

# New Conflict of Laws Act of the Republic of Korea

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## I. Introduction

The Law amending the Conflict of Laws Act of The Republic of Korea(“Korea”), which had taken two years to prepare, was promulgated on April 7, 2001 and finally took effect as of July 1, 2001. The name of the Conflict of Laws Act has been changed from “*Seboesabeop*” to “*Gukjesabeop*”. In fact the Old conflict of laws Act(“Old Act”) was promulgated in 1962. However, since the Old Act was modelled after the German Private International Law (*EGBGB*) and the Japanese International Law (*Horei*) which had been promulgated toward the end of the 19th century, the Old Act was viewed as outdated from the moment of its promulgation. Now at the beginning of the new Millennium one can say that through the promulgation of the New conflict of laws Act(“New Act”), Korea has succeeded in reflecting in its codification substantial parts of the major developments of the private international law which the advanced countries achieved during the last century.

The purpose of this memo is to make a brief presentation of the New Act without discussing its individual provisions. An English language translation of the New Act prepared by myself is attached at the end of this memo.

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## II. Salient Features of the New Act Compared with the Old Act

### A. Change of the Structure

The Old Act had 47 articles under the following three chapters: “General Provision,” “Provisions on Civil Matters,” and “Provisions on Commercial Matters.” The New Act rearranged the existing provisions together with new provisions and has in total 62 articles under the following nine chapters: “General Provisions,” “Person,” “Juridical Act,” “Rights in rem (Real Rights),” “Claim (*chaekwon*),” “Kinship,” “Succession,” “Promissory Note · Bill of Exchange · Check,” and “Maritime Matters.”

Chapter 3 of the Old Act, namely “Provisions on Commercial Matters” consisted of “Special Provisions on Commercial Matters,” “Provisions on Promissory Note · Bill of Exchange · Check” and “Provisions on Maritime Matters.” Since the Special Provisions on Commercial Matters were heavily criticized as unnecessary and unreasonable, most of those provisions have been deleted and several surviving provisions such as Articles 29 and 31 of the Old Act were moved to the relevant chapters of the New Act, with some modifications.

### B. Orientation Toward a Complete Conflict of Laws Act and Filling of Lacunae

The Old Act was not complete since it did not have any express provisions on capacity of natural person, legal person or association, voluntary agency, means of transportation, *res in transitu*, security interest on claim (*chaekwon*), intellectual property, transfer of claim (*chaekwon*) by operation of law, assumption of obligations, legitimation, etc. By introducing new provisions on governing laws of the foregoing subject matters, the New Act purports to enhance legal certainty and predictability, and has made a step forward toward a more complete private international law regime of Korea.

### C. Equal Treatment of Men and Women in Conflict of Laws Act

As to the area of international family law, the Old Act was criticized for violating the principle of equality between men and women, one of the paramount principles

guaranteed by the Constitution of Korea because it designated as governing law the *lex patriae* of the husband with respect to the effect of marriage (Article 16), the matrimonial property regime (Article 17) and divorce (Article 18), and the law of father with respect to the legal relationship between parents and child (Article 22).

In order to be consistent with the principle of equality between men and women, the New Act has designated firstly the common *lex patriae* of the spouses, secondly the law of the common habitual residence, and otherwise removed the factors which may be viewed as discriminatory against women, thereby eliminating the possibility of unconstitutionality (Articles 37 to 39).

#### *D. Expansion of Provisions on International Jurisdiction*

The settled court decisions and majority views of Korean legal commentators have taken the position that Korea has no written law regulating international jurisdiction to adjudicate. In fact the rules on international jurisdiction to adjudicate have been mainly developed by a series of court decisions. The Old Act contained provisions on international jurisdiction, but only in a limited number of noncontentious matters, such as quasi-incompetency and incompetency, declaration of disappearance and guardianship. However, the New Act introduced in Chapter 1 (General Provisions) a new provision (Article 2 which sets forth general principles on international jurisdiction to adjudicate) and in Chapter 5 (Claims) special provisions to protect the interests of consumers and employees who are regarded as socio-economically weaker parties (Articles 27 and 28).

It is true that the provisions on international jurisdiction to adjudicate of the New Act are not complete and only fragmentary. However, legislators have intentionally done so and the provisions on international jurisdiction to adjudicate are expected to be supplemented or completed in due course by subsequent legislation.

#### *E. Strengthening of “the closest relationship” Principle*

The New Act designates as governing law the law of the country which has the closest connection with the various subject matters. For example, in determining the objective governing law of an international contract, the New Act has replaced the mechanical “place of conclusion of contract principle” with designating as governing

law the law of the country which has the closest connection with the contract (Article 26). Other examples are Article 32, Paragraph 2 which provides that tort shall be governed by the law of the country of the common habitual residences of the tortfeasor and the victim if they had their habitual residences there, and the so called accessory connection (Article 30, Paragraph 1, proviso of Article 31 and Article 32, Paragraph 3) which provides that management of affairs without mandate, unjust enrichment or tort shall be subject to the governing law of the existing legal relationship between the parties if such causal event has occurred with respect to such legal relationship.

