

# Some Observations on the Chinese Private International Law Act: Korean Law Perspective

Kwang Hyun SUK<sup>1</sup>

## I. Introduction

The Law on the Application of Laws to Foreign-Related Civil Matters ("CPILA") of the People's Republic of China ("China" or "PRC") was promulgated by the Standing Committee of the National People's Congress ("NPC") on October 28, 2010 and became effective on April 1, 2011.<sup>2</sup> This legislation is important to foreign parties who may engage in cross-border transactions or encounter disputes with China and this paper seeks to explore the impact of this legislation from a Korean<sup>3</sup> perspective. Following the ongoing internationalization of Chinese society subsequent to China's adoption of market reform, open-door policy and the expansion of China's trading relationships, which was further enhanced by China's accession to the World Trade Organization in 2001, the importance of private international law, which purports to resolve the conflicts of various legal systems by offering the rules on international adjudicatory jurisdiction ("international jurisdiction") and governing law for legal relationships involving foreign elements and the rules on the recognition and enforcement of foreign judgments, should not be underestimated. Codification of private international law rules is the most reliable way to ensure legal certainty and predictability in resolving disputes involving foreign elements of civil or commercial nature among various parties. It follows that certainty and predictability are core values of the rule of law.

As of October 27, 2010,<sup>4</sup> China had not promulgated a private international law act, and accordingly private international law rules were scattered across various different laws. Chapter Eight of the General Principles of Civil Law (GPCL. 民法通则), adopted in 1986 and taking effect on January 1, 1987, is currently regarded as the most important and primary source of law (法源) pertaining to private international law in China; the "Application of Laws to Civil Matters Involving Foreign Elements". However, Chapter Eight consists of only 9 articles dealing with contractual obligations, torts and succession, etc.<sup>5</sup>

Against the foregoing background, in 2008 the Legislative Affairs Committee of NPC's Standing Committee ("Legislative Affairs Committee") entrusted the Chinese Society of Private International Law to prepare a draft of the "Law on Application of Laws to Civil Matters involving Foreign Elements" which was expected to serve as a blueprint for the NPC's enactment of the first private international law act of China. The Chinese Society of Private International Law<sup>6</sup> proposed in April 2010, the first draft bill of the private international law act ("PIL Society Draft").<sup>7</sup> Based upon the PIL Society Draft, the Legislative Affairs Committee has prepared the second deliberation draft bill of the private international law act (二次审议稿)("Draft")<sup>8</sup>

<sup>1</sup> Prof. Dr. Kwang Hyun SUK (石光琨) School of Law, Seoul National University. This paper is based upon a presentation made by Prof. Dr. Kwang Hyun Suk on November 20, 2010 at the international conference organized by the Chinese Academy of Social Sciences (CASS), Institute of International Law. An informal English translation of the Chinese Private International Law Act prepared by Professor. LU Song, China Foreign Affairs University is now available at <http://conflictoflaws.net/>. The English translation in this paper is my own and is not necessarily same as that of Professor Lu.

<sup>2</sup> In this paper the terms 'private international law' and 'conflict of laws' are used interchangeably.

<sup>3</sup> Korea in this paper refers to the Republic of Korea, namely South Korea.

<sup>4</sup> As to the prior status of the Chinese private international law rules and the recent Chinese codification efforts on private international law, see *Huo Zhengxin*, China's Codification of Conflicts Law: Latest Efforts, in *Seoul Law Journal* Volume LI, No. 3 (September 2010), p. 279 et seq.

<sup>5</sup> In addition, several laws such as the Maritime Act of 1993, the Civil Aviation Act of 1996 and the Contract Law of 1999, which have been recently promulgated contain private international law rules applicable to the relevant issues under the respective law.

<sup>6</sup> A drafting group consisting of Chinese scholars and experts with Professor HUANG Jin as chairman has prepared the draft.

<sup>7</sup> I understand that the "Model Law of Private International Law of the People's Republic of China" prepared by the Chinese Society of Private International Law in 2000 served as a blueprint for the PIL Society Draft. The Model Law consisted of 166 articles and contained provisions on international jurisdiction, applicable law and judicial assistance. For more details of the above model law see *Chinese Society of Private International Law*, Model Law of Private International Law of the People's Republic of China, Yearbook of Private International Law, Volume 3 (2001), p. 349 et seq.

