

# New Private International Law in Korea

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## I Introduction

The “Sub-Oi-Sa-Beob” (Conflict of Laws Act of Korea), was enacted on January 15, 1962 with no major changes until the Amendment of April 7, 2001. The purpose of the Amendment is to update the old law by incorporating recent developments in Korean and international conflict of laws principles. The Amendment was proposed by the Ministry of Justice of Korea and passed the National Assembly, effective as of July 1, 2001.

The new law is renamed the “Kuk-Je-Sa-Beob” (Private International Law Act or the Conflict of Laws Act, (“new CLA”)) better defines the areas which were not sufficiently addressed in the original act, such as jurisdiction, capacity to have rights, legitimation, legal person, intellectual property, agency, means of transportation, *res in transitu*, and security interest in claims. The new CLA also amends some provisions<sup>(1)</sup> which may have been contrary to the constitutional principle of gender equality. In addition, the new CLA adopts the “Most Closely Connected Country” rule in determining the governing law and uses the concept of the “Habitual Residence” as a connecting factor. While the CLA broadens party autonomy, it also incorporates provisions to protect consumers and workers with weak societal and low economic status. Also, the CLA narrowly defines the scope of *renvoi*, which allows only *remission* but does not allow *transmission* in most cases, except in the capacity to effect billing.

To promote the congruence of international rules, the CLA reflects several international laws relating to the governing law of international contracts. Those laws include the “EC Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Brussels, 1968” (“Brussels Convention”); the “EC EFTA Convention on Jurisdiction and the Enforce-

ment of Judgments in Civil and Commercial Matters, Lugano, 1988," which parallels the Brussels Convention in dealing with international jurisdiction matters; the "EC Convention on the Law Applicable to Contractual Obligations, Rome, 1980" ("Rome Convention"); and the "Inter-American Convention on the Law Applicable to International Contracts, Mexico City, 1994" ("Mexico City Convention").

I describe the new CLA and briefly review its impact on the legal practice as follows.

## II Jurisdiction

### 1. Developments in Case Law

In a series of decisions, the Supreme Court of Korea held that the venue provisions in the Code of Civil Procedure of Korea ("CCP") may be grounds for Korean courts to establish their jurisdiction over international cases. The Supreme Court declared in its decision (S. Ct. 71Da248, April 20, 1972) in consideration of Article 6 (Special Venue of Abode or Place of Performance) of the CCP that the Korean court has jurisdiction when the place of performance of obligation is Korea. In another decision (S. Ct. 87DaKa1728, Oct. 25, 1988), the Supreme Court held that Article 9 (Special Venue of Assets Location) of the CCP may offer grounds for a Korean court to exercise its jurisdiction over international cases.

The Supreme Court also issued a decision (S. Ct. 88DaKa3991, Dec. 26, 1989) that for the first time accepted "sound reasoning ("Jo-Ri")" as a standard for determination of jurisdiction. This decision appears to change the traditional mechanical determination of jurisdiction from an application of the venue provisions of the CCP into a determination based upon sound reasoning, such as fairness, justice and the promptness of procedure. Such a position has been maintained by subsequent rulings both in transactional cases and family law matters.<sup>(2)</sup>

### 2. Statutory General Principles

### A. Statutory Criteria for Jurisdiction

The new CLA codifies the standards for determining jurisdiction. Article 2 of the CLA provides that, for a Korean court to have jurisdiction in an international matter, the parties or the case in dispute must have a substantial connection to Korea. The substantial connection shall be determined by a reasonableness principle aligned with the idea of apportionment of international jurisdiction. The court shall determine its jurisdiction by reference to the venue provisions of domestic laws such as the venue provision of the CCP, the Family Case Procedure Act or the Non-Litigation Procedure Act.

Article 2 differs from Einführungsgesetz zum Bürgerlichen Gesetzbuch of Germany (“EGBGB”) or Switzerland’s Bundesgesetz über das Internationale Privatrecht (“IPRG”).<sup>(9)</sup> As the venue provision in the German CCP also applies to jurisdiction (Double Function Theory), the private international law provision in Chapter 2, the EGBGB does not separately provide for jurisdiction. Article 2 of the IPRG provides a general jurisdiction clause, but that clause is only applicable when the specific international jurisdiction provision is not set forth as a separate legal relationship. The legal theory varies greatly from the “minimum contacts” rule of the United States.

Article 2 of the CLA applies both in the determination of indirect jurisdiction for the recognition of foreign judgments and in direct jurisdiction. Since Article 2 does not adopt the United States doctrine of “*forum non conveniens*,” the interpretation of the doctrine depends on future scholarly opinions and precedents. Nevertheless, by determining the existence of a substantial connection, the same result may also be achieved indirectly in some exceptional cases.

### B. Modification of Case Law

The CLA may impact some of the above case law regarding jurisdiction. Because the CLA expressly states that a substantial connection is required for exercise of jurisdiction, Korean courts’ application of the venue provisions

of the Korean domestic laws to international cases may be limited.

For example, the Supreme Court held that under Article 4 (General Venue of Legal Person, etc.) of the CCP, a Korean court has jurisdiction over a foreign company with a branch office in Korea even when the Korean branch is not involved in the dispute (S. Ct. 98Da35037, June 9, 2000). This decision has been criticized for disregarding the intent of Article 10 of the CCP, which allows for a special venue only when the dispute concerns the office or a company's other place of business.

These Supreme Court precedents may be altered by considering the "substantial connection" factor rather than applying the venue provisions of the CCP. In particular, the provisions of Article 6 (Special Venue of Abode or Place of Performance)<sup>(4)</sup> and Article 22 (Venue for Correlated Claims)<sup>(5)</sup> of the CCP should be carefully applied to international cases.