In addition, the New Act purports to strengthen “the closest relationship” principle by introducing a general exception clause (Article 8) which requires a Korean court to apply the law of the country which clearly has the closest connection with the case if the application of rules of the New Act would lead to a result inconsistent with the closest connection principle. The exception clause has been modeled after Article 15 of the Swiss Private International Law.

#### *F. Introduction of Flexible Connecting Principles*

The Old Act provided for an alternative connection only with respect to the form of juridical act and did not provide for a so called subsidiary or cascade connection. However, the New Act has diversified connecting factors by expanding the alternative connection with respect to the form of juridical act and by newly introducing (1) the alternative connection with respect to the formation of relationship between parent and legitimate child, and parent and illegitimate child (Articles 40 and 41), to legitimation (Article 42), and to the form of will (Article 50, Paragraph 3), and (2) the subsidiary or cascade connection with respect to the general effect of marriage (Article 37) and the matrimonial property regime (Article 38), thereby enabling more flexibility in determining connection by courts.

In addition, the New Act has expanded the scope of application of renvoi (Article 9). Unlike the Old Act which permitted remission only when the *lex patriae* of a person is designated as governing law, the New Act permits the remission generally save certain exceptions. However, the transmission is still not permitted except for the capacity of a person to bind himself by a bill of exchange, promissory note or check (Article 51, Paragraph 1), which was also the case under the Old Act. The rationale

behind the expansion of permissibility of renvoi is to afford more flexibility to courts in determining the governing law in a particular case at hand, and that courts will be able to apply Korean law, thereby being relieved from the burden of examining and proving foreign law in case the remission is permitted.

### *G. Maintenance of Principle of Lex Patriae and Introduction of Habitual Residence as a New Connecting Factor*

The New Act maintains in principle the principle of *lex patriae* in the area of personal status, family law and inheritance law. However, the New Act has diversified the connecting factors in an effort to follow the international trends in the relevant area. For example, the New Act has introduced the law of the common habitual residence of the spouses as a subsidiary connecting factor with respect to the general effect of marriage (Article 37), the matrimonial property regime (Article 38) and divorce (Article 39). The New Act also has introduced the habitual residence of the testator as an alternative connecting factor with respect to the form of a will (Article 50, Paragraph 3).

### *H. Consideration of the Value of Substantive Law*

Following the ideals of traditional conflict of laws principles, the Old Act only designated governing laws that are geographically most closely connected with the case at hand and was not concerned about the content of the substantive law so designated. However, the New Act has introduced some special connecting principles in order to further the interests and welfare of children, and to protect the interests of consumers and employees who are generally regarded as socio-economically weaker parties. This means that the New Act takes into account the value of substantive laws and that such value has been elevated to the level of the conflict of laws.

For example, as a means of promoting the interests of child, the establishment of relationship between a parent and an illegitimate child, and legitimation may now be governed by the law of the habitual residence of the child (Articles 41 and 42). As a means of protecting the interests of consumers and employees, a choice of law made by the parties cannot deprive the consumer or the employee of the protection afforded to him by the mandatory rules of the law of the country in which (in the case of

consumer) he has his habitual residence or (in the case of employee) the employee habitually carries out his work (Articles 27 and 28). The New Act has also introduced special rules on international jurisdiction to adjudicate to protect the interests of the consumers and employees.

In addition, as a means of protecting the maintenance (or support) creditor, the New Act designates as governing law of maintenance obligations the law of the habitual residence of the maintenance creditor rather than the maintenance debtor, in clear contrast to the Old Act. Moreover, the New Act enables the maintenance creditor to receive maintenance by way of a so called corrective connection whereby if the creditor is unable to obtain maintenance from the debtor by virtue of the law of his habitual residence, the creditor has an option to resort to the law of their common nationality (Article 46, proviso of Paragraph 1).

### *I. Expansion of Party Autonomy*

The Old Act permitted party autonomy only in the context of international contracts. However, the New Act has introduced party autonomy in the context of international family law and inheritance law such as matrimonial property regime (Article 38) and inheritance (Article 49). In addition, even in the case of management of affairs without mandate, unjust enrichment and tort, parties are also allowed to agree upon a governing law after occurrence of the event (Article 33). On the contrary, in the case of consumer contracts and individual employment contracts the New Act restricts party autonomy to a certain extent in order to protect the socio-economically weaker parties (Articles 27 and 28).

