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Extraterritorial Application Clause in the Korean Capital Markets Law and Its Implications to the Choice-of-Law Rules for Prospectus Liability: Focusing on the Comparison with the Extraterritorial Application of Administrative Regulation and Criminal Punishment*

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Abstract

Prospectus liability stipulated in Article 125 of Korea's Financial Investment Services and Capital Markets Act ("KCMA") is one of the regulatory provisions for securing the effectiveness of disclosure regulation regarding securities offerings. However, it is uncertain which law should govern cases in which the issuer is a foreign company and/or the securities are offered to the public in a foreign capital market and whether Article 125 of the KCMA should be applied to these cases. Article 2 of the KCMA is an extraterritorial application clause based on the effects principle, but the clause cannot be applied uniformly to administrative regulation, criminal punishment, and civil liability. Administrative regulation provisions take the territoriality principle as a starting point and expand the scope of extraterritorial application through the effects principle, and criminal punishment provisions take both the territoriality principle and the nationality principle and delimit the scope of extraterritorial application through the effects principle. With respect to Article 125 of the KCMA, the effects principle does not function significantly, since the law applicable to prospectus liability should be determined in accordance with the rules of private international law. If the place of occurrence of the tortious event incurring pure economic loss is determined unitarily as the place where the market is located, and the term "an effect on Korea" in Article 2 of the KCMA is interpreted reasonably,

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the effects principle only has the meaning of confirming the results of designating the applicable law according to the rules of private international law. As such, the supplementary function of Article 2 of the KCMA as a special choice-of-law rule is rather restrictive.

KEYWORDS: capital markets law, extraterritorial application, prospectus liability, choice-of-law rules, civil liability, administrative regulation, criminal punishment

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I. Introduction

Extraterritorial application refers to the application of domestic law to an act conducted in a foreign country, due to the regulatory need as a result of internationalization of the domestic market, despite the general principle that domestic law is applied on the basis of the territoriality principle (*sokjijuui* in Korean) or the nationality principle (*soginjuui* in Korean).[1] In the legal system of the Republic of Korea (hereinafter, "Korea"), a clause explicitly mentioning extraterritorial application of Korean domestic law is stipulated in Korea's Financial Investment Services and Capital Markets Act (hereinafter, "KCMA"), which, since February 4, 2009, has provided in its Article 2 that "the Act shall apply to any act conducted in a foreign country as well if such act has an effect on Korea." The predecessor was Article 2-2 of Korea's Monopoly Regulation and Fair Trade Act (hereinafter, "KFTA")[2] and similar clauses have been introduced increasingly in the

1) JUNG SOO KIM, JABONSIJANGBEOB WOLLON [FUNDAMENTALS OF CAPITAL MARKETS LAW] 48 (2nd ed. 2014); JEHO BYUN ET AL., JABONSIJANGBEOB [CAPITAL MARKETS LAW] 38-39 (2nd ed. 2015); YOUNG KIE LEE, JABONSIJANGBEOP HAESEOL [COMMENTARY ON CAPITAL MARKETS LAW] 29 (3rd ed. 2016). Currently, there is no internationally accepted general principle regarding extraterritorial application, so each country's courts have no choice but to deal with it in accordance with its own capital markets law. However, when each country exercises its state jurisdiction, it is inevitable to be bound by the limits set up by international law, and the problem is the delimitation of those limits. KOREA SECURITIES LAW ASSOCIATION, JABONSIJANGBEOP JUSEOKSEO [COMMENTARY ON CAPITAL MARKETS LAW], Vol. 1, 6-7 (2nd ed. 2015).

2) Since April 1, 2005, Article 2-2 of the KFTA has provided that "the Act shall apply to

Korean legal system.[3] It is commonly said that these extraterritorial application clauses are based on the effects doctrine established by precedents of the federal courts of the United States (hereinafter, "U.S.").[4] With respect to the extraterritorial application of the anti-fraud provisions of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated by the U.S. Securities and Exchange Commission, the U.S. Federal Courts of Appeals have established an "effects" approach,[5] a "territorial" approach,[6] and a "balancing" approach.[7] [8] However, the Morrison decision of the U.S. Supreme Court adopted a "transactional" approach on the basis of 'presumption against extraterritoriality' of the anti-fraud provisions,[9] and the decision has made a significant influence on

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any act conducted in a foreign country as well if such act affects the Korean market." This clause is equivalent to Article 3 of the current KFTA entering into effect on December 30, 2022. Article 3 of the current KFTA mentions the Korean market explicitly, whereas Article 2 of the KCMA does not.

3) For example, Article 6(2) of Korea's Act on the Report and Use of Specified Financial Transactions Information provides that "the Act shall apply to any financial transaction of virtual asset service providers conducted in a foreign country as well if such transaction has an effect on Korea." In addition, Article 2-2 of Korea's Telecommunication Business Act and Article 5-2 of Korea's Act on the Promotion of Utilization of Information and Communications Network and the Protection of Data provide respectively that "the Act shall apply to any act conducted in a foreign country as well if such act affects the Korean market or the users in Korea." It is noteworthy that these two Acts mention not only "the Korean Market" but "the users in Korea."

4) Kon Sik Kim & Sun Seop Jung, Jabonsijangbeob [Capital Markets Law] 832 (3rd ed. 2013); Korean Securities Law Association, *supra* note 1, at 8; Kwang Hyun Suk & Sun Seop Jung, *Gukjejabonsijangbeobui seoronjeok gochal [An Introductory Study on the International Capital Market Regulations]*, 11 Korean J. Sec. L. 27, 35 (2010).

5) For example, David H. Schoenbaum v. Bradshaw D. Firstbrook, 405 F.2d 200 (2d Cir. 1968); Mak v. Wocom Commodities, Ltd., 112 F.3d 287 (7th Cir. 1997).

6) For example, Leasco Data Processing Equipment Corporation et al. v. Maxwell et al., 468 F.2d 1326 (2d Cir. 1972); Bersch v. Drexel Firestone, Inc., 519 F.2d 974 (2d Cir. 1975).

7) For example, Itoba Limited v. LEP Group PLC, 545 F.3d 118 (2d Cir. 1995).

8) For each approach's theoretical foundations in private international law, *see* William Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 Harv. Int. L. J. 101, 121-143 (1998).

9) Morrison v. National Australia Bank, 561 U.S. 247, 130 S. Ct. 2869 (2010). The U.S. Supreme Court ruled on the basis of the presumption against extraterritoriality that the extraterritorial application of the anti-fraud provisions is allowed only to (i) the sale of securities listed on the U.S. stock exchange and (ii) the sale of securities, not listed on the U.S. stock exchange, in the U.S. territory.

the extraterritorial application of the Securities Act of 1933 as well.[10] In the U.S. so far, civil liability for a violation of the Securities Act of 1933 or the Securities Exchange Act of 1934 has been treated as a matter of extraterritorial application of those statutes. As influenced by the U.S., some capital markets law professionals in Korea have not considered it a matter of private international law. However, the author intends to argue that civil liability for a violation of the KCMA with foreign element(s) is a matter of private international law that must presuppose the determination of applicable law.

When securities are offered to the public, a prospectus drawn up by the issuer should be distributed mainly by underwriters to investors in order for them to know the potential investment risks. Each country has its own capital markets law regulating a prospectus by stipulating provisions for administrative regulation, criminal punishment, and civil liability to enforce a prospectus with accurate information to be drawn up and distributed so that investors are provided with accurate information on the issuer and the securities in question. However, there are cases in which the issuer is a foreign company and/or the securities are offered to the public in a foreign capital market; it is not certain which law should govern those cases and whether the prospectus liability provision of Article 125 of the KCMA should be applied to those cases.