### C. Party Autonomy in Jurisdiction

(1) The CLA also allows for the parties' agreement on jurisdiction as allowed under Article 26 (Venue by Agreement) of the CCP. The Supreme Court, however, has held that the prerequisites for a valid agreement on the exclusive jurisdiction of a foreign court are: (1) that the dispute shall not be under the Korean courts' exclusive jurisdiction; (2) the foreign courts' jurisdiction is valid under the corresponding foreign law; and (3) the dispute must have a "reasonable connection" to the foreign court (S. Ct. 96Da20093, Sep. 9, 1997). Because the "reasonable connection" consideration has been criticized, it is unknown whether the lack of a "substantial connection" under Article 2 of the CLA would void the agreement on jurisdiction. This uncertainty must be determined by future academic opinions, judicial precedents and ultimately legislation. In this author's opinion, as international transactions increase and national borders continue to become less meaningful, parties' agreement on jurisdiction will not be invalidated simply because the dispute is not connected to the country unless it would lead to a significantly unreasonable and unjust result.<sup>(6)</sup>

(2) According to the CLA, in reference to Article 27 (Venue by Appearance) of the CCP, jurisdiction created by a defendant's appearance may be allowed. However, when a plaintiff brings a lawsuit in a jurisdiction with no connection to the dispute and the defendant appears in that jurisdiction, an issue exists as to whether there is jurisdiction, as that country does not meet the substantial connection standard of Article 2, assuming that it does not conflict with the exclusive jurisdiction provisions.<sup>(7)</sup> Many believe that the CLA allows the jurisdiction by appearance because the defendant's convenience is a consideration in determining a substantial connection.

### **3. Jurisdiction over Consumer Contract Cases**

(1) Article 27, Para. 4 of the CLA provides, in certain consumer contract cases, that: (1) in a claim brought by a consumer, the jurisdiction may be given to the court of the habitual residence of the consumer; (2) in a claim brought against a consumer, the jurisdiction shall be allowed only in the court of the habitual residence of the consumer; and (3) an agreement on jurisdiction may be valid only when it is entered into after the dispute has arisen or if it is favorable to the consumer.

The provision of the CLA applies to consumer contracts which were entered into for purposes outside the consumer's professional or business activity and fall into any of the items listed in Article 27, Para. 1 of the CLA.<sup>(8)</sup> This rule is an exception to Article 2, and protects consumers who are in a weak position economically and socially. The provision reflects Articles 13 and 15 of the Brussels Convention and Article 114 of the IPRG.

(2) It must be noted that, because the Standard Terms Regulation Act of Korea ("STRA") invalidates the standard terms of contract having a jurisdiction clause which is unjustly unfavorable to a customer, the standard terms which include an agreement on international jurisdiction excessively unfavorable to a customer would also be void. The STRA applies not only to consumers but also to business customers of an enterprise who use the standard

terms. In this author's opinion, a dispute involving a consumer contract having standard terms should be determined by the relevant provisions of the CLA because they are more concrete and protective than Article 14 of the STRA.

#### **4 . Jurisdiction over Labor Contract Cases**

Article 28, Para. 3 of the CLA provides that a worker may bring an action against his employer, and he must be brought on action by his employer, in the country in which the worker habitually carries out his work or in the last country in which he did so. An agreement on jurisdiction may be valid only when it is entered into after the dispute has arisen or if it is favorable to the worker.

As in the provision regarding jurisdiction of consumer contract cases, this provision was drafted by referring to the Articles 13 and 15 of Brussels Convention and Article 114 of the IPRG. As to labor contract cases, this provision only applies where the worker is under a subordinate labor relationship with the employer. Therefore, it does not apply to general employment agreements under the Civil Code of Korea because the subordinate labor relationship is specifically governed by the Labor Standards Act. Moreover, the provision only applies to individual labor agreements and not collective labor agreements.

#### **5 . Jurisdiction over Incompetency**

Article 14 of the CLA provides that the Korean courts may have jurisdiction to declare incompetence or quasi-incompetence against a foreigner who has habitual residence or residence in Korea. In general, such a declaration of legal capacity should be determined by a competent court under the governing law. A declaration of incompetence or quasi-incompetence of a non-Korean citizen, however, may be made by a Korean court in order to protect the foreigner and/or the domestic transaction in Korea even where the *lex patriae* does not give it grounds to do so.<sup>(9)</sup>

### III General Principles in Conflict of Laws Rule

#### 1. Adoption of "Most Closely Connected Country" Rule

##### A. Statutory Provisions

The new CLA has adopted "the most closely connected country" rule as a *de facto* general principle in determining governing law. This rule reflects the legislations of Germany, Switzerland, Austria, Italy, Japan, et alia. Article 3 provides that, when there is a positive conflict of nationalities due to double nationalities acquired by birth, marriage or immigration, the *lex patriae* is not necessarily the law of the country whose nationality was most recently acquired, but rather the law of the most closely connected country. Article 26 provides that the governing law by an objective connection shall be the law of the country which has the closest connection and not by the *lex loci actus*. In the case of a subordinate connection of the non-contractual claims, Articles 30 and 31 and Article 32, Para. 3 provide that the law of the country which applies to the legal relationship prevails over the law of the country where the causal fact occurred.

##### B. Determination of *Lex Patriae*

As noted above, where there are double nationalities, the *lex patriae* is the law of the country that has the closest connection; provided, however, if one of such nationalities is Korea, the Korean law becomes the *lex patriae*. When there is a negative conflict of nationalities due to the lack of a nationality or the nationality is unknown, the *lex patriae* is the law of the country where the person maintains the habitual residence, or his residence (if he does not have a habitual residence) and not the *lex domicilii*.<sup>(10)</sup> When the person has the nationality of a federal state, the *lex patriae* of the person shall be the law of the region designated by the uniform quasi-private international law of the federal state and, if not, the law of the most closely connected region. Therefore, for example, when the federal law of the United States, which does not have a uniform quasi-private international law, is determined to be the *lex patriae* under the CLA, the governing law will be the

law of the most closely connected state of the United States.

### C. Exceptional Application of the Most Closely Connected Country Rule

Article 8 of the CLA adopts the most closely connected country rule which overrides a particular conflict of laws rule under the following circumstances: (1) the governing law as determined by the CLA has insignificant connection with the relevant legal relationship; (2) the law of another country which has the closest connection with the legal relationship exists; and (3) it is evident.<sup>(11)</sup>

The exception may apply in certain cases as follows: (1) a tort where the governing law may be differently determined depending on the various types of torts; or (2) a flag of convenience. When the governing law, however, is determined (1) by agreement (Article 8, Para. 1 of the CLA); (2) by Articles 27 or 28 to protect consumers or workers; (3) for the establishment of a corporation<sup>(12)</sup>; (4) in connection with maritime commerce; (5) or by *renvoi*, the exception provided by Article 8 may not apply in consideration of the purpose of those provisions.

