

Back to the Future of Conflict of Laws: Enhancing interface through mutual trust

寺本, 振透

九州大学大学院法学研究院：教授 | 九州大学大学院法学研究院：講師

ユルチス, ポール

九州大学大学院法学研究院：教授 | 九州大学大学院法学研究院：講師

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BACK TO THE FUTURE OF CONFLICT OF LAWS: Enhancing interface through mutual trust

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Shinto Teramoto^{*}

Paulius Jurčys^{**}

^{*} Professor of Law, Kyushu University, e-mail: jshin768@gmail.com

^{**} Assist. Professor of Law, Kyushu University, e-mail: pjurcys@gmail.com

OUTLINE

- Criticism of conventional conflict of laws debate
- Emphasis on *actors* and *relations among actors*
- Mutual trust and interface:
 - Interaction between development of mutual trust and establishment of interface between governments, agencies and professionals
 - Mechanisms to promote developing mutual trust
- Implications of mutual trust to conflict of laws

CRITICISM OF THE CONVENTIONAL CONFLICT OF LAWS DEBATE (1)

- Conventional terminology:
place of act / effects,
territoriality, domicile,
residence, comity, etc.
- These notions symbolize
citizens' "deemed" trust in local
agencies and societal structures
- Territorial connecting factors
became less appropriate due to
the development of global
communications network



CRITICISM OF THE CONVENTIONAL CONFLICT OF LAWS DEBATE (2)

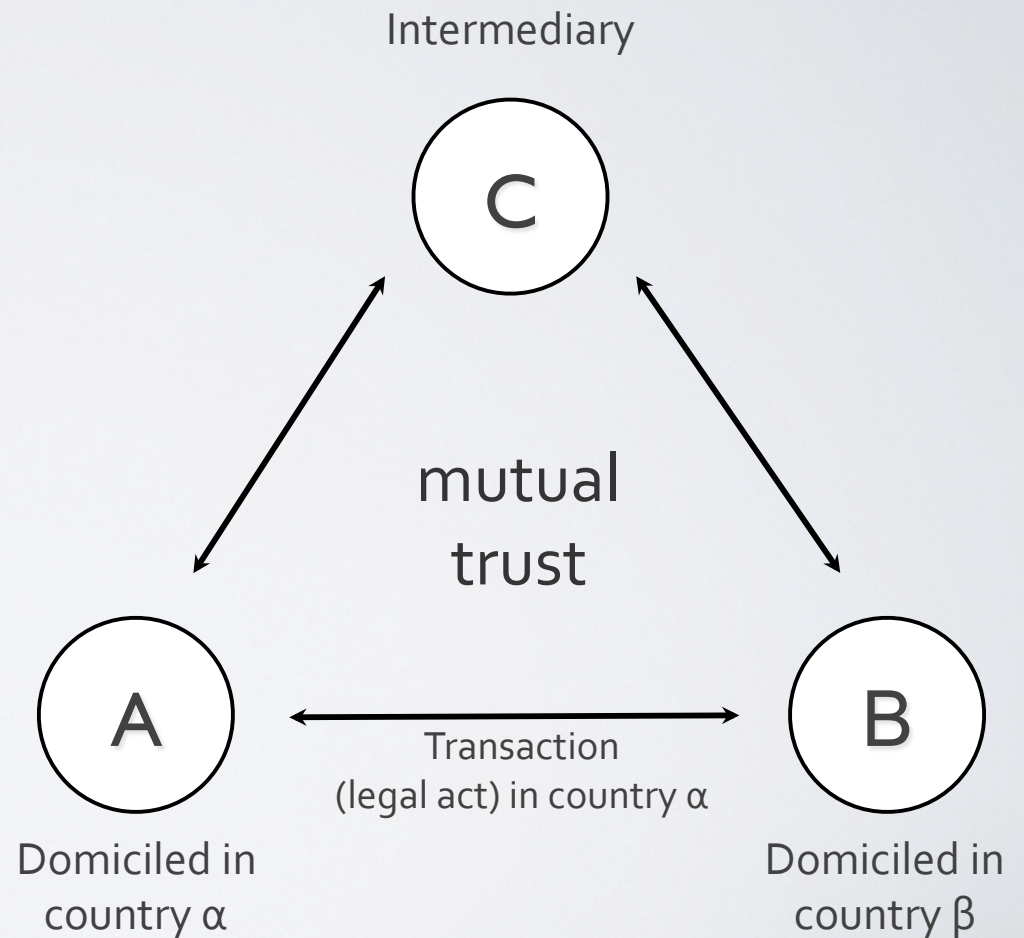
- **Limited efficiency of conventional tools of conflict of laws:**
 - **Recognition and enforcement of foreign judgments** between Japan and PRC have been consistently denied due to lack of reciprocity
 - **Party autonomy** has been a source of divergent regulation (cf. Rome I and Rome II)
 - **Arbitration** has been effective only in B2B situations (not B2C or mass claims)