This article deals with prospectus liability, one of the representative types of capital market torts, as a subject matter, and aims to discuss how the extraterritorial application clause of Article 2 of the KCMA does not perform an independent role in the context of civil liability arising from cross-border capital market torts, differently from the contexts of

10) The U.S. Supreme Court declared that the presumption against extraterritoriality applies to the extraterritorial application of a disclosure obligation stipulated in Article 5 of the Securities Act of 1933. *Id.* 130 S. Ct. at 2885: "the same focus on domestic transactions is evident in the Securities Act of 1933, enacted by the same Congress as the Exchange Act, and forming part of the same comprehensive regulation of securities trading." In the U.S., disclosure obligations and prospectus liability in cross-border securities offerings are regulated by Articles 5, 11 and 12 of the Securities Act of 1933, subject to exceptions in Regulation S. For specific cases regarding the extraterritorial application of the Securities Act of 1933, *see* George III Conway, *Morrison at Four: A Survey of Its Impact on Securities Litigation*, *in* Federal Cases from Foreign Places: How the Supreme Court Has Limited Foreign Disputes from Flooding U.S. Courts 11-12 (2014).

administrative regulation and criminal punishment. To reach the above conclusion, this article argues that the effects principle (*hyogwajuui* in Korean) stipulated in Article 2 of the KCMA does not perform the same uniform function with respect to administrative regulation, criminal punishment, and civil liability. The scope of application of these three is determined, respectively, on the basis of different fundamental principles, and the effects principle works differently. In principle, administrative regulation takes the territoriality principle and becomes applied extraterritorially by the effects principle, and criminal punishment takes both the territoriality principle and the nationality principle but restricts the scope of extraterritorial application by the effects principle. On the contrary, in determining the law governing cross-border capital market torts, Article 2 of the KCMA is not considered a special choice-of-law rule to the general choice-of-law rules for torts in Articles 52 and 53 of Korea's Private International Law Act of 2022 (hereinafter, "KPILA"). As will be discussed later, the law applicable to prospectus liability should be determined by an interpretation of Articles 52 and 53 of the KPILA in a way specific to prospectus liability deriving from capital market torts that incur pure economic loss. Thus, by interpreting the ordinary conflicts rule, the place where the capital market tort occurs is determined unitarily as the place where the market is located. As such, Article 2 of the KCMA could not perform an independent role in the context of civil liability. Even if the place where the investor is located or a similar place is considered a connecting factor, contrary to the author's argumentation, Article 2 of the KCMA only performs a supplementary function in a limited manner.

II. Is Article 2 of the KCMA a Special Conflicts Rule?

Prospectus liability is civil liability resulting from a violation of an obligation to prepare, issue, and deliver a prospectus without misrepresentation in accordance with Articles 123 and 124 of the KCMA, which impose a number of obligations with an administrative law character. The law applicable to prospectus liability becomes an issue if the prospectus prepared, issued, and/or delivered for a cross-border securities offering contains a false statement. Even though a public offering is

targeted at a foreign capital market, the issuer, either a Korean company or a foreign company, should file a report for a public offering with Korea's Financial Services Commission (hereinafter, "KFSC") if it is likely to be resold to 50 or more Korean investors within a year from the date of issuance. In that case, Korean investors claim damages against the issuer, the underwriter(s), and so on, regardless of whether they are domestic or foreign, in accordance with the prospectus liability provision of Article 125 of the KCMA.[11)]

The problem is the legal basis on which the KCMA is applied in the above case with foreign element(s). Two different perspectives on this problem are as follows.[12)] The first possible perspective is that in order to

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11) In Article 125 of the KCMA titled "civil liability for damage caused by false statements, etc.," its paragraph 1 provides as follows: "Each of the following persons shall be liable for damage sustained by any purchaser of securities due to a false statement or representation of any material fact in a securities report (including a corrective securities report and accompanying documents; hereafter the same shall apply in this Article) and an prospectus (including a preliminary prospectus and a short-form prospectus; hereafter the same shall apply in this Article) or an omission of a material fact therefrom: Provided, that such person shall not be liable if he or she proves that he or she was unable to discover such false statement or representation or omission although he or she exercised due diligence or that the purchaser of the securities was aware of the fact as at the time he or she made an offer to purchase them: (a) the registrant of that securities report and a director of the issuer as at the time of filing the registration (referring to a person in a similar position if no director exists, or a promoter if the securities report was filed prior to the incorporation of the corporation); (b) a person referred to in any subparagraphs of Article 401-2(1) of the Commercial Code, who instructed or executed the preparation of that securities report; (c) a person specified by the Presidential Decree, including a certified public accountant, a certified appraiser or a credit rating specialist (including an organization with which each of them is affiliated), who certified that the descriptions of that securities report or the accompanying documents were true and accurate by affixing his or her signature thereto; (d) a person who consented to include his or her statement of appraisal, analysis, or verification in the descriptions of the securities report or the accompanying documents and confirmed the contents as described therein; (e) an underwriter or intermediary of the securities (referring to a person specified by the Presidential Decree, if two or more underwriters or intermediaries exist); (f) a person who prepared or delivered the prospectus; or (g) the seller as at the time the securities report for sale was filed, if the case involved a sale of securities.

12) *See* Kwang Hyun Suk, *Gukjegeumyunggwa gukjesabeop [International Finance and Private International Law]*, *in* Gukjegeumyungbeobui hyeonsanggwa gwaje [Phenomenon and Problems of International Financial Law], Vol. 1, 66-68 (Kwang Hyun Suk & Sun Seop Jung ed., 2009); Kwang Hyun Suk & Sun Seop Jung, *supra* note 4, at 51-53; Kon Sik Kim & Sun Seop Jung, *supra* note 4, at 837-838.

apply Article 125 of the KCMA to an act conducted in a foreign country, applicable law should be determined according to the rules of private international law, and Article 125 of the KCMA applies only when Korean law is designated as the law governing the prospectus liability in question. Since prospectus liability has a private law character, unlike administrative sanctions or criminal punishment for non-submission, non-use, non-delivery, or misrepresentation of a prospectus, it is also subject to private international law, and the applicability of Article 125 of the KCMA should be determined according to the rules of private international law. There is no special provision on prospectus liability in the KPILA, but since prospectus liability is characterized as a tort,[13] Articles 52 and 53 could be applied.

The second possible perspective is that it is necessary to determine whether an act resulting in prospectus liability satisfies the requirements for extraterritorial application stipulated in Article 2 of the KCMA and other related provisions in both the KCMA and KFSC's regulations. This says that Article 125 of the KCMA applies directly to an act satisfying those requirements, along with the provisions for administrative regulation and/or criminal punishment. In the KCMA, a violation of administrative regulation is a preliminary question for civil liability, so the KCMA would be the law applicable to civil liability accordingly, if administrative regulation under the KCMA is applied extraterritorially. Since the KCMA independently determines the governing law in accordance with the requirements stipulated in the KCMA itself, the process of characterization as a prerequisite for applying the rules of private international law does not become a problem, and private international law has nothing to do with the determination of the applicable law. If it is considered that Article 2 of the

13) Kwang Hyun Suk & Sun Seop Jung, *supra* note 4, at 58-59; Kwang Hyun Suk, *Dongsisangjang gita jabonsijang gukjehwae ttareun gukjesabeop munjeui seoronjeok gochal [An Introductory Review of Various Private International Law Issues arising from Internationalization of the Korean Capital Market including Cross-Listing]*, *in* Gukjesabeopgwa gukjesosong [Private International Law and International Litigation], Vol. 6, 366-368 (2019); Jong Hyeok Lee, Gukjejabonsijangbeopsiron: Gukjejeok jeunggwongongmobalhaengeseo tujaseolmyeongseochaegimui jungeobeop [A Preliminary Study on International Capital Markets Law: Applicable Law of Prospectus Liability in Cross-border Securities Offerings] 77-80 (2021).