### *J. Consideration of International Conventions*

In the field of international contracts, the New Act seeks international decisional harmony by incorporating key provisions of the “Convention on the Law Applicable to Contractual Obligations of the European Community” of 1980 (the “Rome Convention”) and the “Inter-American Convention on the Law Applicable to International Contracts” of 1994 (Articles 17, 25 *et seq.*). In addition, the New Act also incorporated substantial parts of the “Convention on the Law Applicable to Maintenance Obligations” of 1973 and the “Convention on the Conflicts of Laws

Relating to the Form of Testamentary Dispositions” of 1961, both adopted by the Hague Conference on Private International Law (Article 46 and Article 50, Paragraph 3).

With respect to international jurisdiction to adjudicate, the New Act has considered the relevant provisions of the “Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of the European Community” of 1968, as amended by the Council Regulation, the Lugano Convention and the Preliminary Draft of the “Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters,” which is currently under negotiation on a worldwide basis (Article 27, Paragraphs 4 to 6 and Article 28, Paragraphs 3 to 5).

### **III. Conclusion**

The New Act is a product of the efforts to eliminate the existing problems of the Old Act and to adapt the Korean private international law regime to international conventions and national laws of advanced countries by modernizing the rather outdated Old Act. Unlike the Old Act which was heavily dependent upon the Japanese Private International Law (*Horei*), the New Act has been prepared by taking into full account the Rome Convention, the Swiss Private International Law, the German Private International Law and various conventions adopted by the Hague Conference on Private International Law. Therefore, the New Act has substantially reduced dependence upon the Japanese Private International Law. It is hoped, and I am personally confident, that the New Act will be able to achieve its intended objectives in the 21st century as the basic law for the ever-increasing legal relationships with foreign element.

Law Number 6465

**The Act amending the Conflict of Laws Act**

The Conflict of Laws Act shall be amended as follows:

**Conflict of Laws Act (*Gukjesabeop*)**

CHAPTER I GENERAL PROVISIONS

Article 1 (Purpose)

The purpose of this Act is to set forth the principles of the international jurisdiction to adjudicate, and to determine the governing law, with regard to the legal relationship which has a foreign element.

Article 2 (International Jurisdiction to Adjudicate)

- (1) The courts shall have international jurisdiction to adjudicate if the parties or the case in dispute has substantial connection with The Republic of Korea. In determining whether or not there is such substantial connection, the courts shall follow the reasonable principles which are in conformity with the ideals of the allocation of international jurisdiction to adjudicate.
- (2) The courts shall determine whether or not they have international jurisdiction to adjudicate by reference to the provisions on jurisdiction of domestic laws; provided, however, that they shall fully take into consideration the special nature of international jurisdiction to adjudicate in light of the provisions of paragraph (1).

Article 3 (*Lex Patriae*)

- (1) If, in cases where the *lex patriae* of a party concerned shall govern, the party concerned has two or more nationalities, the *lex patriae* shall be the law of the country with which he has the closest connection; provided, however, that if one of such nationalities is that of The Republic of Korea, the law of The Republic of Korea shall be his *lex patriae*.
- (2) In cases where a person has no nationality or it is impossible to ascertain his

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1) Translated by the author (Kwang Hyun SUK).



nationality, the law of the country where he has his habitual residence (hereinafter referred to as the “Law of Habitual Residence”) shall govern and if it is impossible to ascertain his habitual residence, the law of the country where he has his residence shall govern.

- (3) With regard to a national of a country that has various local laws, the law designated by the relevant choice of law rules of that country and, if there are no such rules, the law of the local district with which he has the closest connection shall govern.

#### Article 4 (Law of Habitual Residence)

If, in cases where the Law of Habitual Residence of a party concerned shall govern, it is impossible to ascertain his habitual residence, the law of his residence shall govern.

#### Article 5 (Application of Foreign Law)

The courts shall examine and apply *ex officio* the content of the foreign law which has been designated by this Act and for this purpose may request the parties’ cooperation therefor.

#### Article 6 (Scope of Governing Law)

The application of provisions of the foreign law, which is designated as governing law by this Act shall not be excluded for the sole reason that it has the nature of public law.

#### Article 7 (Mandatory Application of Korean Law)

Provisions of mandatory law of The Republic of Korea which in view of their legislative purpose must be applied irrespective of the governing law, shall be applicable even if a foreign law is designated as governing law by this Act.

#### Article 8 (Exception to the Designation of Governing Law)

- (1) If the governing law designated by this Act has only a slight connection with the related legal relationship, and it is evident that there is a law of another country which has the closest connection with the legal relationship, the law of that other country shall apply.

- (2) Provisions of paragraph (1) shall not be applicable where the parties have chosen a governing law by their agreement.

Article 9 (*Renvoi* in the case of Designation of Governing Law)

- (1) If, in cases where a foreign law is designated as governing law by this Act, the law of such country provides that the law of The Republic of Korea shall govern, then the law of The Republic of Korea (other than that on determination of governing law) shall govern.
- (2) Provisions of paragraph (1) shall not apply in any of the following cases:
1. where the governing law is chosen by the parties' agreement;
  2. where the governing law of a contract is designated by this Act;
  3. where the governing law of maintenance obligations is designated by the provisions of Article 46;
  4. where the governing law of the form of will is designated by the provisions of Article 50, Paragraph (3);
  5. where the law of the country of registration of a ship is designated by the provisions of Article 60; or
  6. where the application of the provisions of paragraph (1) is against the purpose of the designation under this Act.