<sup>8</sup> The Draft is available at the site [http://www.npc.gov.cn/huiyi/cwh/1116/2010-08/28/content\\_1593162.htm](http://www.npc.gov.cn/huiyi/cwh/1116/2010-08/28/content_1593162.htm).

and submitted it to the NPC in August 2010. The Legislative Affairs Committee also prepared and submitted to the NPC a short report briefly commenting on the provisions of the Draft ("Committee Report"). Entitled as "Draft of Act on Application of Laws to Civil Matters Involving Foreign Element of the PRC", the Draft has 54 articles consisting of 8 chapters. Finally on October 28, 2010 the Standing Committee of the NPC passed a bill of the CPILA.<sup>9</sup> The CPILA has 52 articles consisting of the following eight chapters: Chapter 1 on "General Provisions", Chapter 2 on "Civil Subjects", Chapter 3 on "Marriage and Family", Chapter 4 on "Succession", Chapter 5 on "Real Rights (Rights *in rem*. 物权)", Chapter 6 on "Claims ( 债权)", Chapter 7 on "Intellectual Property Rights", and Chapter 8 on "Supplementary Provisions".<sup>10</sup> There are some differences between the Draft and the CPILA.<sup>11</sup>

As an expert who participated in 1999 and 2000 in the working group and the expert committee for the amendment of the Korean Private International Law Act ("KPILA") which has taken effect as of 1st July 2001, I would like to provide preliminary comments on the CPILA from the Korean law perspective.

## II. China's Codification of its Private International Law Rules and the Implications for Korea

There are several reasons why China's efforts to codify its first private international law rules have roused interest.

First, at present China is the largest trading partner of Korea. In addition, according to recent statistics presented by the Korea Immigration Service under the Ministry of Justice, as of March 31, 2010, the number of foreigners residing in Korea amounts to 1,180,598 and 563,479 (about 48%) are Chinese. Moreover, according to recent statistics presented by The Statistics Korea, a central organization for statistics under the Ministry of Strategy and Finance, around one in nine couples (approximately 10.8%) who celebrated their marriage in Korea in 2009 are parties to an international mar-

riage. Instances where one spouse is a Chinese national was reported to account for approximately 46.9% in 2008.

Secondly, Article 9 of the KPILA expressly permits *renvoi* to Korean substantive law.<sup>12</sup> Therefore, if Chinese law is designated as the governing law by the KPILA, Korean judges need to verify whether the private international law rules of China including the CPILA refer the legal issue in question back to Korean law, in which case Korean judges should apply Korean law instead of Chinese law. Succession is a good example of *renvoi*, where a Chinese person with his habitual residence in Korea passes away leaving his immovable property located in Korea.<sup>13</sup>

Thirdly, the codification of Chinese laws pertaining to foreigners will naturally raise interest amongst Korean nationals out of neighbourly curiosity. The timing of the Chinese codification is also significant. The new KPILA has become effective as of July 1, 2001, whereas the "Act on General Rules for Application of Laws" of Japan ("JPILA") has become effective as of January 1, 2007. The first decade of the third millennium will be remembered as the most important period for the codification of private international law rules of Northeast Asia, even if the effective date of the CPILA is in 2011.

Fourthly, since the recent modernization or codification efforts are finished in all the three Northeast Asian countries, it provides the Chinese, Japanese and Korean experts stronger motivation to embark upon deeper comparative analyses of the private international law rules of the three countries. An ambitious goal of such comparative analyses could be to prepare uniform or harmonized private international law rules in the region.<sup>14</sup> It would be desirable for the experts in the region if they could succeed in finding rules that could promote values shared in the region. These efforts

<sup>9</sup> The CPILA is available at the site [http://www.npc.gov.cn/huiyi/cwh/1117/2010-10/28/content\\_1602779.htm](http://www.npc.gov.cn/huiyi/cwh/1117/2010-10/28/content_1602779.htm).

<sup>10</sup> The PIL Society Draft had 78 articles consisting of the following 10 chapters: Chapter One on "General Provisions" (Articles 1-18); Chapter Two on "Civil Subjects" (Articles 19-28); Chapter Three on "Marriage and Family" (Articles 29-35); Chapter Four on "Succession" (Articles 36-41); Chapter Five on "Real Rights" (Articles 42-49); Chapter Six on "Intellectual Property Rights" (Articles 50-51); Chapter Seven on "Contracts" (Articles 52-60); Chapter Eight on "Torts" (Articles 61-70); Chapter Nine on "Other Civil Relationships" (Articles 71-76); and Chapter Ten on "Supplementary Provisions" (Articles 77-78).

<sup>11</sup> In fact immediately after I had completed my paper commenting on the Draft, the Standing Committee of the NPC passed the CPILA upon making several changes to the Draft. Therefore I had to revise my paper quickly to reflect those changes.

<sup>12</sup> Article 9 provides that if a foreign law is designated as the governing law under the KPILA and the law of such country provides that Korean law shall apply, Korean law (other than the rules of law determining the governing law) shall be applicable. Moreover, as discussed in more detail herein below, the Supreme Court of Korea has expressly permitted the hidden *renvoi*. For more details of KPILA see Kwang-Hyun SUK, The New Conflict of Laws Act of the Republic of Korea, Yearbook of Private International Law, Volume 5 (2003), p. 99 et seq.

<sup>13</sup> As explained in more detail below (IV.8.), Article 33 of the Draft reflecting the current Chinese private international law rules adopts the principle of scission by treating succession of movable property and immovable property differently.