## 2. Expansion of *Renvoi* Principle

Article 9 of the CLA broadly allows the simple *renvoi* (or *remission*, as in German law) that allow the *renvoi* in property rights or non-contractual claims as well as to kinship and inheritance. On the other hand, *transmission* is not allowed in any other areas than in the matter of the capacity to effect bill. Neither indirect *renvoi* nor double *renvoi* is allowed.

*Renvoi* is not allowed when the governing law: (1) is chosen by the parties' agreement; (2) if of a contract, it is designated by the CLA<sup>(13)</sup>; (3) if maintenance obligations, it is designated by the CLA<sup>(14)</sup>; (4) of the form of a will is designated by the CLA<sup>(15)</sup>; (5) of the country of registration of a ship is designated by Article 60 (however, *renvoi* is allowed in the cases of collision of ships or salvage)<sup>(16)</sup>; or (6) if *renvoi* is allowed following the provision of the CLA, is against the purpose of the designation under the CLA.<sup>(17)</sup>



### 3. Application of Mandatory Rules

Under Article 7 of the CLA, the provisions of the mandatory rules of Korea shall be applicable even if a foreign law is selected as governing law by the CLA.<sup>(18)</sup> The international mandatory rule includes the mandatory law, the application of which cannot be avoided on the ground that the governing law is a foreign law. Moreover, its application cannot be avoided by agreement of the parties concerned. Article 6 stipulates the mandatory rule of the governing law country and Article 7 provides the mandatory rules of the forum. Therefore, for matters before Korean courts, Korean mandatory statutes such as the Foreign Exchange Transactions Act, the Foreign Trade Act and the Monopoly Regulation and Fair Trade Act will apply as mandatory rules regardless of the governing law. The application of the mandatory rule of a third country is not clearly mentioned in the CLA but left to scholarly opinions and court precedents.

### 4. Application of Foreign Laws by Court

Article 5 provides that the courts shall examine and apply *ex officio* the foreign law that has been selected by the CLA and for this purpose may request the parties' cooperation therefor.<sup>(19)</sup> Whether the law of the forum will apply when the foreign law is not clear must be determined by future scholarly opinions or precedents. The Supreme Court decisions state that the court must determine the content and meaning of the applicable foreign law according to the general principle of the interpretation of the law (S. Ct. 87 DaKa1427, Feb. 9, 1988; S. Ct. 90DaKa19470, Feb. 22, 1991; S. Ct. 94Da30041, Feb. 9, 1996; S. Ct. 98Da35037, June 9, 2000).

Under Article 6, the application of the foreign law shall not be excluded for the sole reason that it has the nature of public law.<sup>(20)</sup> Therefore, the foreign laws which have the nature of public law such as labor laws, foreign exchange transactions laws and foreign trade laws are not inapplicable.

Article 10 excludes the application of a foreign law even when the foreign law is the governing law if the outcome of the application is manifestly in-

compatible with the good morals and social order of Korea.<sup>(21)</sup>

## IV Conflict of Laws Rules in Contracts

### 1. Party Autonomy

Article 25, Para. 1 of the CLA declares the party autonomy in selecting the governing law in contracts.<sup>(22)</sup> It also clearly allows for an implied choice of governing law as well as an explicit one. The implied choice shall be limited to circumstances where the choice may be admitted reasonably based on all factors including the clauses of the contract. Other factors may be the use of the standard contract form, agreement on jurisdiction, the arbitration agreement, the governing law in a previous similar contract by the parties who maintain a continuous business relationship, the nationalities and habitual residences of the parties, et alia.

Article 25, Para. 2 of the CLA explicitly allows *dépeçage* in the choice of governing law by the parties to a contract.<sup>(23)</sup> The Supreme Court held that the parties may make a partial choice in the governing law (S. Ct. 96Da39707, July 14, 1998). Changing the governing law after the conclusion of a contract is also allowed (Article 25, Para. 3). Whether the change will be effective retroactively, however, depends on future scholarly opinions and precedents. Currently, it appears the parties' intent will be given some weight.<sup>(24)</sup> In principle, the CLA allows a foreign law to be the governing law of a purely domestic contract (Article 25, Para. 4). Nonetheless, even in such a case, the mandatory rule of the country still applies. The principle of party autonomy applies to both the formation and validity of the parties' agreement to choose the governing law (Article 25, Para. 5).

### 2. Flexible Objective Connection

Article 26 of the CLA shows the change from the *lex loci actus* to the law of the most closely connected country in terms of the objective connection and provides that the law of the most closely connected country is presumed

in certain circumstances.<sup>(25)</sup> When the characteristic performance such as (1) performance of the assignor in assignment contracts, (2) performance of the party that grants the use of a thing or right in use contracts, (3) performance of the parties providing services in mandate contracts, contracts for completing of work or other similar contracts for services is admitted, the parties' habitual residence (the place of the parties' business when the contract is made for the occupational or business purpose) is presumed to be the most closely connected country and, when the contract is about the right as to the real property, the place of the real property is presumed to be the most closely connected country.

### **3. Contract Formation and Validity**

Article 29 provides that the governing law of a contract shall be the governing law to the formation and validity of the contract. If it is manifestly unreasonable to follow the provisions of the governing law, the law of the habitual residence may be invoked to deny the formation of the contract.<sup>(26)</sup>

### **4. Agency**

Article 18 of the CLA newly stipulates the governing law of the authority-in-fact.<sup>(27)</sup> According to this provision, the relationship between the principal and the agent is governed by the governing law to the legal relationship and the relationship between the principal and a third party is governed by the law of the place of the agent's business. When the agent does not have a place of business or a third party is unable to locate the place of business, the law of the country where the agent has actually acted in the particular case shall govern (S. Ct. 86DaKa715, March 24, 1987; S. Ct. 84DaKa1003, Feb. 9, 1988).

Because party autonomy is restrictively allowed, the CLA allows the principal to designate the governing law in a document where the principal proves the agent's power of representation or in a letter by the principal or the agent to the third party.<sup>(28)</sup> In the case of an unauthorized representation,

the relationship between the agent and the third party shall be governed by the law which would have applied if the agent had been the authorized agent.

The above provisions apply to the authority-in-fact and the authority-in-law shall be governed by the governing law of the legal relationship which is the cause to create the representation. The method of the legal act by the agent is governed by both the governing law of the act and by the *lex loci actus* based on the place of the agent.