Article 10 (Provisions of Foreign Law Contrary to Public Order)

The application of provisions of a foreign law is excluded if such application is manifestly incompatible with the good morals and other public order of The Republic of Korea.

## CHAPTER II PERSON

Article 11 (Capacity to Have Rights)

The capacity to have rights of a person shall be governed by his *lex patriae*.

Article 12 (Declaration of Disappearance)

If it is not clear whether a foreigner is alive or dead, the court may issue a declaration of disappearance under the laws of The Republic of Korea only when he has any property in The Republic of Korea, there is any legal relationship that is to be

governed by the laws of The Republic of Korea or there is any legitimate reason therefor.

Article 13 (Capacity to Act)

- (1) The capacity to act of a person shall be governed by his *lex patriae*. The same shall apply where the capacity to act is expanded by marriage.
- (2) The capacity to act which has been already acquired shall not be deprived or restricted by change of nationality.

Article 14 (Declaration of Quasi-Incompetency and Incompetency)

The court may issue a declaration of quasi-incompetency or incompetency under the laws of The Republic of Korea against a foreigner having his habitual residence or residence in The Republic of Korea.

Article 15 (Protection of Transactions)

- (1) If a person who effects a juridical act and the opposite party are in the same country, a person who would have capacity under the law of that country cannot invoke his incapacity resulting from his *lex patriae* unless the other party was, or could have been, aware of his incapacity at the time of the juridical act.
- (2) The provisions of paragraph (1) shall not apply to the juridical acts under the provisions of the family law or the inheritance law and the juridical acts relating to any real estate located in a country other than the place of juridical act.

Article 16 (Legal Persons and Associations)

Legal persons or associations shall be governed by the law of the country under the laws of which the persons or associations were incorporated 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.

### CHAPTER III JURIDICAL ACT

Article 17 (Form of Juridical Act)

- (1) Form of a juridical act shall be subject to the governing law of the act.

- (2) A juridical act is formally valid if it satisfies the formal requirements of the law where the act was effected.
- (3) If the parties are in different countries at the time of conclusion of a contract, the contract is formally valid if it satisfies the formal requirements of a juridical act of the law of one of those countries.
- (4) Where a juridical act is effected by an agent, the country in which the agent acts is the relevant country for the purposes of paragraph (2).
- (5) Provisions of paragraphs (2) to (4) shall not apply to the form of a juridical act the subject matter of which is the creation or disposal of a real right or any other right which is subject to registration.

#### Article 18 (Agency)

- (1) The relationship between principal and agent shall be subject to the governing law of the legal relationship between the parties.
- (2) Whether or not the principal is bound to a third party by an act of an agent shall be governed by the law of the country in which the agent has his place of business or, if there is none, or if it is not discernable by the third party, by the law of the country in which the agent has actually acted in the particular case.
- (3) If the agent is in an employment relationship with the principal and if he has no place of business of his own, the principal place of business of the principal shall be deemed to be the place of business of the agent.
- (4) Notwithstanding the provisions of paragraphs (2) and (3), the principal may choose a governing law of agency; provided, however, that in order for the choice of governing law to be effective it must be expressly stated in the document proving the authority of the agent or must be notified in writing to the third party by either the principal or the agent.
- (5) Provisions of paragraph (2) shall apply *mutatis mutandis* to the relationship between an agent without authority and a third party.

### CHAPTER IV REAL RIGHTS (RIGHTS *IN REM*)

#### Article 19 (Governing Law of Real Rights)

- (1) Real rights concerning immovables and movables and other rights that are subject to registration shall be governed by the law of the site (*lex situs*) of the

subject matter.

- (2) Acquisition, loss or change of the rights prescribed in paragraph (1) shall be governed by the law of the site (*lex situs*) of the subject matter at the time of the completion of the causal action or event.

Article 20 (Means of Transportation)

Real rights of aircraft shall be subject to the law of its nationality and real rights of rolling stock shall be subject to the laws of the country approving its traffic service.

Article 21 (Bearer Bond)

Acquisition, loss and change of rights of a bearer bond shall be governed by the law of the site (*lex situs*) of such bond at the time of the completion of the causal action or event.

Article 22 (*Res in transitu*)

Acquisition, loss and change of real rights of goods in transit (*res in transitu*) shall be governed by the law of the country of destination.

Article 23 (Contractual Security Interest in Claims, etc.)

Contractual security interest in claims (*chaekwon*),<sup>2)</sup> shares and other rights, and the securities which embody such claims, shares and other rights shall be governed by the law governing the subject right of such security interest. However, contractual security interest in bearer bonds shall be subject to the provisions of Article 21.