CRITICISM OF THE CONVENTIONAL CONFLICT OF LAWS DEBATE (3)

- “there is nothing new left in our area that has not been proposed already”
(F. Juenger, Choice of Law and Multistate Justice (2005))
- How to return to the original situation: from symbolic (or, “deemed”) trust to actual trust?
 - NB: we are not seeking to propose a uniform law approach
 - we fully respect conflict of laws approach

IRRELEVANCE OF GEOGRAPHICAL LOCATION

- Traditionally, certain territorial connecting factors could be considered as a signal of trust in the institutions of a particular place
- E.g., transaction between different parties made in state α ; conferral of jurisdiction to the courts and applying the law of that state is a signal of trust
- In the era of global telecommunication, such territorial factors loose their signaling function:
 - the place of certain acts and location of the parties can be hardly identified;
 - most communication occurs via a third party (intermediary such as telecom service provider or cloud computing service provider)



TRADITIONAL WAYS OF INTERFACE AND MUTUAL TRUST

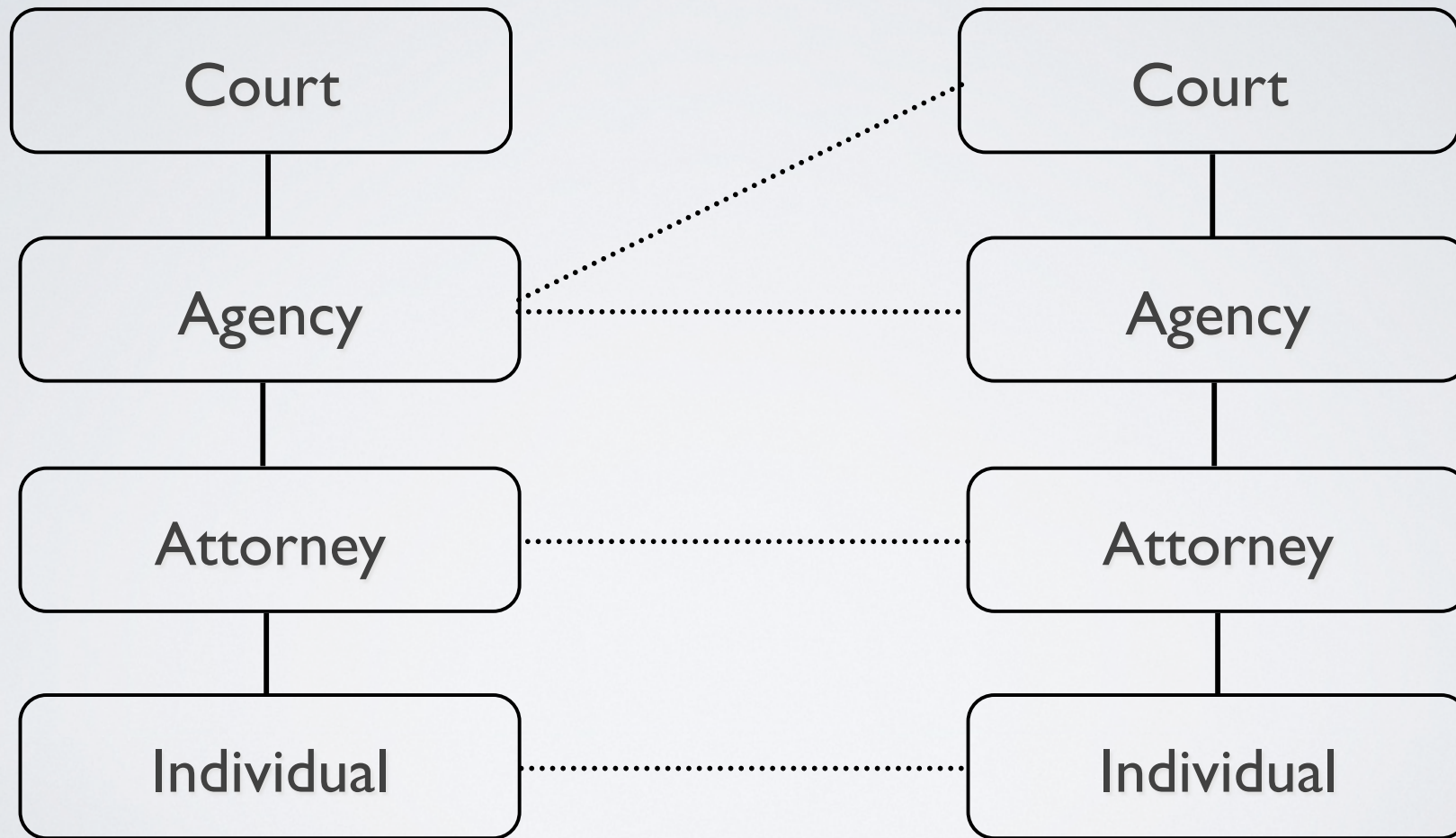
- Interface - points of interaction (sending signals, exchanging the information) among different levels of a system
- Lower level actor is the principal of an actor on a higher level, and higher level actor often becomes its agent
- Vertical authority-based relations represent deemed trust among the actors