KCMA and other provisions for the requirements of extraterritorial application of respective disclosure obligations play a role as special conflicts rules, the legal effects according to the ordinary conflicts rules under the KPILA, for example, the victim's right to choose the applicable law in the case of multi-state tort,[14] cannot be invoked.[15]

The author supports the first perspective, which does not consider Article 2 of the KCMA a special choice-of-law rule. Rather, the law applicable to prospectus liability should be determined by the general choice-of-law rules for torts under the KPILA. The rationale is as follows.[16]

First, even within a single statute, the scope of application of each individual provision should be determined in consideration of its respective purpose, so the applicability of civil liability provisions, such as Article 125 of the KCMA, separately from other provisions in the KCMA, should be determined through the rules of private international law. It cannot be denied that civil liability provisions are closely related to administrative regulation provisions and criminal punishment provisions, and these three kinds of provisions fulfill the function of securing the effectiveness of disclosure regulation by way of a uniform, integral, and multi-level application. However, in the case with foreign element(s), it is not always necessary for those three types of provisions to follow the same principle to achieve the regulatory objectives intended by the KCMA. Above all, there is a big difference among the three in the role and function of the effects principle as a basis for justifying extraterritorial applications. As it will be described later, the scope of extraterritorial application of administrative regulation provisions is based on the territoriality principle but 'extended' by the effects principle, and the scope of extraterritorial application of criminal punishment provisions is based on both the territoriality principle and the nationality principle but 'limited' by the effects principle. Since the scope of extraterritorial application of civil liability provisions is a matter of determining the law governing the legal relationship with a private law nature, the rules of private international law should be applied. If prospectus liability is governed by the law of the place

14) *See* Daebeobwon [S. Ct.], May 24, 2012, 2009Da22549 and 2009Da68620 (S. Kor.).

15) Jong Hyeok Lee, *supra* note 13, at 84.

16) For details, *see* Jong Hyeok Lee, *supra* note 13, at 83-87.

where the market is located, the purpose of the effects principle could also be incarnated at the level of private international law.

Second, since the second perspective does not secure the legal effects deriving from the conflicts rules for torts under the KPILA, the victim of a capital market tort is not allowed to choose the law that is advantageous to him or her in the situation of a cross-border securities offering. For example, disclosure regulation for a securities offering under the KCMA and under a foreign country's capital markets law might overlap if a prospectus contains a misrepresentation and the place of a public offering is a foreign country, and the applicability of civil liability provisions of both legal systems could become a problem.[17] If an act conducted in a foreign country has a direct effect on Korea or its result extends to Korea, then Korea could correspond to the place where the result emerged, and the foreign country to the place where the conduct occurred, in the sense of the place where the tortious event occurred under Article 52(1) of the KPILA.

Third, Article 2 and other provisions of the KCMA regarding the requirements for extraterritorial application do not conform to the detailed choice-of-law rules of the KPILA, and are incompatible with the methodology for the designation of governing law through characterization and connecting factors. In addition, contrary to the effects principle of Article 2 of the KCMA as the general requirement for extraterritorial application, the requirements stipulated both in the KCMA and subordinate statutes, such as the KFSC's Regulation on the Issuance and Disclosure of Securities (hereinafter, "KSDR"), are too complicated to function as multilateral conflicts rules.

III. Different Functions of Article 2 of the KCMA on the Regulatory Tripod

According to Article 2 of the KCMA, the KCMA applies even if an act conducted abroad has an effect on Korea. The problem is the meaning of the term "effect" in Article 2 of the KCMA, which generally refers to (i) the

17) Kwang Hyun Suk & Sun Seop Jung, *supra* note 4, at 53.

case of affecting the reliability, stability, and fairness of domestic capital markets and (ii) the case of affecting the protection of domestic investors.[18] The meaning of case (i) might be derived from the Supreme Court of Korea's recent precedents regarding the extraterritorial application clause of Article 2-2, equivalent to current Article 3, of the KFTA,[19] which states that Korea has executive jurisdiction if an act conducted in a foreign country has 'a direct, substantial and reasonably predictable effect' on Korea. Case (i) is considered to mean the case that has a direct, substantial, and predictable effect on the domestic market. However, regarding case (ii), there is no restriction in the text of Article 2 of the KCMA; thus, there is room to consider that if even one domestic investor acquires the securities by any means, it falls under Article 2 of the KCMA.[20] However, it is necessary to find the choice-of-law rules through a reasonable interpretation of Article 2 of the KCMA, such as a restrictive interpretation similar to case (i) or a teleological reduction through the targeted activity requirements.[21]

The KCMA's regulatory means, such as administrative regulation, criminal punishment, and civil liability, differ in legal character and legal effects, so each means of the regulatory tripod should establish its own normative structure by itself to create a balanced legal system regulating cross-border capital market torts.[22] However, since the KCMA is essentially an administrative regulatory law, the provisions on criminal punishment and civil liability in the KCMA are part of the mechanism to achieve the goal of administrative regulation. In that not only administrative sanctions but also criminal punishment and civil liability derive from a violation of administrative regulation, a violation of administrative regulation is a

18) Kon Sik Kim & Sun Seop Jung, *supra* note 4, at 833.

19) Daebeobwon [S. Ct.], May 16, 2014, 2012Du13269, 2012Du13655, and 2012Du13689 (S. Kor.); Daebeobwon [S. Ct.], Dec. 24, 2014, 2012Du6216 (S. Kor.).

20) Kwang Hyun Suk, *supra* note 13, at 348.

21) Jong Hyeok Lee, *supra* note 13, at 224. The targeted-at criterion was adopted in Article 27 of Korea's Private International Law of 2001 regarding international adjudicatory jurisdiction and applicable law of consumer contracts. The same is also stipulated in Articles 42 and 47 of the current KPILA. For details, *see* Kwang Hyun Suk, Gukjesabeop haeseol [Commentary on Private International Law] 323 *et seq.* (2013).

22) Kwang Hyun Suk, *supra* note 12, at 64.

preliminary question for criminal punishment and civil liability, and both criminal punishment and civil liability perform a function of supplementing administrative regulation.[23] However, in the case of cross-border capital market torts with foreign elements, the question arises as to on which theoretical basis and to what extent each of the administrative regulation provisions, criminal punishment provisions, and civil liability provisions in the KCMA are applied.[24]

For example, all administrative regulation, criminal punishment, and civil liability could be imposed for an issuer's violation of a disclosure obligation. In the past, the criteria for the deemed public offering for a foreign company's securities offering in a foreign country was the same as that of a domestic company's. However, since the KSDR's revision on February 23, 2017, it has been limited to (i) a foreign company with securities listed on the Korea Exchange or (ii) a foreign company whose at least 20% of the shares are held by the Korean residents as of the end of the latest business year. The revision also alleviated the resale restriction requirements for foreign companies.[25] Such revisions have accommodated the criticism that there is a risk that the scope of extraterritorial application of the KCMA and the KSDR could be excessively expanded, as long as a foreign company's public offering has the possibility of resale toward Korean investors, regardless of the number of investors receiving a solicitation for subscription. As the scope of extraterritorial application of administrative regulation has been reduced, it has a spillover effect, decreasing the probability of criminal punishment and civil liability.