Article 24 (Protection of Intellectual Property Rights)

The protection of intellectual property rights shall be subject to the law where the right has been infringed.

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2) “*Chaekwon*” is a Korean counterpart for “*une creance*” in French and “*die Forderung*” in German.  
[Translator’s Note]

CHAPTER V CLAIM (*CHAEKWON*)

Article 25 (Party Autonomy)

- (1) A contract shall be governed by the law expressly or impliedly chosen by the parties; provided, however, that existence of an implied choice may be acknowledged only when it is reasonable to do so in light of the terms of the contract or the circumstances of the case.
- (2) The parties can choose the law applicable to the whole or a part only of a contract.
- (3) The parties may at any time agree to change the governing law of a contract, which has been so designated as a result of this Article or Article 26. Any change by the parties of the governing law made after the conclusion of the contract shall not prejudice its formal validity or prejudice the rights of third parties.
- (4) Where all the elements relevant to a situation are connected with only one country, the parties' choice of a foreign law shall not exclude the application of mandatory rules of the law of that country.
- (5) Provisions of Article 29 shall apply *mutatis mutandis* to the formation and validity of the parties' agreement to choose the governing law.

Article 26 (Objective Connection of Governing Law)

- (1) If the governing law of a contract has not been chosen by the parties, the contract shall be governed by the law of the country which has the closest connection with the contract.
- (2) It shall be presumed that the contract has the closest connection with the country where the party who is to effect one of the following performances has, at the time of conclusion of the contract, his habitual residence (in the case of a legal person or association, with the country where the party has its principal place of business); provided, however, that if the contract is entered into in the course of a party's profession or business activity, that country shall be the country in which the place of business of that party is situated:
  1. in contracts to transfer, the performance of the transferor;
  2. in contracts to grant the use of a thing or a right, the performance of the party that grants the use; or
  3. in mandate contracts, contracts for completion of work and other similar

contracts for services, the performance of the party providing services.

- (3) If the subject matter of the contract is a right in immovables, the law of the country where the immovable is situated is presumed to have the closest connection with the contract.

Article 27 (Consumer Contracts)

- (1) If a contract which a consumer enters into for a purpose which can be regarded as being outside his profession or business activity falls into any one of the following cases, a choice of law made by the parties cannot deprive the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence:
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.
- (2) Notwithstanding the provisions of Article 26, a contract to which paragraph (1) of this Article is applicable shall, be governed by the law of the country in which the consumer has his habitual residence.
- (3) Notwithstanding the provisions of Article 17, paragraphs (1) to (3), a contract to which paragraph (1) of this Article is applicable shall, be governed by the law of the country in which the consumer has his habitual residence.
- (4) In the case of a contract to which paragraph (1) of this Article is applicable, a consumer may also bring an action in the country in which he has his habitual residence.
- (5) In the case of a contract to which paragraph (1) of this Article is applicable, an action against the consumer may only be brought by the other party in the country in which the consumer has his habitual residence.
- (6) The parties to a contract to which paragraph (1) of this Article is applicable may, by a written agreement, enter into an agreement on international jurisdiction to adjudicate; provided, however, that such agreement is effective

only when it falls under any one of the following:

1. where such agreement is entered into after the dispute has arisen; or
2. where it allows the consumer to bring an action in another court in addition to the courts which have jurisdiction under this Article.

#### Article 28 (Employment Contract)

- (1) In the case of an employment contract a choice of law made by the parties cannot deprive the employee of the protection afforded to him by the mandatory rules of the law which would be applicable under the provisions of paragraph (2).
- (2) Notwithstanding the provisions of Article 26, an employment contract shall, in the absence of choice of governing law by the parties, be governed by the law of the country in which the employee habitually carries out his work, or if the employee does not habitually carry out his work in any one country, by the law of the country in which the place of business through which he was engaged is situated.
- (3) In the case of an employment contract, an employee may also bring an action against the employer in the country in which the employee habitually carries out his work or in the last country in which he did so, or, if the employee does not or did not habitually carry out his work in any one country, in the country in which the place of business through which the employee was engaged is or was situated.
- (4) In the case of an employment contract, an action against an employee may be brought by the employer only in the country where the employee has his habitual residence, or in the country in which the employee habitually carries out his work.
- (5) The parties to an employment contract may, by a written agreement, enter into an agreement on international jurisdiction to adjudicate; provided, however, that such agreement is effective only when it falls under any one of the following:
  1. where such agreement is entered into after the dispute has arisen; or
  2. where it allows the employee to bring an action in another court in addition to the courts which have jurisdiction under this Article.

#### Article 29 (Formation and Validity of Contract)

- (1) The formation and validity of a contract shall be determined by the law which



would govern it under this Act if the contract were valid.

- (2) Nevertheless a party may recourse to the law of the country in which he has his habitual residence to establish that he did not consent to the contract if it is evident from the circumstances that it would be clearly unreasonable to determine the effect of his conduct in accordance with the law set forth in paragraph (1).