### **5. Consumer Contracts and Labor Contracts**

Articles 27 and 28 of the CLA restrict the party autonomy in choosing the governing law to protect the consumers and workers.<sup>(29)</sup>

The new CLA admits a choice of the governing law by the parties in the consumer contract but clearly provides that the mandatory laws of the country of the habitual residence of the consumer still apply. When the governing law is not chosen, the objective governing law shall be the law of the consumer's habitual residence. The formality of the consumer contract shall be governed by the law of the consumer's habitual residence.

The CLA admits a choice of the governing law by the parties in labor contracts but clearly provides that the mandatory laws (simple mandatory laws, such as the Labor Standard Act) of the country of the governing law apply. The objective governing law shall be the law of the country where the worker habitually performs his work (when there is no country where the worker habitually performs his work, the law of the employer's place of the business shall govern).

### **6. Non—Contractual Claims**

The CLA designates as the governing law the law of the "place where the management of affairs took place" in the management of affairs<sup>(30)</sup> (Article 30), the law of the "place where the enrichment took place" in an unjust en-

richment<sup>(31)</sup> (Article 31), the law of the “place where the unlawful act took place” in a tort<sup>(32)</sup> (Article 32). Each expression above about the place of the governing law is a paraphrase of the “place where the causal fact has taken place” under the old CLA.

Also, due to the possibility of overlapping or vacancy of the rule when different governing laws apply depending on the various remedies arising from one legal relationship, the CLA adopts a subordinate connection to secure a substantial connection between the legal relationship and the governing law by flexibly applying the formal connection principle. In the management of affairs, unjust enrichment and torts based on the legal relationship between the parties shall be subject to the governing law of the legal relationship (provisos of Articles 30 and 31, Article 32, Para. 3). Examples include when a trustee, according to the mandate, manages the entrusted affairs and there arises the dispute that his performance was beyond the scope of the contractual obligation; when the return of unjust enrichment is requested by the liquidation after the corresponding contract is performed and terminated; and when the lessee negligently loses or destroys the subject matter of the lease, the governing law of each contract applies. However, the claims resulting from payment of the other person’s obligation shall be subject to the governing law of the obligations which followed Article 39, Para. 2 of EGBGB (Article 30, Para. 2 of the CLA).

The CLA does not separately provide a governing law to a multi-place tort, which is left to future scholarly opinions and precedents. The Supreme Court, however, has stated that the place of the tort is to include both the place the event occurs and the place the result of the event takes place.<sup>(33)</sup> The CLA created a new provision that the law of the country, where both the wrongdoer and the victim has the habitual residence in the same country, governs tort (Article 32, Para.2).<sup>(34)</sup> In the meantime, the liability for torts is restricted as in the EGBGB to regulate the excessive damages including the punitive damages (Article 32, Para. 4).

Article 33 of the CLA allows the parties to choose Korean law by an agreement on the governing law after the event constituting the management of affairs, unjust enrichment and torts.<sup>(35)</sup> In the case of a tort, the governing law is determined, therefore, by the order of: (1) the agreement after the causal event (the Korean law); (2) subordinate connection; and (3) the law of the common habitual residence of the parties.

### **7. Transfer of Claims and Obligation**

Article 34 of the CLA by recognizing the principle of the party autonomy provides that the governing law to the contracts shall govern the assignment of claims or the assumption of obligations. Therefore, it further provides that the governing law to the claims and obligations shall be applicable to the possibility of an assignment of claims and the assumption of obligations and to the effects of the assignment of claims or the assumption of the obligations to the debtor and third parties.<sup>(36)</sup> Therefore, any interested third party needs to find out the governing law of the claims and obligations to find the requisites for effectiveness to the relevant party. It also applies to non-contractual claims.

Article 35 of the CLA provides that the transfer of a claim by operation of law is subject to the law governing the underlying legal relationship which causes the transfer between the old and the new claimant, if there is any, as the IPRG or Rome Convention do.<sup>(37)</sup> Therefore, when a surety or an insurer is subrogated by operation of law, it shall be governed by the governing law of the suretyship agreement or the insurance contract. However, the provision, if any, to protect debtors in the governing law of the claims which were transferred shall apply. If there is no legal relationship which caused the transfer, the governing law of the claims which were transferred shall apply as in the IPRG

### **8. Bill of Exchange, Promissory Note and Check**

The old CLA had provisions as to the governing law of the bill of ex-

change, promissory note and check. The provisions are almost identical to the provisions in Convention for Settlement of Certain Conflicts of Laws in Connection with Bill of Exchange and Promissory Notes, 1930, and Convention for Settlement of Certain Conflicts of Laws in Connection with Cheques, 1931 ("Cheques Convention").<sup>(38)</sup> The CLA maintains the same principles for the governing law as to the bill of exchange, promissory note and check by making a separate chapter (Chapter 8) for the provisions.

## V Conflict of Laws Rules in Property

### 1. *Lex Situs* Principle

Article 19 of the CLA is similar to the old CLA in that the property rights over immovables or movables or any right requiring registration shall be governed by the *lex situs* to the subject matter. The *lex situs* to the subject matter at the time of the completion of the causal action or event shall govern the acquisition or any change in the title to a property.

It depends on future scholarly opinions and precedents to determine whether the real estate leases and the right of repurchase in real estate may be considered as the "rights requiring registration" under this provision. It also depends on future court precedents whether it is necessary to consider foreign requisites or the facts for an acquisition, transfer or any change in the title to a property, including adverse possession.

### 2. Specific Provisions regarding Movables

#### A. Transportation Equipment

Article 20 of the CLA provides that property of an aircraft shall be subject to the law of its nationality while property of rolling stock shall be subject to the laws of the country approving its traffic service.<sup>(39)</sup> Because of the characteristics of the transportation equipment, the general principle of the *lex situs* to the subject matter should be revised. A ship is governed by the law of the country of registration of a ship according to Article 60 of the CLA and a car is treated as general movables governed by the *lex situs* of the

subject matter. Therefore the acquisition of a smuggled car shall be governed by the *lex situs* to the car with respect to the bona fide purchase of the car.

#### B. Bearer Bond

Under Article 21 of the CLA, the acquisition or any transfer of title to bearer bond shall be governed by the *lex situs* to the bearer bond at the time of the completion of the causal action or event. The right over the bearer bond includes both the right to the bearer bond itself and the inherent right to such bond. Whether a bond is a bearer bond or not shall be determined by the governing law of the inherent right. However, the provision does not apply when transfer of title to the bearer bond is not transferred together with the bond itself, such when it is deposited. Article 23 provides that the matters of security interest established on a bearer bond itself shall be governed by the *lex situs* of the bearer bond in accordance with Article 21.