TRADITIONAL WAYS OF INTERFACE AND MUTUAL TRUST (2)

- Traditionally, lower level actors hardly had any horizontal interface (e.g., Japanese consumers and Californian consumers)
- Higher level actors often had horizontal interface (e.g., inter-governmental communication). However, it was not necessarily supported by personal communication and relationship

How to establish mutual trust and interface on a horizontal level among actors belonging to different systems?



BUILDING MUTUAL TRUST AND INTERFACE

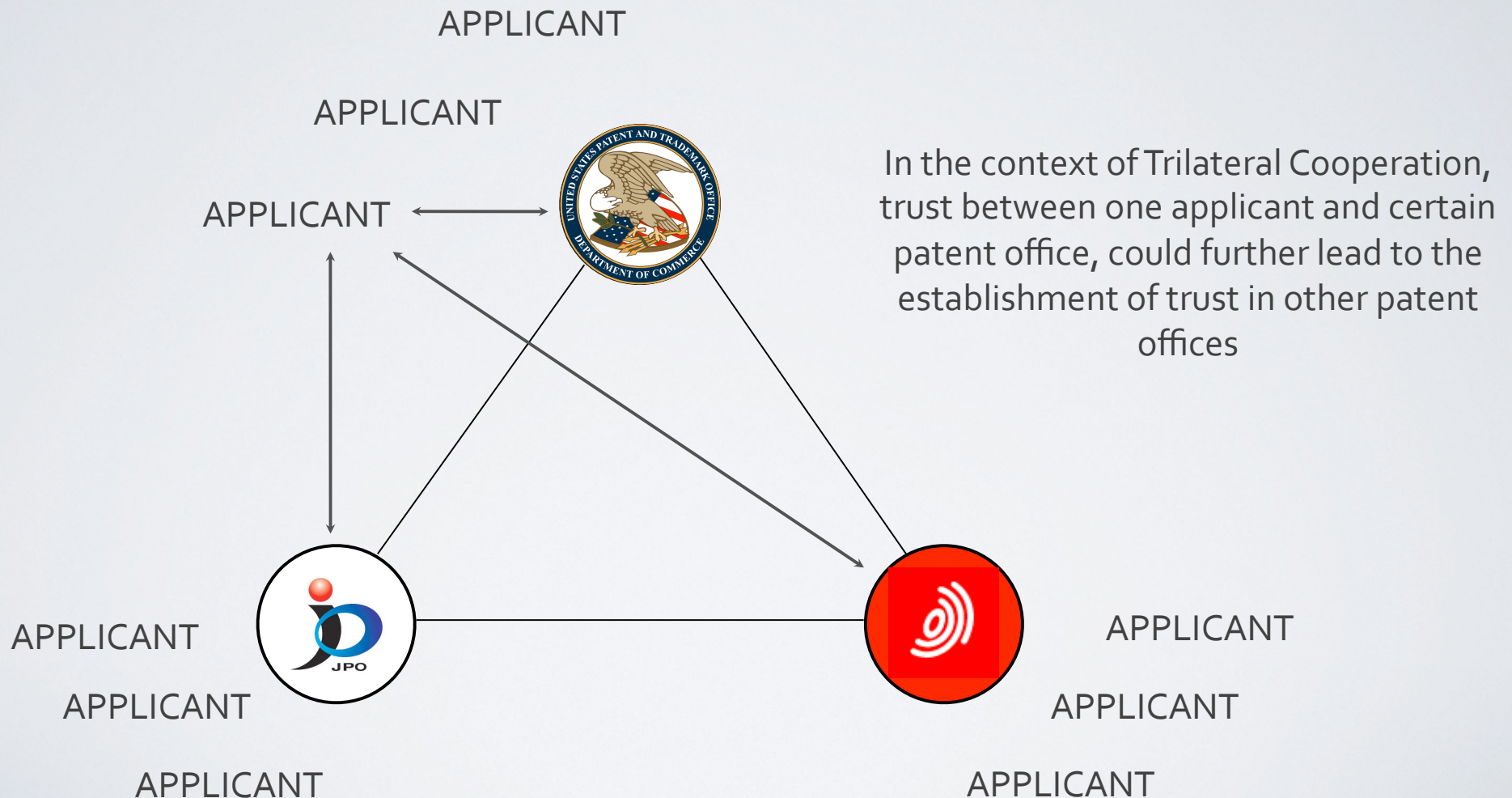
- Repetitive interaction over time in a particular field of knowledge leads to the established of actual mutual trust
- The establishment of mutual trust:
 - Is more likely among actors on the same horizontal level (peers)
 - Facilitates exchange of information and other values
 - Contributes to the building of mutual expectations of certain behavior
- Such cooperation could be noticed among professionals

BUILDING MUTUAL TRUST AND INTERFACE:

An example of patent offices (1)

- Since 1983, three major patent offices (JPO, EPO, USPTO) engaged into a Trilateral Offices partnership which facilitates cooperation and harmonization of procedures
 - Patent Prosecution Highway (PPH) started in 2006 and aims to streamline international patent prosecution and deal with backlog
 - PPH-PCT Program: fast-track patent examination using the search results of the Office of First Filing
 - Patenting procedures and application forms have been been to a large degree harmonized by multilateral agreements among the patent offices

BUILDING MUTUAL TRUST AND INTERFACE: An example of patent offices (2)



IMPLICATIONS to conflict of laws:

Enhancing mutual trust and interface

- Enhancing mutual trust could contribute to multiple layers of interface:
 - Allocation of jurisdiction and coordination of multi-state proceedings could be streamlined if agencies and courts cooperate (e.g., insolvency proceedings, int'l family law disputes)
 - Applicable law problems could be mitigated if greater trust is developed among professionals (attorneys, courts); e.g., proof of the content of foreign law
 - Recognition of judgments could be also facilitated if courts of the recognizing state deem themselves as agents of the litigating parties and their attorneys

THANK YOU !

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