Article 30 (Management of Affairs without Mandate)

- (1) Management of affairs without mandate shall be governed by the law of the country in which the management took place. However, if management of affairs without mandate has been effected based upon a legal relationship between the parties, it shall be subject to the governing law of the legal relationship.
- (2) Claims resulting from payment of other person's obligations shall be subject to the governing law of the obligations.

Article 31 (Unjust Enrichment)

Unjust enrichment shall be governed by the law of the country in which the enrichment took place. However, if unjust enrichment has resulted from a performance effected based upon a legal relationship between the parties, it shall be subject to the governing law of the legal relationship.

Article 32 (Tort)

- (1) Tort shall be governed by the law of the place where the event has occurred.
- (2) Notwithstanding the provisions of paragraph (1), if the tortfeasor and the victim had, at the time of tort, their habitual residences in the same country, tort shall be governed by the law of that country.
- (3) Notwithstanding the provisions of paragraphs (1) and (2), if an existing legal relationship between the tortfeasor and the victim is violated by the tort, the tort shall be governed by the law which is applicable to the legal relationship.
- (4) In cases where a tort is governed by foreign law by provisions of paragraphs (1) to (3), damages based upon a tort shall not be awarded if the nature of the damages is clearly not for appropriate compensation for damage to the victim, or to the extent the damages is substantially in excess of appropriate

compensation for damage to the victim.

Article 33 (Subsequent Agreement on Governing Law)

Notwithstanding the provisions of Articles 30 to 32, the parties may agree, after an event constituting the management of affairs without mandate, unjust enrichment or tort has taken place, that such event shall be subject to the law of The Republic of Korea; provided, however, that rights of third parties shall not be prejudiced by such agreement.

Article 34 (Contractual Assignment of Claim (*Chaekwon*) and Assumption of Obligations)

- (1) The legal relationship between assignor and assignee of a contractual assignment of a claim(*chaekwon*) shall be governed by the law which governs the contract between the assignor and assignee. However, the law governing the claim (*chaekwon*) to be assigned shall determine its assignability and the effect of assignment as against the debtor and third parties.
- (2) Provisions of paragraph (1) shall apply *mutatis mutandis* to assumption of obligations.

Article 35 (Transfer of Claim (*Chaekwon*) by Operation of Law)

- (1) The transfer of a claim (*chaekwon*) by operation of law shall be subject to the law which governs the underlying legal relationship between the old and the new creditors based upon which the transfer takes place. However, if there is any provision in the law governing the claim to be assigned which protects the debtor, such provision shall apply.
- (2) If there is no such legal relationship referred to in paragraph (1), the transfer of a claim (*chaekwon*) by operation of law shall be subject to the law which governs the claim (*chaekwon*).

## CHAPTER VI KINSHIP

Article 36 (Formation of Marriage)

- (1) The requirements for the formation of a marriage shall be governed by the *lex patriae* of each of the parties.

- (2) The form of a marriage ceremony shall be governed by the law of the place where the marriage ceremony takes place or the *lex patriae* of any one of the parties. However, if, in cases where the marriage ceremony takes place in The Republic of Korea, one of the parties is a national of The Republic of Korea, the form of a marriage ceremony shall be governed by the law of The Republic of Korea.

Article 37 (General Effect of Marriage)

The general effect of a marriage shall be governed by the law in the following order:

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.

Article 38 (Matrimonial Property Regime)

- (1) Provisions of Article 37 shall apply *mutatis mutandis* to matrimonial property regime.
- (2) Notwithstanding the provisions of paragraph (1), if the spouses choose, by their agreement, any one of the following laws, the matrimonial property regime shall be governed by the law chosen by the spouses; provided, however, that the agreement must be executed in writing and be affixed with the date and name and seal or signature of the spouses:
  1. the law of nationality of one of the spouses;
  2. the law of habitual residence of one of the spouses; or
  3. as regards matrimonial property regime concerning immovables, the law of site of the immovable.
- (3) The matrimonial property regime under foreign law may not be enforceable against *bona fide* third parties with respect to juridical act effected in The Republic of Korea or the property located in The Republic of Korea. In this case, to the extent the matrimonial property regime under foreign law cannot be applied, the matrimonial property regime as against third parties shall be governed by the law of The Republic of Korea.
- (4) Notwithstanding the provisions of paragraph (3), the matrimonial property contract entered into under foreign law may be enforceable against *bona fide*

third parties if it is registered in The Republic of Korea.

Article 39 (Divorce)

Provisions of Article 37 shall apply *mutatis mutandis* to divorce. However, if one of the spouses is a national of The Republic of Korea having a habitual residence in The Republic of Korea, divorce shall be governed by the law of The Republic of Korea.