#### C. *Res In Transitu*

Under Article 22 of the CLA, acquisition and transfer of title to goods in transit (*res in transitu*) shall be governed by the law of the country of destination.<sup>(40)</sup> When securities such as a bill of lading or a consignment sheet which represents the title to the goods in transit is issued, the governing law to the acquisition, loss and transfer of title to the goods is not clear but is usually determined by the *lex situs* of securities. When there are both a bona fide purchaser of the goods itself and a bona fide holder of the securities which represents the title to the goods, the governing law to the goods itself shall apply as Article 106, Para. 3 of the IPRG provides because the governing law to the goods itself has a closer relationship.

#### D. Security Interest in Claims

Under Article 23 of the CLA, the security interest in claims, stocks or other rights or securities representing those rights is governed by the law



governing the subject matter of the security interest.<sup>(41)</sup> However, the contractual security interest in bearer bond shall be governed by the *lex situs* of the bearer bond. According to the CLA, the debt-pledge shall be governed by the governing law to the claims and the stock-pledge shall be governed by the *lex societatis* of the joint-stock company. The provision applies when there is an acquisition, loss of, or any alteration in, the property right such as the issuance of the securities. The CLA does not have the provision about the statutory security interest and puts this issue on future scholarly opinions and precedents. The issue is, in the case of the establishment of the secured claims, whether the governing law to the property right would apply or the governing law to the secured claims would apply. As to the maritime lien, Article 60 provides that the law of the country of registration of ship applies.

### 3. Intellectual Property

According to Article 24 of the CLA, the protection of the intellectual property right shall be governed by the law of the place where the infringement occurs.<sup>(42)</sup> It is considered the *lex loci protectionis* (the principle that the law of the country which provides the protection of the right shall apply) and it shall be handled differently from the rules regarding property. Because this provision has the characteristic of the special provision to tort, an agreement after the event or the restriction on the liability may be possible. Also, because it has a supplementary nature to the international treaty, the international treaty prevails in the case of conflict.

## VI Conflict of Laws Rules in Maritime Commerce

### 1. Adoption of "Law of Vessel Registration Country" Rule

Article 60 of the CLA provides that certain matters<sup>(43)</sup> shall be governed by the law of the country of registration of the ship.<sup>(44)</sup> In relation to the flag of convenience, it is an issue whether the law of the country of registration of the ship is not applicable under the CLA which adopts the most closely

connected country rule. Although certain scholarly opinion says that it can be excluded only when the strict requirements of Article 8 are satisfied, justice will be accomplished in more instances where the most closely connected country rule applies. The provision as to the maritime lien is different from that of the German law in that it is not governed by the law governing the security interest. It is because there is the possibility that the priority order may not be fixed if the maritime lien which was allowed under the governing law of the security interest is not allowed under the *lex situs* (Article 60, Para. 3).

## **2. Collision of Vessels**

Under Article 61 of the CLA, the liability resulting from a collision of ships in an open port, on a river or in a territorial sea is governed by the law of the place of collision. The liability resulting from a collision of ships on the high seas shall be governed by the law of the country of registration, if the ships have the same country of registration, otherwise it shall be governed by the law of the country of registration of the ship that has damaged. Because the collision of ships may be considered as one type of tort, the provisions as to the subsequent agreement on the governing law by the parties or the limitation on the liability in torts may apply.

## **3. Salvage**

Article 62 of the CLA provides that the right to claim remuneration arising from salvage shall be governed by the law of the place where the salvage takes place when the salvage was effected in a territorial sea. The right to claim remuneration may be governed by the law of the country of registration of the ship that has effected the salvage if the salvage was effected on the high seas. Because it is one of the management of affairs without mandate, the provisions as to the subsequent agreement on the governing law by the parties or the limitation on the liability in the management of affairs without mandate will apply.

## VII. Conflict of Laws Rules in Family Law

### 1. Marriage and Divorce

(1) According to Article 36 of the CLA, the requirements for the formation of a marriage shall be governed by the *lex patriae* of each of the parties (distributive connection) and the form of a marriage ceremony shall be governed by the law of the place of marriage or the *lex patriae* of any one of the parties (alternative connection).<sup>(45)</sup> The form of a marriage is alleviated by allowing the choice of the governing laws. However, if one of the parties is Korean when the ceremony takes place in Korea, the Korean law governs. The CLA has no provision as to the governing law to an engagement or a separation.

(2) Article 37 of the CLA takes three steps in determining the governing law to the general effect of a marriage: (1) the same *lex patriae* of the spouses; (2) the law of the same habitual residence of the spouses; and (3) the law of the place with which the spouses have the closest connection.<sup>(46)</sup> In the same *lex patriae* of the spouses, when one of the spouses has two or more nationalities, the *lex patriae* of the spouse shall be the *lex patriae* determined by Article 3, Para. 1 of the CLA, which means that the law of the place with which the spouses have the closest connection. Therefore, it is different from the “law of their common nationality” applicable to the maintenance obligation.

(3) Article 38 of the CLA provides that the law governing the effect of marriage shall apply to the matrimonial property regime.<sup>(47)</sup> However, it allows the spouses to agree to choose one among several laws<sup>(48)</sup> in order to enhance foreseeability of the effect of marriage under the principle of the limited party autonomy. An agreement on the matrimonial property regime must be executed in writing and affix the date although it is not required to be notarized.

Under Article 38, Paras. 3 and 4 of the CLA, in order to protect the domestic transactions, the matrimonial property regime under foreign law may not be enforceable against bona fide third parties with respect to a juridical act effected in Korea or the property located in Korea and that the matrimonial property contract entered into under the foreign law may be enforceable against bona fide third parties if it is registered in Korea.

(4) Article 39 of the CLA provides that the law governing the effect of marriage shall govern the divorce. However, if one of the spouses is a national of Korea and has a habitual residence in Korea, the divorce shall be governed by the Korean law.<sup>(49)</sup>

## 2. Kinship

### A. Legitimate Child

Under Article 40 of the CLA, the formation of a relationship between a parent and a legitimate child is governed by the *lex patriae* of one of the parents at the time of the birth of the child and that, if the husband has died before the birth of the child, the *lex patriae* of the husband at the time of his death shall be deemed as his *lex patriae*.<sup>(50)</sup> However, when the parents divorce before the birth of the child, the governing law will be determined by future scholarly opinions and precedents. The above provision applies *mutatis mutandis* to the denial of the relationship between a parent and a legitimate child.