As another example, consider the case of a domestic financial investment business entity's violation of the KCMA abroad, which is subject to criminal punishment in principle. Article 3 of Korea's Criminal Code (hereinafter, "KCC") stipulates the applicability of the KCC to a Korean national's criminal offense in a foreign country. Even if Article 8 of the KCC regarding an exception by another statute's special provision and Article 2 of the KCMA could prevent criminal punishment in this case, authorization or registration of the domestic financial investment business

23) Kon Sik Kim & Sun Seop Jung, *supra* note 4, at 838.

24) *See* Jeho Byun et al., *supra* note 1, at 39; Kwang Hyun Suk, *supra* note 13, at 344.

25) For details of Article 2-2-2 of the KSDR, *see infra* note 33.

entity can possibly be revoked pursuant to Article 420(1)(g) of the KCMA on the ground that it has violated the KCMA.

The following discusses more meticulously that there are differences in the fundamental principles governing the extraterritorial application of administrative regulation, criminal punishment, and civil liability, and the effects principle of Article 2 of the KCMA plays a different role in the regulatory tripod.

IV. Administrative Regulation Provisions and the Extraterritorial Application

Most of administrative regulation in the KCMA accompanies administrative sanctions against a violation of that regulation, but not always. In the KCMA, administrative regulation regarding misrepresentation in a prospectus is as follows: (i) The KFSC shall keep a prospectus at a designated place and disclose it through its website, etc. for at least three years;[26] (ii) if necessary to protect investors, the KFSC may order an issuer, a seller, an underwriter, and other related persons regarding the securities to report or submit materials for reference by the KFSC, or have the Governor of Korea's Financial Supervisory Service (hereinafter, "KFSS") inspect books, documents, and other related materials;[27] (iii) if an issuer, a seller, an underwriter, or an intermediary violates the obligation to prepare, submit, use, and deliver a prospectus, the KFSC may publicly announce and order correction after presenting the reason to the violator, and, if necessary, suspend or prohibit any issuance, public offering, sale, or other transactions of the securities;[28] (iv) in the case of non-submission of or misrepresentation in a prospectus, a fine may be imposed on its issuer, seller, underwriter, or intermediary not exceeding 3% of the offering price or sales value (2 billion KRW if it exceeds 2 billion KRW);[29] (v) the KFSC may take measures, such as a request for dismissal,

26) Article 129(ii) of the KCMA.

27) Article 131(1) of the KCMA.

28) Article 132(iv) of the KCMA and Article 138 of the Presidential Decree for the KCMA.

29) Article 429(1)(i), (ii) of the KCMA.

on an executive of a financial investment business entity if there is one of the stipulated reasons related to the prospectus;[30] and (vi) the KFSC may request a financial investment business entity to dismiss its employee, if he or she has one of the stipulated reasons related to the prospectus.[31]

The question is whether the KFSC or the KFSS should impose administrative regulation on a foreign company if it engages in an act conducted in a foreign country that affects the Korean capital markets or Korean investors. This is a matter of international administrative law (*internationales öffentliches Recht* or *internationales Verwaltungsrecht* in German), which determines the scope of each country's domestic administrative law and the scope of the executive jurisdiction of each country's domestic administrative institutions.[32] For the extraterritorial application of administrative regulation in the KCMA, the KFSC or the KFSS should be able to actually supervise a foreign financial institution's business activities toward Korean investors, but due to practical difficulties, exceptions to the extraterritorial application of the KCMA are allowed by excluding certain kinds of securities offerings in a foreign country from the scope of the KCMA's concept of securities offerings[33] or by excluding certain kinds of business activities from the scope of the KCMA's concept of financial investment business.[34]

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30) Articles 422(1)(i) to (vi) and 420(1)(vi) of the KCMA.

31) Articles 422(2)(i) to (vii) and 420(1)(vi) of the KCMA.

32) Ho Chung Lee, Gukjesabeop [Private International Law] 29 (1981).

33) For example, Article 2-2-2(1) of the KSDR provides that a foreign company is also subject to a filing obligation to the KFSC regarding a securities offering, provided that (i) the foreign company conducts a principal act related to the issuance of securities, including a solicitation for subscription and subscription itself, in a foreign country, (ii) the foreign company is listed on the Korea Exchange market or at least 20% of the foreign company's shares are held by the Korean residents as of the end of the latest business year, and (iii) those securities to be publicly offered overseas are possible to be acquired by the Korean residents at the time of issuance or are issued under the conditions that those securities are possible to be acquired by the Korean residents within one year from the date of issuance.

34) *See* Jeho Byun et al., *supra* note 1, at 40-43 (discussing Article 7(4)(e), (e)*bis*, (f), (g) of the Presidential Decree for the KCMA); Seong Koo Cheong, *Gukjejeunggwongeoraewa gwallyeonhan jabonsijangbeobui yeogoejeogyong: Oeguk tujamaemaeeopja mit oeguk tujajunggaeeopjae daehan jinipgyujemunjereul jungsimeuro [Extraterritoriality of the Capital Markets Act in Connection with Cross-border Securities Transactions: Focused on the Entry Regulation on Foreign Brokers and Dealers]*, 25 Korean Forum on International Trade and Business Law 247, 259 *et seq.* (2016)

In a cross-border securities offering, the scope of application of the KCMA's provisions with an administrative law character is determined in a different way from the rules of private international law, which determine the law governing the legal relationship with a private law character.[35] Private international law adopts a method of selecting the most appropriate among the different but equal legal systems, whereas public law, including administrative law and criminal law, does not presuppose multiple legal systems but rather the applicability of each domestic legal system.[36]

Theories to explain the scope of extraterritorial application of the KCMA's provisions for administrative regulation are divided into three categories: territoriality principle, effects principle, and modified effects principle. First, the territoriality principle says that the KCMA applies to the case in which part of the regulated activity is conducted in Korea. This is the basic attitude with respect to the extraterritorial application of administrative regulation. Furthermore, the territoriality principle is divided into (i) the subjective territoriality principle, which means that the country of the location of the regulated activity's 'subject' should exercise jurisdiction to execute, and (ii) the objective territoriality principle, which means that the country of the location of the regulated activity's 'result' should exercise jurisdiction to execute.[37] However, the distinction between the location of an activity and its results is not always clear. Second, the effects principle says that the KCMA applies to the case in which there exists any possibility to infringe any legal interest that the KCMA intends to protect. In light of the Supreme Court of Korea's decisions regarding Article 3 of the KFTA,[38] Korea has executive jurisdiction if an act conducted in a foreign country has 'a direct, substantial and reasonably predictable effect' on Korea. If "effect" in the effects principle is equated with "result" in the objective territoriality principle, the effects principle could be said to be a

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(discussing Article 7(4)(e), (e)*bis*, (f) of the Presidential Decree for the KCMA and the KFSC and the KFSS's guidelines thereto).

35) Kon Sik Kim & Sun Seop Jung, *supra* note 4, at 833.

36) Jong Hyeok Lee, *supra* note 13, at 229.

37) Kwang Hyun Suk, *Keullaudeu keompyutingui gyuje mit gwanhalgwongwa jungeobeop [Regulation of Cloud Computing, and International Adjudicatory Jurisdiction and Applicable Law]*, 7 L. & Tech. 3, 17 (2011).

38) *See supra* note 19.

sub-type of the territoriality principle.[39] Third, the modified effects principle says that starting from the territoriality principle, the scope of extraterritorial application of administrative regulation should be adjusted by the effects principle if it is not sufficient to attain the KCMA's purposes.[40] This seems to be the practical attitude of financial regulators in many countries.