Article 40 (Relationship between Parent and Legitimate Child)

- (1) The formation of a relationship between a parent and a legitimate child shall be governed by *lex patriae* of one of the parents at the time of the birth of the child.
- (2) 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* for the purpose of paragraph (1).

Article 41 (Relationship between Parent and Illegitimate Child)

- (1) 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.
- (2) The recognition may also be governed by the *lex patriae* of the person recognizing the child in addition to the laws set forth in paragraph (1).
- (3) In the case of paragraph (1), if the father has died before the birth of the child, the *lex patriae* of the father at the time of his death shall be deemed as his *lex patriae*, and in the case of paragraph (2), 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*.

Article 42 (Legitimation of Illegitimate Child)

- (1) The matters relating to whether an illegitimate child is changed to a legitimate child shall be 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.

- (2) In the case of paragraph (1), if 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*.

#### Article 43 (Adoption and Its Dissolution)

Adoption and its dissolution shall be governed by the *lex patriae* of the adoptive parent at the time of the adoption.

#### Article 44 (Consent)

If the law of 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 Articles 41 to 43, such requirement must also be satisfied.

#### Article 45 (Legal Relationship between Parent and Child)

The legal relationship between a parent and a child shall be governed by the law of 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.

#### Article 46 (Maintenance)

- (1) Maintenance obligations shall be governed by the law of the habitual residence of the maintenance creditor. However, if the maintenance creditor is unable to obtain maintenance from the debtor by virtue of such law, the law of their common nationality shall apply.
- (2) Notwithstanding the provisions of paragraph (1), the law applied to a divorce shall, if such divorce has been effected, or has been recognized, in The Republic of Korea, govern the maintenance obligations between the divorced spouses.
- (3) In the case of a maintenance obligation between persons related collaterally or by affinity, the debtor may contest a request from the creditor on the ground that there is no such obligation under the law of their common nationality or, in the absence of a common nationality, under the law of the debtor's habitual residence.
- (4) If the creditor and the debtor are both nationals of The Republic of Korea and if

the debtor has his habitual residence in The Republic of Korea, the law of The Republic of Korea shall apply to the maintenance obligations.

Article 47 (Other Kinship)

Formation of, and the rights and obligations arising from, the kinship shall be governed by the *lex patriae* of each party concerned, unless otherwise set forth in this Act.

Article 48 (Guardianship)

- (1) Guardianship shall be governed by the *lex patriae* of the ward.
- (2) The guardianship for a foreigner who has his habitual residence or residence in The Republic of Korea shall be governed by the law of The Republic of Korea only in any of the following cases:
  1. where there is no person to perform the duties of guardianship even if the causes for commencement of guardianship exist under the *lex patriae* of the ward or the person to perform the duties of guardianship cannot actually perform his duties;
  2. where a declaration of quasi-incompetency or incompetency has been issued in The Republic of Korea; or
  3. where there is an otherwise urgent need to protect the ward.

## CHAPTER VII INHERITANCE

Article 49 (Inheritance)

- (1) Inheritance shall be governed by the *lex patriae* of the deceased at the time of his death.
- (2) Notwithstanding the provisions of paragraph (1), 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 such 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 regards inheritance of immovables, law of the place where they are situated.

Article 50 (Will)

- (1) A will shall be governed by the *lex patriae* of the testator at the time when he made the will.
- (2) The amendment or withdrawal of a will shall be governed by the *lex patriae* of the testator at the time of the amendment or withdrawal of the will.
- (3) The form of a will shall be governed by any one of the following:
  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. as regards a will relating to immovables, law of the place where they are situated.

CHAPTER VIII BILL OF EXCHANGE · PROMISSORY NOTE · CHECK

Article 51 (Capacity to Act)

- (1) The capacity of a person who assumes obligations by a bill of exchange, promissory note, or check shall be governed by the *lex patriae* of such person. If the *lex patriae* provides that such capacity shall be governed by the law of another country, the law of that other country shall apply.
- (2) If a person who, under the provisions of paragraph (1), lacks capacity has signed within the territory of another country where he is considered legally capable, he shall be held capable of assuming such obligations.

Article 52 (Qualification for Payer of Check)

- (1) The qualification for a person who may become the payer of a check shall be governed by the law of the place of payment.
- (2) If a check is invalid because the payer is a person who may not become a payer according to the law of the place of payment, the obligations arising from the signature that was affixed in another country where there are no such provisions shall not be affected.

Article 53 (Form)

- (1) The form of act on a bill of exchange, promissory note or check<sup>3)</sup> shall be governed by the law of the place of the signature; provided, however, that the form of act on a check may be governed by the law of the place of payment.
- (2) If an act is invalid under the provisions of paragraph (1), but such act is legal under the law of the place where a subsequent act is effected, the validity of any subsequent act shall not be affected by the ineffectiveness of the previous act.
- (3) If an act on a bill of exchange, promissory note or check that has been effected by a national of The Republic of Korea in a foreign country is invalid under the law of the place where such act was effected, but such act is legal under the law of The Republic of Korea, such act shall be effective as against other nationals of The Republic of Korea.