### B. Illegitimate Child

Article 41 of the CLA provides that the formation of a relationship between a parent and an illegitimate child shall be governed by the law of the mother at the time of the birth of the child. However, the formation of parent and child relationship between the father and the child may also be governed by the law of the *lex patriae* of the father at the time of the birth of the child or the law of the current habitual residence of the child. If the father has died before the child is born, the *lex patriae* of the father at the

time of his death shall be deemed as his *lex patriae*. In the meantime, the recognition may also be governed by the *lex patriae* of the person recognizing the child in addition to the laws for the formation of parent and child relationship. If the person recognizing the child has died before the recognition, the *lex patriae* of the person at the time of his death shall be deemed as his *lex patriae*.<sup>(51)</sup> If the *lex patriae* of the child requires a consent or approval of the child or a third party with respect to the formation of the parent and child relationship under the provisions of Article 41 of the CLA, such requirement must also be satisfied (Article 44).

### C. Legitimation of Illegitimate Child

Under Article 42 of the CLA, the matters relating to whether an illegitimate child is changed to a legitimate child are governed by the *lex patriae* of the father or mother, or the law of the habitual residence of the child at the time of the completion of the event which causes the legitimation. If either the father or mother has died before the completion of the event which causes the legitimation, the *lex patriae* of the father or mother at the time of his or her death shall be deemed as his or her *lex patriae*.<sup>(52)</sup> This provision applies to legitimation by marriage, legitimation during the marriage and the legitimation after the dissolution of the marriage. If the *lex patriae* of the child requires consent or approval of the child or a third party with respect to the formation of the parent and child relationship under the provisions of Articles 42 of the CLA, such requirement must also be satisfied (Article 44).

### D. Adoption and Dissolution

Article 43 of the CLA unifies the governing law as to the adoption and dissolution that the adoption and its dissolution shall be governed by the *lex patriae* of the adoptive parent at the time of the adoption.<sup>(53)</sup> When the *lex patriae* of the adoptive parent at the time of the adoption does not allow the dissolution, it can be done by *renvoi* or the Korean law may apply consider-

ing this as a matter of public policy.<sup>(54)</sup> If the *lex patriae* of the child requires consent or approval of the child or a third party with respect to the formation of the parent and child relationship under the provisions of Articles 43 of the CLA, this requirement must also be satisfied (Article 44).

#### E. Legal Relationship between Parent and Child

Article 45 of the CLA provides that the legal relationship between a parent and a child shall be governed by the *lex patriae* of the child if it is also the *lex patriae* of both the father and mother, and in other cases it shall be governed by the law of the habitual residence of the child.<sup>(55)</sup> This provision regulates only the direct effect inherent in the relationship between a parent and a child and, in effect, applies only to the parental rights issue because its maintenance shall be governed by Article 46 of the CLA.

#### F. Maintenance

Under Article 46 of the CLA, maintenance obligations are governed by the law of the habitual residence of the maintenance obligee. The old CLA stipulated individual governing law to each legal relationship which causes the maintenance. Article 46 considers the maintenance as an independent legal relationship and takes into consideration the characteristic of the monetary rights of the maintenance obligee. However, if the maintenance obligee is unable to obtain maintenance from the obligor by virtue of such law, the law of their common nationality shall apply.<sup>(56)</sup>

If a divorce has been effected, or has been recognized in Korea, the law applied to the divorce shall govern the maintenance obligations between the divorced spouses. In the case of a maintenance obligation between person related collaterally or by affinity, the obligor may contest a request from the obligee on the ground that there is no such obligation under their common *lex patriae* or, in the absence of a common *lex patriae*, under the law of the obligor's habitual residence (Para. 3). If the obligee and the obligor are both nationals of Korea and if the obligor has his habitual residence in Korea, the

Korean law shall apply to the maintenance obligations. *Renvoi* is excluded for the governing law of the maintenance obligation (Article 9, Para. 2, Subpara. 3).

### 3. Inheritance

(1) Article 49 of the new CLA provides that inheritance shall be governed by the *lex patriae* of the deceased at the time of his death, which is not changed from the old CLA. However, it also provides that, if the deceased has selected one law among others<sup>(57)</sup> as the governing law, inheritance shall be governed by that law. Therefore, the infringement on third party's interest such as that of the holder of the legal reserve of inheritance (Pflichtteil) such interest will be protected by the public policy provision.<sup>(58)</sup>

(2) Under Article 50 of the CLA, a will and the amendment to or withdrawal of the will is governed by the *lex patriae* of the testator at the time when he made the will or when he amended or withdrew the will respectively. The form of a will shall be governed by one of the relevant laws.<sup>(59) (60)</sup>

## VIII Conclusions

As mentioned above, the new CLA reflects the international standard and trends developed since the enactment of the old CLA in 1962. By enacting of the new CLA, Korea has joined the world's judicially advanced countries by utilizing comprehensive statutes to cover a variety of issues in jurisdictional and conflict of laws matters.

It should be noted, however, that the new CLA does not fully reflect the discussions made in the common law system. Since the Korean legal system adopted the civil law system, the conflict of laws issues arise more often with the laws of common law countries. Because Korea is more involved in international transactions and personal exchange with common law countries, such as the United States, the necessity to solve the conflict of laws issues arising between Korean law and the laws of the common law countries has grown substantially.

Furthermore, many transactions today are conducted in cyberspace; many more are will be conducted over the Internet in the future. Because the standards of the new CLA for determination of jurisdiction and governing law are mainly drafted based on off-line transactions with geographical factors, it would not be appropriate to apply existing standards for determining jurisdiction and governing law to the new type of international disputes that involve on-line or both on-line and off-line characteristics.

For these reasons, I stressed the necessity for conflict of laws rules that conform to the common law system and cyberspace issues during the drafting of the new CLA. I expect the study on the conflict of laws rules to continue with attention given to future issues, which will entail further improvements and developments of the Korean private international laws.