To analyze elaborately, by combining an act's subject or conducting entity, regardless of a natural person or a juristic person, and the country where an act occurs, cross-border financial transactions could be divided into four categories: (i) a Korean entity's transactions in Korea, (ii) a Korean entity's transactions in a foreign country, (iii) a foreign entity's transactions in Korea, and (iv) a foreign entity's transactions in a foreign country. It should be noted that neither the territoriality principle, the effects principle, nor the modified effects principle apply uniformly to all administrative regulation provisions under the KCMA, and it is necessary to examine which principle could be applied to each specific case. With respect to each category, some examples and the rationale for the extraterritorial application of the KCMA are as follows.[41]

First, in the case of a Korean entity's transactions in Korea, the KCMA is applied by the subjective territoriality principle. It does not matter whether the counterpart of the Korean entity is a foreign resident. To determine whether it falls under the public offering of securities, a foreign resident who has been solicited to acquire securities in Korea is included in the number of counterparties solicited to acquire the securities. In addition, an obligation to submit a securities report for public offerings and an obligation to prepare, submit, and deliver a prospectus are imposed on both Korean and foreign companies when the securities in question are publicly offered in Korea. If the KCMA's administrative regulation is not applied to a foreign company and Korean investors are not provided with sufficient information, they cannot make informed investment decisions regarding the foreign company.

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39) Jong Hyeok Lee, *supra* note 13, at 230.

40) *See* Han Key Lee, Gukjebeopgangui [Lectures on Public International Law] 299 (4th ed. 1997).

41) For details, *see* Jong Hyeok Lee, *supra* note 13, at 231-232.

Second, in the case of a Korean entity's transactions in a foreign country, especially when a Korean entity initiates an act in Korea and its result occurs in a foreign country across the border, the KCMA is applied by the subjective territoriality principle, as long as the Korean entity is deemed to act in Korea. If a Korean securities company solicits foreign residents to acquire securities in a foreign country, it is not subject to the KCMA's regulation, since only Korean residents are subject to the KCMA's policy to protect investors. However, if a Korean securities company in Korea solicits foreign residents temporarily sojourning in Korea to acquire securities, these foreign residents are also subject to the KCMA's same policy. This is justified by the subjective territoriality principle.

Third, in the case of a foreign entity's transactions in Korea, especially when a foreign entity initiates an act in a foreign country and its result occurs in Korea across the border, the KCMA is applied by the objective territoriality principle. For example, when a foreign resident buys and sells the securities issued by either a Korean company or a foreign company listed on the Korea Exchange, the foreign investor is subject to administrative regulation under the KCMA, such as a report of securities held in bulk, a tender offer, a submission of sales report, and a prohibition of insider trading. This is an approach in which the effects principle is tacked on the territoriality principle.

Fourth, in the case of a foreign entity's transactions in a foreign country, more specifically when a foreign entity acts in a foreign country and its result occurs in that or another foreign country, the KCMA is not applicable, in light of the territoriality principle. It does not matter whether the counterpart of the foreign entity is a Korean resident or a foreign resident. For example, when a foreign securities company brokers an order from its customer, a foreign resident, in a foreign country and places the order with a Korean securities company, the foreign securities company is not subject to the KCMA in principle. However, the KCMA could be applied in the exceptional circumstances that are justified from the perspective of the effects principle, such as the situation in which the purpose of evading the KCMA obviously exists.

V. Criminal Punishment Provisions and the Extraterritorial Application

According to Articles 444 and 446 of the KCMA, criminal punishments for the crimes related to a prospectus are as follows: (i) a person who has made a false statement regarding important matters in a prospectus[42] or (ii) a certified public accountant, a certified appraiser, or a credit rating specialist who knows a false statement in a prospectus but certifies that the statement is true and accurate[43] may be sentenced to up to five years in prison or a fine of up to 200 million KRW; and (iii) a person who fails to submit a prospectus to the KFSC,[44] (iv) a person who makes a solicitation, etc. without using a prospectus,[45] (v) a person who acquires or sells securities without issuing a prospectus in advance,[46] or (vi) a person who violates the measures rendered by the KFSC on non-submission, non-use, or non-delivery of a prospectus[47] may be sentenced to up to one year in prison or a fine of up to 30 million KRW.

If a Korean or a foreigner violates the KCMA in a foreign country, especially if fraudulent acts, such as conspiring, preparing, and writing down a prospectus with misrepresentation, are carried out across two or more countries, the problem is whether criminal punishments stipulated in the KCMA could be imposed by Korean courts. This is a matter of conflict of laws regarding cross-border criminal cases or international criminal law (*internationales Strafrecht* in German) that determines which country's criminal law applies to a criminal offender in a criminal case with foreign elements.[48] From the perspective of each country's own criminal law, it is a matter of its geographical sphere of application and its scope of application against a person to be subject to the criminal law.[49]

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42) Article 444(xiii)(c) of the KCMA.

43) Article 444(xiii)(c) of the KCMA.

44) Article 446(xxi) of the KCMA.

45) Article 446(xxiii) of the KCMA.

46) Article 446(xxii) of the KCMA.

47) Article 446(xxiv) of the KCMA.

48) Ho Chung Lee, *supra* note 32, at 6, 8.

Articles 2 and 3 of the KCC stipulate the territoriality principle and the nationality principle, and these principles provide a basis for Korean courts to exercise adjudicatory jurisdiction over criminal cases for violations of the KCMA. With respect to the territoriality principle, it does not matter whether a criminal offender has Korean nationality or foreigner nationality, but it does matter where the crime occurs. The place of crime includes both the place where a criminal offense takes place and the place where the result of a criminal offense arises.[50] As such, Korean courts could exercise adjudicatory jurisdiction over a criminal case on the basis of the territoriality principle, not only when the criminal offense was initiated in Korea and its result emerges in a foreign country, but also when the criminal offense was initiated in a foreign country and its result emerges in Korea. For example, when the preparation, execution, and consequences of a violation of the KCMA occur in two or more countries, and when an unfair securities transaction in a specific securities market affects another due to cross-listing, the territoriality principle could play an important role.[51]

However, unlike provisions for civil liability or administrative regulation, criminal punishment provisions must be strictly interpreted in accordance with the principle of *nullum crimen, nulla poena sine lege*, and this is also the case in the application of the territoriality principle.[52] For example, a simple act of preparation could not be punished according to the territoriality principle, unless it is stipulated as punishable. It is controversial, in connection with the principle of *nullum crimen, nulla poena sine lege*, as to whether some sort of omission, such as a failure to submit a securities report for a public offering, a failure to deliver a prospectus, or a failure to submit a business report, could be punished according to the territoriality principle by way of considering the place where merely an obligation to act exists as the place where a criminal offense takes place.[53]

The problem is the interrelationship between Article 8 of the KCC and

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49) Korean Institute of Judicial Administration, Juseok hyeongbeop: Chongchik [Commentary on Criminal Law: General Rules], Vol. 1, 73 (Jae Yoon Park ed., 2nd ed. 2011).

50) Korean Institute of Judicial Administration, *supra* note 49, at 111.

51) Chang Hyeon Ko, Myoung Jae Chung, & Yon Mi Kim, *Gungnaeoe jeunggwonsijang dongsisangjange gwanhan beopjeok munjejeom [Issues relating to Dual Listing from Korean Law Perspective]*, 3 Korean J. Sec. L. 127, 142 (2002).

52) Kon Sik Kim & Sun Seop Jung, *supra* note 4, at 839.