Article 54 (Effect)

- (1) The obligations of the acceptor of a bill of exchange and of the issuer of a promissory note shall be governed by the law of the place of payment, the obligations arising from a check shall be governed by the law of the place of signature.
- (2) The obligations under a bills of exchange, promissory note and check of the persons other than those set forth in paragraph (1), shall be governed by the law of the place of signature.
- (3) The period allowed for the exercise of a right of recourse on a bill of exchange, promissory note or check shall be governed by the law of the place of issuance of such instrument with regard to all the signatories.

Article 55 (Acquisition of Underlying Claim)

Whether or not the holder of a bill of exchange or promissory note acquires the claim which caused the issuance of such instrument shall be governed by the law of the place of issuance of such instrument.

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3) Act on a bill of exchange, promissory note or check is a generic term referring to various acts which encompasses issuance, endorsement, acceptance and aval, etc. effected in relation to a bill of exchange, promissory note or check. [Translator's Note]



Article 56 (Partial Acceptance and Partial Payment)

- (1) Whether or not the acceptance of a bill of exchange may be restricted to a part of the sum payable, and whether or not the holder is obligated to accept the partial payment shall be governed by the law of the place of payment.
- (2) The provisions of paragraph (1) shall apply *mutatis mutandis* to the payment under a promissory note.

Article 57 (Form of Act for Exercise and Preservation of Rights)

The form of, and the limits of time for, protest, as well as the form of other measures necessary for the exercise or preservation of the rights concerning a bill of exchange, promissory note, or check shall be governed by the law of the place in which the protest must be drawn up or the measures in question are to be taken.

Article 58 (Loss or Theft)

The measures to be taken in case of loss or theft of a bill of exchange, promissory note or check shall be governed by the law of the place of payment.

Article 59 (Law of Place of Payment)

The matters regarding a check as under any of the following shall be governed by the law of the place of payment of the check:

1. whether a check must necessarily be payable at sight, or it can be drawn payable at a fixed period after sight, and also what the effects are of the post-dating of a check;
2. the limit of time for presentment of a check;
3. whether a check can be accepted, guaranteed, confirmed or visaed, and what the effects are of such acceptance, guarantee, confirmation or visa;
4. whether the holder of a check may demand, and whether he shall be bound to accept, partial payment;
5. whether a check can be crossed and what the effects are of such crossing or of the words "payable in account" or any equivalent expression written on a check. In case where a check in respect of which payment in cash has been forbidden by the issuer or holder by writing on the instrument the expression "payable in account" or an equivalent expression has been drawn in a foreign country and is to be paid in The Republic of Korea, it shall have the effect of

- a generally crossed check;
6. whether the holder of a check has special rights to the cover and what the nature is of these rights;
  7. whether the issuer may revoke the mandate for payment of a check or take measures to stop its payment; and
  8. whether a protest or any equivalent declaration is necessary in order to preserve the right of recourse against the endorsers, issuer or any other parties liable under the instrument.

## CHAPTER IX MARITIME COMMERCE

### Article 60 (Maritime Commerce)

The following matters relating to maritime commerce shall be governed by the law of the country of registration of ship:

1. the ownership, mortgage, maritime lien and other real rights (rights *in rem*) in a ship;
2. the priority order of the security interests in a ship;
3. the scope of a shipowner's liability for acts of the shipmaster and crew;
4. whether the shipowner, charterer, 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 a shipmaster.

### Article 61 (Collision of Ships)

- (1) The liability resulting from a collision of ships at an open port, on a river or territorial sea shall be governed by the law of the place of collision.
- (2) The liability resulting from a collision of ships on the high sea shall be governed by the law of the country of registration if each of the ships has the same country of registration; it shall be governed by the law of the country of registration of the ship that has injured if each of the ships has a different country of registration.

Article 62 (Salvage)

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 on a territorial sea; it shall be governed by the law of the country of registration of the ship that has effected the salvage when the salvage was effected on the high sea.

ADDENDA

- (1) (Effective Date) This Act shall enter into force on July 1, 2001.
- (2) (Scope of Application of Governing Law in Terms of Timing) The matters which have occurred before the entry into force of this Act shall be governed by the old Act (*Seboesabeop*). However, the legal relationship which was formed before the entry into force of this Act but continues even after the entry into force of this Act shall be governed by this Act but only with respect to the part of the legal relationship which is in effect from the entry into force of this Act onwards.
- (3) (Transitional Measures on the International Jurisdiction to Adjudicate) Provisions on the international jurisdiction to adjudicate under this Act shall not apply to cases which are pending before courts on the date as of which this Act takes effect.
- (4) (Amendment of other Act) The Arbitration Act shall be amended as follows:  
“*Seboesabeop*” in Article 29, Paragraph 1 shall be amended to “*Gukjesabeop*.”