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- (1) Art. 16 (Effect of Marriage), Art. 17 (Matrimonial Property Regime), Art. 19 (Biological Child), Art. 22 (Relationship between Parent and Child) of the old CLA.
- (2) S. Ct. 93Da39607, Nov. 21, 1995; S.Ct. 91Da41897, July 28, 1999; S.Ct 98Da 35037, June 9, 2000, et al.
- (4) Critics of this provision state that in statutory claims, such as management of affairs without mandate, unjust enrichment or tort, it is unreasonable to allow jurisdiction of the country based on the special venue of abode or place of performance because it forces the defendant to appear in an unforeseeable foreign forum.
- (5) If Art. 22, Para. 2, of the CCP is used as the standard for determining the



- jurisdiction without any restrictions to an international joint claim, there may be an unfair result for joint defendants.
- (6) See Sec. 110, Para. 1, Uniform Computer Information Transaction Act (UCITA). The above Supreme Court precedent also considers the agreement on jurisdiction to be void if it is against public policy.
  - (7) Of course, the jurisdiction of the foreign court is not allowed by appearance when the defendant does not plead as to the merits of a lawsuit or makes statements in the preliminary proceedings but presents objections as to lack of jurisdiction of the foreign court of the first instance.
  - (8) (1) where in that country the conclusion of the contract was preceded by professional or business activities including soliciting business through publicity that the other party has engaged in or directed to that country, and the consumer had taken in that country steps necessary for the conclusion of the contract;  
(2) where the other party received the consumer's order in that country;  
or  
(3) where the other party arranged for the consumer's journey to a foreign country for the purpose of inducing the consumer to order.
  - (9) Art. 8 of the previous EGBGB provided the declaration of incompetence for the same purpose of the CLA but was deleted after the guardianship for an adult was introduced.
  - (10) Art. 5, Para. 2, EGBGB; Art. 23, IPRG; Art. 28, Japanese Horei ("JPIL").
  - (11) Chapter 2, EGBGB provides the exception clauses to each legal relationship in Art. 28, Para. 5, Art. 30, Para. 2, Arts. 41 & 46. On the contrary, Art. 15, IPRG is the general provision about the exception and Art. 1, the Bundesgesetz vom 15. Juni 1978 uber das Internationale Privatrecht of Austria ("AGIP") has the provision which declares this principle.
  - (12) Article 16 of the CLA provides that "legal persons or associations shall be governed by the law of the country under the laws of which the persons or associations were incorporate or formed. However, the law of the Republic of Korea applies if the head office of the person or association is located in the Republic of Korea or the principal activities of the person or association are engaged in the Republic of Korea."
  - (13) Whereas Art. 9, Para. 2, Subpara. 2, CLA provides that *renvoi* is not al-

lowed when the governing law of a contract is designated, Art. 15, Rome Convention excludes *renvoi* in transfer of claims or assignment of claims by law, also.

- (14) Because Art. 46, CLA adopted the relevant provisions of "Hague Convention on the Law Applicable to Maintenance Obligation, 1973," *renvoi* in this case is excluded accordingly.
- (15) Because Art. 50, Para. 3, CLA adopted the relevant provisions of "Hague Convention on the Conflicts of Laws to the Form of Testamentary Dispositions, 1961," *renvoi* in this case is excluded accordingly.
- (16) S. Ct. 88DaKa22411 (July 25, 1989); S. Ct. 90Da9728 (Dec. 10, 1991).
- (17) Art. 4, EGBGB.
- (18) Art. 7, Rome Convention considers the application of the mandatory rules of a third country which is closely connected to the matter. Therefore, Germany and the United Kingdom reserved the application of Art. 7, Para. 1, Rome Convention. See Art. 18, IPRG.
- (19) Art. 16, IPRG; Arts. 3 & 4, AGIP; Art. 14, Italian "Diritto Internazionale Privato" ("DIP").
- (20) Art. 13, IPRG.
- (21) See Art. 6, EGBGB; Art. 17, IPRG; Art. 6, AGIP; Art. 16, DIP; Art. 33, JPIL.
- (22) See Art. 27, EGBGB; Art. 116, IPRG; Art. 57, DIP; Art. 7, Para. 1, JPIL; Art. 3, Rome Convention; Art. 7, Mexico City Convention; Art. 7, Hague Convention on the Law Applicable to Contracts for the International 'Sale' of Goods, 1986 ("Hague Sales Law Convention").
- (23) Art. 27, EGBGB; Art. 3, Rome Convention.
- (24) Art. 116, Para. 3, IPRG allows the retroactive effect.
- (25) See Art. 28, EGBGB; Art. 117, IPRG; Art. 58, DIP; Art. 7, Para. 2, JPIL; Art. 4, Rome Convention; Art. 9, Mexico City Convention; Art. 8, Hague Sales Law Convention.
- (26) See Art. 31, EGBGB; Art. 123, IPRG; Art. 8, Rome Convention; Art. 12, Mexico City Convention.
- (27) See Art. 126, IPRG; Art. 49, AGIP; Arts. 5 & 15, Hague Convention on the Law Applicable to Agency, 1978 ("Hague Agency Convention").
- (28) Art. 14, Hague Agency Convention requires the consent of the counterpart or the principal in addition to the letter designating the governing law

by the other party or the principal.