Article 2 of the KCMA. Article 8 of the KCC provides that Part I of the KCC, that is, the General Rules, applies to the crimes stipulated in other statutes, but an exception is made if there is a special provision among those statutes. Since Article 2 of the KCMA specifically stipulates the extraterritorial application of the KCMA on the basis of the effects principle, the question is how this clause relates to the territoriality principle of Article 2 and the nationality principle of Article 3 of the KCC.[54] If it were not for Article 2 of the KCMA, a violation of the KCMA could have been punishable according to the territoriality principle and the nationality principle, and the delimitation of these principles would have become a problem. Article 8 of the KCC stipulates that an exception is made if there is a special provision among other statutes, but this does not mean that Article 2 of the KCMA totally excludes Articles 2 and 3 of the KCC. By reifying the term "has an effect on Korea" in Article 2 of the KCMA in its interrelationship with the principle of *nullum crimen, nulla poena sine lege*, the term could be used as a criterion to supplement the territoriality principle and the nationality principle or to set their limitations. For example, as long as the Supreme Court of Korea does not abrogate the concept of a joint principal offender of conspiracy (*gongmo gongdong jeongbeom* in Korean) and if the territoriality principle is applied to a joint principal offender of conspiracy case, then even if only conspiracy is organized in Korea, all the relevant persons could become punishable in Korea, but the scope of the application of criminal punishment should be appropriately limited by the effects principle of Article 2 of the KCMA.[55]

Moreover, some countries prevent unrestricted expansion of the nationality principle—for example, Article 7(2) of the German Criminal Code provides that the Code applies to an offense committed abroad only if the act is a criminal offense at the place of its commission, and Article 3 of the Japanese Criminal Code provides only a limited number of crimes to be punished for an offense committed abroad by a Japanese national. However, the KCC does not impose any limitations on the nationality principle. Therefore, in the case where a Korean national violates the

53) Jong Hyeok Lee, *supra* note 13, at 236.

54) Kon Sik Kim & Sun Seop Jung, *supra* note 4, at 839.

55) Jong Hyeok Lee, *supra* note 13, at 236-237.

KCMA in a foreign country, it is necessary to properly limit the scope of the application of criminal punishment by specifically examining the necessity of imposing criminal punishment on the basis of the effects principle. Recently, the Seoul High Court ruled that even if a Korean national's act in a foreign country violates Korean law, but if it is permitted by laws or social norms at the place of its commission, and does not infringe on the legal interests that Korean law intends to protect, so that it has nothing to do with national security, maintenance of order, or public welfare in Korea,[56] the illegality of the act would be denied by applying Article 20 of the KCC by analogy,[57] and the Supreme Court of Korea also recognized this ruling.[58] In the context of the extraterritorial application of criminal punishment provisions of the KCMA, the legal interests to be protected by disclosure regulation under the KCMA are fairness, reliability, efficiency, and protection of investors in Korean capital markets, which are part of the social legal interests to be protected by Korean law. However, an act in a foreign country would be punished as a criminal offense only when it is necessary to prohibit it for the sake of national security, maintenance of order, or public welfare in Korea. This means that there should be justifiable purposes for restricting fundamental human rights, and it is especially necessary to materialize the concepts of maintenance of order and public welfare, which could have multiple and comprehensive meanings in the context of the KCMA. As such, it should be interpreted in connection with the Korean Constitution's Chapter 9, titled the "economy" and especially Article 125 therein, which stipulates the promotion of foreign trade and its regulation and coordination. Since the regulation and coordination of foreign trade would be aimed at forming an economic order (passive nature) and must be allowed only within the limitation of guaranteeing the free economic activity of the people (supplementary nature),[59] such constitutional doctrine could be invoked as criteria for the interpretation of Article 2 of the KCMA.[60]

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56) *See* Daehanminkuk Hunbeob [Hunbeob] [Constitution] Art. 37(2) (S. Kor.).

57) Seoul Godeungbeobwon [Seoul High Ct.], June 14, 2018, 2017No2802 (S. Kor.).

58) Daebeobwon [S. Ct.], Aug. 30, 2018, 2018Do10042 (S. Kor.).

59) Heonbeop juseok: Beobwon, gyeongjejilseo deung [Commentary on Constitutional Law: Courts, Economic Order, etc.] 1614 (Korean Constitutional Law Association ed., 2018).

Table 1. Applicability of the KCC and Function of Article 2 of the KCMA[61]

No.	Issuer's Nationality	Market's Location	Investor's Location	Type of the Scope of Application of the KCC	Possibility of Punishment and Function of Extraterritorial Application Provision
1	Korean	Korean	Korean	Territoriality Principle (Art. 2)	Punishable, Irrespective of Extraterritorial Application
2	Korean	Korean	Foreign		
3	Korean	Foreign	Korean	Nationality Principle (Art. 3)	Punishable, Illegality Deniable
4	Korean	Foreign	Foreign		
5	Foreign	Korean	Korean	Territoriality Principle (Art. 2)	Punishable, Irrespective of Extraterritorial Application
6	Foreign	Korean	Foreign		
7	Foreign	Foreign	Korean	Foreigner's Crime at Foreign Country (Art. 6)	Punishable, Possibly Limiting Art. 6[62]
8	Foreign	Foreign	Foreign		Unpunishable, Confirming No Effects on Korea

VI. Supplementary Function of the Extraterritorial Application Clause for the Determination of Law Applicable to Prospectus Liability

1. Choice-of-law Rules for Prospectus Liability

The law applicable to prospectus liability should be determined in accordance with the choice-of-law rules for torts. Articles 52 and 53 of the KPILA stipulate, one after another, the choice-of-law rules for torts in general. Article 52(1) provides that a tort shall be governed by the law of the place where the tortious event occurred. This is based on the principle of *lex loci delicti commissi*, that is, the law of the place where the tort was

60) Jong Hyeok Lee, *supra* note 13, at 237-239.

61) This is a summary of the author's argumentation in Part V.

62) Article 6 of the KCC provides that "this Act shall apply to a foreign national who commits crimes, other than those specified in Article 5, against Korea or its nationals outside the territory of Korea, unless such act does not constitute a criminal offence, or the prosecution thereof or the execution of the punishment therefor is remitted, at the place of its commission."

committed, and it is interpreted that the place where the tortious event occurred includes both the place where the conduct occurred (*Handlungsort* in German) and the place where the result emerged (*Erfolgsort* in German).[63] Article 52(1) explicitly mentions both the place where the conduct occurred and the place where the result emerged. In cases where the former and the latter are located in different countries, the Supreme Court of Korea ruled that the victim is allowed to choose the law that is advantageous to him or her as the law governing the tort.[64] Notwithstanding Article 52(1), if the tortfeasor and the victim had their habitual residences in the same country at the time the tort was committed, the tort shall be governed by the law of that country (Article 52(2), principle of the location of common habitual residence). Notwithstanding Article 52(1), (2), if the legal relationship had existed between the tortfeasor and the victim was violated by the tort, the tort shall be governed by the law applicable to the legal relationship (Article 52(3), principle of accessory or secondary connection). Notwithstanding Article 52, the parties may agree that the tort shall be subject to Korean law after the tort has occurred (Article 53, principle of party autonomy).

