.S. and Korea would be found in the range of restitution; thus, the U.S. restitution does not include the expected benefit, while, in Korea, the plaintiff may claim restitution for the benefit that is expected to occur to the defendant in the future, which may increase the opportunity for the plaintiff's loss to be recovered by unjust enrichment.

Considering the differences described above, the degree to which the party claiming unjust enrichment is protected may vary depending on

68) See, *Lectrodryer v. Seoulbank*, 77 Cal. App. 4th 723, 726 (2000) (holding that the plaintiff established "the elements for a claim of unjust enrichment: receipt of a benefit and unjust retention of the benefit at the expense of another.").

the jurisdiction. When the governing law of an international arbitration is based on the U.S. law, unjust enrichment would be established more strictly than it is in Korea, vice versa. Thus, in the U.S., the claimant may be in better position if the dispute is resolved through arbitration rather than litigation, while the claimant may have higher chance to be restituted if the dispute is resolved in Korean jurisdiction. It is of concern that such difference may lead to hesitance of international arbitration in Korea.

V. Suggestions

This paper has been focused on the legal principles of unjust enrichment to find out their major similarities and differences between the U.S. and Korea, and attempted to investigate how unjust enrichment affects the choice of dispute resolution methods. Three fundamental legal issues on unjust enrichment were raised to be compared between the two countries including the characteristics, the elements to establish unjust enrichment, and the legal effect of unjust enrichment.

First, there do not seem to be significant differences in the issue of legal characteristics of unjust enrichment between the two countries, because unjust enrichment is interpreted on the same basis of equity or fairness in both countries. The only distinction can be made that unjust enrichment is more rigidly applied in the U.S. than in Korea due to the different interpretation of the condition of benefit conferred to the defendant: 'unjustness' versus 'without legal causes'.

Second, although the basic elements to form unjust enrichment were found to be generally the same between the U.S. and Korea, two

discrepancies were suggested with respect to the defendant's awareness of the benefit and exclusion of the expected benefit in the future. As noted in Chapter III, such discrepancies seemed to have made unjust enrichment in Korea more broadly adaptable to the cases claiming restitution than in the U.S.

Third, remedial legal measure on unjust enrichment have been found to converge into restitution in both of the countries, in which no significant differences in restitution were found between the two countries.

Due to the difference⁶⁹⁾ of legal implications of unjust enrichment between the U.S. and Korea, it seems to be highly possible that in the U.S. arbitration is more readily available method to resolve international disputes while in Korea litigation is more attractive option to count on when the main claim is based on unjust enrichment.

In conclusion, it may be suggested that unjust enrichment for restitution is more acceptable and quotable legal principles in the Korean courts than in the U.S. courts.

Key word : international arbitration, unjust enrichment, restitution, dispute resolution.

69) The U.S, unjust enrichment demands more tight requirements than Korea's unjust enrichment does.

요 약

국제중재 준거법으로서의 부당이득법리에 관한 한미간 비교 연구

계약법과 관련한 많은 주제 중에서 본 고에서는 미국과 한국에서의 부당이득법리를 중심으로 비교연구를 하였으며 한미간의 부당이득법리의 차이가 분쟁해결수단의 선택에 어떠한 영향을 미칠 수 있을 것인가를 살펴 보았다. 미국의 부당이득법리와 한국의 부당이득법리를 세 가지 관점에서 비교 고찰하였다. 첫째, 부당이득의 법리적 특성에서 살펴본 바에 의하면 양국 모두 형평과 공정성에 의하여 해석되어 지고 있다는 점에서 상당한 공통점을 발견할 수 있었지만, 한국에서는 '법률상 원인없이'라고 하는 명시된 규정에 의하는 반면 미국에서는 단순히 '불공정성'이라고만 하여 법률적 해석기준을 다소 모호하게 하고 있음을 발견하였다. 둘째, 부당이득 성립요건에서는 한미간 상당한 차이가 나타난 바, 미국에서는 '피고가 부당이득 사실에 대하여 인지하고 있어야 한다'라고 하는 반면 한국에서는 부당이득 사실에 대한 피고의 선의 악의를 구분하지 않음으로서 미국이 한국보다 원고의 입증책임을 엄격하게 적용하고 있음을 알 수 있었다. 셋째, 부당이득의 효과와 관련하여 양국 모두 원물의 반환 내지는 합리성과 시장가격에 근거한 상당금액의 보상을 법적구제범위로 설정함으로써 차이가 없었다. 결론적으로 미국에서는 부당이득법리가 분쟁의 쟁점인 경우에 '불공정성'에 대한 법적해석의 모호성과, 악의에 대한 입증 책임 등으로 인하여 법정에서의 해결보다는 우호적 해결 방식인 중재가 한국보다 상대적으로 많이 채택될 것으로 보여 진다.

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