- (29) See Arts. 29 & 30, EGBGB; Arts. 120 & 121, IPRG; Arts. 5 & 6, Rome Convention.
- (30) Art. 39, EGBGB; Art. 47, AGIP; Art. 61, DIP; Art. 11, JPIL.
- (31) Art. 38, EGBGB; Art. 128, IPRG; Art. 46, AGIP; Art. 61, DIP; Art. 11, JPIL.
- (32) Art. 40, EGBGB; Arts. 132 & 142, IPRG; Art. 48, AGIP; Arts. 62 & 63, DIP; Art. 11, JPIL. IPRG provides special rules to the following torts: traffic accidents, products liability, unfair competition, restraint of trade, nuisance and right of personality. The Restatement (Second, 1971) of the United States also provides special rules to the following torts: personal injury, defamation, infringement on privacy, infringement on marital relations and malicious prosecution.
- (33) S. Ct. 82DaKa15343 (March 22, 1983).
- (34) The Supreme Court held that the Korean law shall apply as a governing law to torts between the Koreans in abroad. (S. Ct. 80Da2236 (Feb. 10, 1981), S. Ct. 78Da1343 (Nov. 13, 1979)). However, the decisions were not made reflecting the then current CLA.
- (35) Art. 132, IPRG has the same position.
- (36) Art. 33, Para. 1 & Art. 33, Para. 2, EGBGB; Art. 145, IPRG; Art. 12, Rome Convention; However, the references are the laws as to the assignment of claims and there are no legislation as to the assumption of obligations.
- (37) Art. 33, Para. 3, EGBGB; Art. 146, IPRG; Art. 13, Rome Convention.
- (38) However, Art. 42 of the old CLA provides that “[i]n a case where a check in respect of which payment in cash has been forbidden by the drawer or holder by writing on the instrument the express “payable to account” or a similar expression has been drawn, such check is to be paid in the Republic of Korea, it shall have the validity of a generally crossed check,” which means that the check payable to an account may be considered as the crossed check. Therefore, this provision is identical to the provision in Art. 74 of the Japanese Check Act. It may be compared with the provision in Art. 7, Para. 5, Cheques Convention which provides that “[t]he law of the country in which the cheque is payable shall determine: Whether a cheque can be crossed or marked either with the words ‘payable in account’ or with some equivalent expression and what the effects are some of such crossing

or of the words 'payable in account' or any equivalent expression."

- (39) Art. 45, EGBGB provides that an aircraft shall be governed by the laws of its nationality, a ship by the laws of the country of its registration; a rolling stock by the laws of the country approving the traffic service. Art. 107, IPRG provides that it is reserved in each domestic law. Art. 33, AGIP provides that an aircraft and ship are applied by the law of its registration and a rolling stock by the laws of the country in which the principal office of the business.
- (40) Arts. 101 & 106, IPRG.
- (41) Art. 105, IPRG.
- (42) Art. 110, IPRG; Art. 34, AGIP; Art. 54, DIP.
- (43) The certain matters are as follows:
- (1) the ownership, mortgage, maritime lien and other property rights in a ship;
  - (2) the priority order of the security interest in a ship;
  - (3) the scope of a ship owner's liability for acts of the shipmaster and crew;
  - (4) whether the ship owner, charter, manager, operator or other users of the ship shall be entitled to invoke the limitation of liability and the scope of such limitation of liability;
  - (5) general average; and
  - (6) the power of agency of shipmaster.
- (44) Art. 45, Para. 2, EGBGB provides that the establishment of the legal security interest in a ship shall be governed by the governing law to the security interest and that the priority order shall be governed by the governing law of the *lex situs* to the subject matter.
- (45) See Art. 13, EGBGB; Art. 44, IPRG; Art. 17, AGIP; Arts. 27 & 28, DIP; Art. 13, JPIL; Arts. 1 to 6, Hague Convention on Celebration and Recognition of the Effect of marriage (1978).
- (46) See Art. 14, EGBGB (5 steps); Art. 48, IPRG; Art. 18, AGIP (5 steps); Art. 29, DIP; Art. 14, JPIL (3steps).
- (47) See Art. 15, EGBGB; Arts. 52 & 57, IPRG; Art. 19, AGIP; Art. 30, DIP; Art. 15, JPIL; Arts. 3 & 14, Hague Convention of the Law Applicable to Matrimonial Property Regimes (1978).

- (48) The laws may be:
- (1) the law of nationality of one of the spouses;
  - (2) the law of a habitual residence of one of the spouses; or
  - (3) regarding matrimonial property regimes concerning immovables, the law of the site of the immovable.
- (49) See Art. 17, EGBGB; Art. 61, IPRG; Art. 20, AGIP; Art. 31, DIP; Art. 16, JPIL.
- (50) See Art. 61, IPRG; Art. 20, AGIP; Art. 16, JPIL. Art. 19, EGBGB provides *mutatis mutandis* to illegitimate children. Art. 31, DIP provides that the governing law shall be the *lex patriae* of the child.
- (51) See Art. 72, IPRG; Art. 25, AGIP; Art. 35, DIP; Art. 18, JPIL. Art. 19, EGBGB applies *mutatis mutandis* to legitimate child.
- (52) See Arts. 22 & 23, AGIP; Art. 34, DIP; Art. 19, JPIL.
- (53) See Art. 22, EGBGB; Art. 77, IPRG; Art. 26, AGIP; Art. 38, DIP; Art. 20, JPIL; Arts. 3 & 5, Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoption (1965).
- (54) Seoul District Family Ct. 91Deu63419 (April 23, 1992), Seoul District Family Ct. 89Deu73468 (Nov. 28, 1990).
- (55) See Art. 21, EGBGB; Art. 82, IPRG; Art. 24, AGIP; Art. 36, DIP; Art. 21, JPIL.
- (56) See Art. 18, EGBGB; Arts. 49 & 83, IPRG; Art. 45, DIP; Arts. 4 & 11, Hague Convention on the Law Applicable to Maintenance Obligation. Japan enacted the "Act regarding the Governing Law of Maintenance Obligation," and the above countries ratified and enforced Hague Convention on the Law Applicable to Maintenance Obligations towards Children (1956).
- (57) If the deceased has selected, by any form which is applicable to a will, one of the following laws as the governing law, inheritance shall be governed by that law:
- (1) the law of a country in which the deceased had his habitual residence at the time of designation. Such designation shall be effective only when the deceased has maintained until his death his habitual residence in that country; or
  - (2) as regarding inheritance of immovables, the law of the place where such immovables are situated.

- (58) See Art. 25, EGBGB; Arts. 90 & 92, IPRG; Arts. 28 & 29, AGIP; Art. 46, DIP; Art. 26, JPIL; Arts. 3 & 12, Hague Convention on the Law Applicable to Succession to the Estate of Deceased Persons (1989).
- (59) The governing law may be one of the followings:
- (1) law of a nationality possessed by the testator, either at the time when he made the will, or at the time of his death;
  - (2) law of the place in which the testator had his habitual residence, either at the time when he made the will or at the time of his death;
  - (3) law of the place where the testator made the will; or
  - (4) regarding a will relating to immovables, law of the place where such immovables are situated.
- (60) Art. 26, EGBGB; Arts. 93 & 95, IPRG; Art. 30, AGIP; Art. 47, DIP; Art. 1, Hague Convention on the Conflicts Laws Relating to the Form of Testamentary Dispositions (1961). Japan enacted the "Act regarding Governing Law of Formality of Will" which is currently in force.