In the case of prospectus liability, the questions are (i) whether it is necessary and possible for the determination of the law applicable to torts resulting in pure economic loss, such as the loss derived from prospectus liability, to specify the place where the result emerged; (ii) whether the place where the conduct occurred could take precedence over the place where the result emerged, or only the place where the conduct occurred could be considered as the place where the tortious event occurred; and (iii) most importantly, whether Articles 52(2), (3) and 53 which, in principle, take precedence over Article 52(1) could be avoided by the general exception clause of Article 21(1). Article 21(1) stipulates that if the applicable law designated by the KPILA has only a slight relevance to the relevant legal relationship, and the law of another country most closely related to the legal relationship clearly exists, the law of that other country

63) Daebeobwon [S. Ct.], March 22, 1983, 82Daka1533 (S. Kor.); Daebeobwon [S. Ct.], Jan. 28, 1994, 93Da18167 (S. Kor.); Daebeobwon [S. Ct.], April 24, 2008, 2005Da75071 (S. Kor.); Daebeobwon [S. Ct.], July 12, 2013, 2006Da17539 (S. Kor.).

64) Daebeobwon [S. Ct.], May 24, 2012, 2009Da22549 and 2009Da68620 (S. Kor.).

shall govern. In the following, taking into account a particular context of prospectus liability, the author discusses the above-mentioned provisions in the order to which they are applied practically rather than the order in which they are stipulated in the KPILA.

Should party autonomy be allowed to determine the law governing prospectus liability? In spite of Article 53, this should be interpreted in terms of a teleological inhibition or reduction, in which investors are not allowed to agree on the applicable law of prospectus liability *ex post facto* with an issuer, an underwriter, or an intermediary[65] This is to achieve the purposes of regulation regarding a prospectus, including prospectus liability, which are the protection of investors and the maintenance of capital markets order.[66]

Should a direct contractual relationship between an investor and a potential person responsible for prospectus liability be treated specially? Even if Article 52(3) indicates the application of the law governing the pre-existing legal relationship, this provision should not be invoked for determining the law applicable to prospectus liability for the following reasons. Any investor alleging misrepresentation in a prospectus is entitled to claim prospectus liability to a certain range of juristic persons or natural persons, regardless of whether they have a direct contractual relationship with an investor. Thus, if the applicable law is designated rigidly according to the principle of accessory connection under Article 52(3), it is of concern that the governing law would be determined differently depending on whether a pre-existing contractual relationship exists between an investor and a potential person responsible for prospectus liability. However,

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65) *See* Jan von Hein, *Die Internationale Prospekthaftung im Lichte der Rom II-Verordnung [International Prospectus Liability in Light of the Rome II Regulation]*, *in* Perspektiven des Wirtschaftsrechts: Deutsches, europäisches und internationales Handels-, Gesellschafts- und Kapitalmarktrecht — Beiträge für Klaus J. Hopt aus Anlass seiner Emeritierung [Perspectives on Business Law: German, European and International Commercial, Company and Capital Markets Law — Articles for Klaus J. Hopt on the Occasion of His Retirement] 394-395 (Harald Baum et al. ed., 2008); Björn Steinrötter, *Der notorische Problemfall der grenzüberschreitenden Prospekthaftung [The Notorious Problem of Cross-border Prospectus Liability]*, 2015 Recht der internationalen Wirtschaft (RIW) [International Business Law] 407, 412; European Commentaries on Private International Law: Rome II Regulation Art. 14, para. 13 (Ulrich Magnus & Peter Mankowski ed., 2019).

66) Jong Hyeok Lee, *supra* note 13, at 103.

regarding the public offering of securities, it is difficult to affirm that an investor and each of its numerous parties in a securities offering establish a direct legal relationship. It varies depending on the specific circumstances of an individual transaction, such as the structure of a transaction and the market practices of the place of public offering or issuance of securities.[67] In the case where an investor claims prospectus liability against a party with a direct contractual relationship, as far as prospectus liability is characterized as tort, complicated problems may arise if the principle of accessory connection is applied. Those problems are, for example, whether misrepresentation in a prospectus and the pre-existing contract are internally interrelated, whether misrepresentation made before the investor's acquisition of the securities could be regarded as infringing the contractual relationship between the investor and the alleged party, and how to determine the law governing the contract if it was not agreed upon.[68]

Should the fact that an investor and a potential person responsible for prospectus liability habitually reside in the same country at the time relevant to prospectus liability be treated seriously? Despite Article 52(2), the law of the country where the tortfeasor and the victim had common habitual residence should not be applied as the law governing prospectus liability. The reason is that there are numerous (at least 50)[69] investors who might be claimants, and further, those investors might have been located in two or more countries, and an issuer, an underwriter, and an intermediary who bear joint liabilities for prospectus liability could also have been established and/or located in two or more countries. In this case, it would not be equitable if the law of common habitual residence would be applied on the grounds that the plaintiff and the defendant incidentally had their habitual residence in the same country, and, except in the above case, if the law of the place where the tortious event occurred would be applied on the basis that the plaintiff and the defendant were habitually resident in the different countries. It could be reasonably said that investors who have

67) *Id.* at 64-66.

68) *Id.* at 66-67, 197-198.

69) Article 9(7), (9) of the KCMA requires at least 50 investors for a public offering of securities.

participated in a specific capital market should be compensated for their economic loss by the same means.[70]

Overall, it is important to interpret Article 52(1) in a fair and equitable way. If misrepresentation in a prospectus is characterized as a tort, the subsequent question is where to identify the two connecting points in typical torts, that is, the place where the conduct occurred and the place where the result emerged, especially in the case of pure economic loss, such as prospectus liability. More subsequently, the problems are as follows: (i) whether the notion of the place where the result emerged could exist; (ii) whether it is possible to use the place where the market is located (*Marktort* in German) as a connecting point; (iii) what the concept of the place where the market is located means specifically; (iv) whether the place where the market is located corresponds to the place where the conduct occurred or the place where the result emerged; and (v) whether the place where the market is located should be subjected to the law of the most closely related country through the general exception clause of Article 21(1). Taking into account a special situation of the tort resulting in pure economic loss, it is hard to hypothetically localize the place where the result emerged among the location of the relevant investor's bank account, the location of his or her habitual residence, the location of his or her center of financial interests, and so on.[71] Only the place where the conduct occurred should be considered in this case, and the place where the market is located should be regarded as the place where the conduct occurred. Even if it were not so, at least the place where the conduct occurred should take precedence over the place where the result emerged. In essence, the location of the market refers to both (i) the place where a securities offering is obliged to be reported and (ii) the place where the securities are offered to the public. As for situation (i), this might be the place where an act should have been made to fulfill the obligation to report a securities offering according to the KCMA, but there was an omission or fault resulting in the obligation not being faithfully fulfilled. With respect to situation (ii), this might be the place where the relevant act, such as a solicitation for subscription, took place.[72] In addition,

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70) Jong Hyeok Lee, *supra* note 13, at 112.

71) *See* Jong Hyeok Lee, *supra* note 13, at 127 *et seq.*

72) As previously mentioned, the U.S. Supreme Court's Morrison decision of 2010

it is reasonable to uniformly apply the law of the place where the market is located, even in scattered tort cases in which the places of conduct span a number of countries, including the location of the market.

Therefore, in determining the law governing prospectus liability, Articles 52(2), (3), and 53 need to be bypassed to avoid a limping conclusion, depending on who the defendant is, and to reduce the meaning of the place where the tort was committed to the place where the conduct occurred, which refers to the place where the market is located in the case of prospectus liability. Such a restrictive interpretation is justified by a teleological reduction and the general exception clause of Article 21(1) of the KPILA, which decides both the law to be applied as the law of the most closely related country and how to reach this decision, and declares, despite respective choice-of-law rules in the KPILA, that the law of the most closely related country should be applied ultimately.[73)]

2. Supplementary Function of the Extraterritorial Application Clause

Torts in capital markets cause pure economic loss, and if they happen across the border, as previously described, the place where the market is located should be identified as the place where the tortious event occurred based on the monism deduced from the principles of private international law that only the place where the conduct occurred exists in the situation of pure economic loss. In this situation, Article 2 of the KCMA does not perform an independent role in determining the law governing civil liability. However, contrary to the author's argumentation, if the choice-of-

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introduced the "transactional" test which seems to regard the place of the location of market as the place where the conduct occurred. This might be understood as a choice-of-law rule for capital market torts in general.

73) It is controversial whether the principle of accessory connection of Article 52(3) could be avoided by Article 21(1). To reach the conclusion mentioned above, the author understands that for the purpose of accomplishing the objectives of prospectus liability, that is, the maintenance of capital markets order and the protection of investors, it is possible that Article 21(1) makes Article 52(3) be bypassed in light of the underlying principle of Article 21(1). *Accord* In Ho Kim, *Jongsokjeok yeongyeore uihan bulbeopaengwiui jungeobeop [The Law Applicable to Infringement by a Tortious Act of a Party of the Legal Relation between the Parties]*, 392 Ingwongwa jeongui [Human Rights and Justice] 90, 98 (2009). *Contra* Kwang Hyun Suk, *supra* note 21, at 399.

law rule for torts under Article 52(1) of the KPILA is rigidly implemented by considering the place where the result emerged as the place of the relevant investor's habitual residence or center of financial interests, there is room to look at Article 2 of the KCMA as a special conflicts rule; but even in that situation, it only performs a restrictive supplementary function as follows.

Types of securities offerings with foreign element(s) are classified into eight categories using three factors: (i) whether the issuer is a Korean company or a foreign company, (ii) whether the market to which the securities are offered is a Korean capital market or a foreign capital market, and (iii) whether the investor is a Korean resident or a foreign resident. As previously discussed, when localizing the place where the tortious event occurred under Article 52(1) of the KPILA, only the factor (ii) above should be considered as the place where the conduct occurred, but even if considering rather the factor (iii) above as the place where the result emerged, there is no significant difference in the role of Article 2 of the KCMA.

If factors (ii) and (iii) above are considered, the applicability of Article 2 of the KCMA is shown in Table 2. First, it should be noted that the indication of "No" in the cases of Type 1, Type 2, Type 5, and Type 6 means that the KCMA does not apply extraterritorially, since Article 2 of the KCMA applies only to "an act conducted in a foreign country." In these cases, the KCMA is applied according to the territoriality principle. Type 2,

Table 2. Applicability of the KCMA and Function of its Article 2

Type No.	Issuer's Nationality	Market's Location	Investor's Location	Effects on Korea (Korean Capital Markets and/or Korean Investors)
1	Korean	Korean	Korean	No (territoriality)
2	Korean	*Korean*	Foreign	No (territoriality)
3	Korean	Foreign	*Korean*	Yes
4	Korean	Foreign	Foreign	No
5	Foreign	*Korean*	Korean	No (territoriality)
6	Foreign	*Korean*	Foreign	No (territoriality)
7	Foreign	Foreign	*Korean*	Yes
8	Foreign	Foreign	Foreign	No (foreign-cubed)[74]

Type 5, and Type 6 are cases with foreign element(s), whereas Type 1 is a purely domestic case.

Even if the territoriality principle is not an independent choice-of-law rule, it could be explained that the indication of "No" in the cases of Type 2, Type 5, and Type 6 confirms that the place where the conduct occurred means only the place where the conduct occurred in the situation of pure economic loss, if the place where the conduct occurred amounts to the place where the market is located, which is both the place where an obligation to report a securities offering exists and the place where the securities are offered to the public.

In the cases of Type 3, Type 4, Type 7, and Type 8, if the same premise regarding the place where the conduct occurred is unitarily the place where the market is located, Korean law cannot be designated as the law applicable to prospectus liability due to the condition that the market is located in a foreign country. However, the indication of "Yes" in the cases of Type 3 and Type 7 shows that if the term "an effect on Korea" in Article 2 of the KCMA means either (i) an effect on Korean capital markets or (ii) an effect on Korean investors, and if a cross-border securities offering falls under either, the KCMA is considered to apply extraterritorially. As indicated "Yes" in the cases of Type 3 and Type 7, and to that extent, Article 2 of the KCMA might have its own supplementary function as an independent conflicts rule.

As shown in Table 3, in the cases of Type 4 and Type 8, the conclusion according to the restrictively interpreted choice-of-law rules in the KPILA and the conclusion according to the extraterritorial application clause of the KCMA are the same, so the latter only has the meaning of confirming the former.

When a domestic or foreign company offers securities in a foreign country, there is a question as to how large domestic investors should acquire or have the possibility to acquire the securities in order to recognize the effects on domestic investors. It is obvious that if resale restriction

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74) Type 8 is the so-called 'foreign-cubed' case where a foreign company publicly offers securities in a foreign capital market and foreign investors make investment thereto. The KCMA does not apply to the case of Type 8, unless there is any special circumstance, such as an immediate resale to Korean investors. *See supra* note 33.

Table 3. Interrelations between Article 52(1) of the KPILA and Article 2 of the KCMA

Type No.	Issuer's Nationality	Market's Location	Investor's Location	Applicability of Korean Law by Unitary Place of Tort (Place of Market)	Applicability of Korean Law by Extraterritorial Application Clause
3	Korean	*Foreign*	*Korean*	No	*Yes*
4	Korean	*Foreign*	Foreign	No	No
7	Foreign	*Foreign*	*Korean*	No	*Yes*
8	Foreign	*Foreign*	Foreign	No	No

measures have been taken according to Article 2-2-2 of the KSDR, the KCMA does not apply.[75] Even if resale restriction measures have not been taken, at least 50 Korean persons who are equivalent to public offerings under the KCMA should acquire or be likely to acquire the securities. The effects on Korean investors cannot be immediately recognized simply because there are 49 or fewer Korean persons who acquire or are likely to acquire the securities. If that is the case, even in the cases of Type 3 and Type 7, a supplementary function regarding the extraterritorial application clause as a special conflicts rule is also quite limited.

VII. Conclusion

Prospectus liability is one of the regulatory means that the KCMA stipulates to secure the effectiveness of administrative regulation. Article 2 of the KCMA is an extraterritorial application clause based on the effects principle, but the clause cannot be applied uniformly to administrative regulation, criminal punishment, and civil liability. Article 2 of the KCMA might be applied to these three, but each determines the scope of application on the basis of different fundamental principles, and the effects

75) *See supra* note 33.

principle plays different roles for each of the three. Administrative regulation provisions take the territoriality principle as a starting point and expand the scope of extraterritorial application through the effects principle, and criminal punishment provisions take both the territoriality principle and the nationality principle and delimit the scope of extraterritorial application through the effects principle. On the contrary, the extraterritorial application of civil liability provisions is a matter of determining the law governing the legal relationship with the nature of private law, and the rules of private international law should be applied before examining the requirements for extraterritorial application. With respect to the KCMA's Article 125 stipulating prospectus liability, one of the provisions for civil liability, the effects principle does not function significantly, since the law applicable to prospectus liability should be determined in accordance with the rules of private international law. If the place where the tortious event occurred resulting in pure economic loss is determined unitarily as the place where the market is located and the term "an effect on Korea" in Article 2 of the KCMA is interpreted reasonably, the effects principle only has the meaning of confirming the results of designating the applicable law according to the rules of private international law. As such, the supplementary function of Article 2 of the KCMA as a special choice-of-law rule is rather restrictive.