<sup>14</sup> Recently I have found an article of Professor Weidong ZHU at Xiangtan University in China, where he stresses the necessity of unification of private international law rules in East Asia and suggests that experts in the region prepare a model law in particular areas of private international law. As an example he suggests a model law of the choice of law of contract. For more details, see Weidong ZHU, Unifying Private International Law in East Asia: Necessity, Possibility and Approach, Asian Women Law, Volume 13 (2010), p. 211 et seq. The article does not mention the CPILA.

should be exerted by the three countries in parallel with their respective efforts to accede to the various conventions adopted at the Hague Conference on Private International Law.

Fifthly, Koreans could learn some lessons from the Chinese codification efforts.

### III. Overall Comments on the CPILA

#### 1. Choice of Law Rules only and Lack of Rules on International Jurisdiction

Out of the three pillars of private international law, the CPILA sets forth choice of law rules only for various legal relationships involving foreign elements and excludes rules on international jurisdiction and rules on recognition and enforcement of foreign judgments. In this regard, the CPILA is similar to the JPILA and the Private International Law of the Federal Republic of Germany contained in the *Einführungsgesetz zum Bürgerlichen Gesetzbuch* (EGBGB) and is different from the KPILA, which also deals with international jurisdiction. Given the close relationship between the international jurisdiction and the applicable law, I believe that it would be more appropriate for the CPILA to deal with both issues together. I understand that the position of the CPILA is against the general expectation of the most Chinese private international law experts.<sup>15</sup>

#### 2. Introduction of the Concept of Internationally Mandatory Rules (Article 4)

Article 4 of the CPILA expressly provides that in case there are provisions of Chinese law, which are mandatorily applicable to civil relationships involving a foreign element, those mandatory provisions shall be applied directly. It is anticipated that “the PRC law which are mandatorily applicable to civil relationships involving a foreign element” refers to the ‘internationally mandatory rules’ (or ‘overriding mandatory provisions’ in the parlance of the Rome II<sup>16</sup>) rather than the domestically mandatory rules of Chinese law. Article 4 appears to be similar to Article 7 of the KPILA which provides under the heading of “Mandatory Application of Korean Law” that provisions of mandatory law of Korea, which in view of their legislative purpose must be applied irrespective of the governing law, shall be applied even if a foreign law is designated as the governing law under the KPILA. It is considered that the text of Article 7 of the KPILA, which has been modeled after

Article 7(2) of the “Convention on the Law Applicable to Contractual Obligations” of the European Community of 1980 (“Rome Convention”) and Article 18 of the *Bundesgesetz über das Internationale Privatrecht* of Switzerland (“SIPRG”), is clearer than Article 4 of the CPILA.

#### 3. Expansion of the Principle of Party Autonomy

It is noteworthy that the CPILA introduces the principle of party autonomy not only in the context of contract but also in the context of international family law in respect of the matrimonial property regime (Article 24) and divorce by agreement (Article 26). In addition, the CPILA extends the principle of party autonomy to the real rights in movable property (Article 37), the creation or change of the real rights in movable property in transit (Article 38), tort (Article 44), unjust enrichment and *negotiorum gestio* (Article 47). The CPILA allows broader party autonomy for unjust enrichment and *negotiorum gestio* than tort in that in the case of the former, the parties are allowed to choose the governing law even before the occurrence of unjust enrichment and *negotiorum gestio*, while in the case of tort the parties are allowed to choose the governing law only after the tort has occurred (Article 47).

It is also noteworthy that the scope of party autonomy permitted for the tort liability resulting from infringement of intellectual property right is not exactly the same as that allowed for tort liability in general. More specifically, in the former case (the tort liability resulting from the infringement of intellectual property right) the parties are allowed to choose only the law of the forum (Article 50), while in the latter case the parties may choose any law (Article 44). It is not apparent why these cases are treated differently.

Expansion of the principle of party autonomy is generally welcomed in that it promotes legal certainty and predictability, provided that the scope is not overly expanded.

#### 4. Introduction of Flexible Connecting Factors

The CPILA introduces flexible connecting factors in various provisions. For example the CPILA introduces (i) alternative connecting factors for legal persons (Article 14(2)), the trust (absent the parties’ choice)(Article 17), the process of marriage (Article 22), the termination of adoption (Article 28), the form and effect of a will (Articles 32 and 33), negotiable instruments (Article 39) and contract (absent the parties’ choice)(Article 41) and (ii) subsidiary or cascade connecting factors in respect of the conditions of marriage (Article 21), the personal relationship between spouses (Article 23), the mat-

<sup>15</sup> Huo Zhengxin, supra note 4, p. 285.

<sup>16</sup> Rome II refers to the Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations.

rimonial property regime (absent the parties' choice)(Article 24), personal relationship between spouses (Article 25) and the divorce by agreement (Article 26). In addition, several provisions which introduce alternative connecting factors combine them with the principle of more favorable law, for example, for personal relationship between spouses (Article 25), maintenance (Article 29) and guardianship (Article 30).

These connecting factors aim at realizing the justice of private international law by ensuring greater and more refined flexibility tailored for individual cases. Having said that, there is a price for these connecting factors. Namely, they would in practice inevitably increase the legal uncertainty and unpredictability. In addition, in the case of alternative connecting factors which are not combined with the principle of more favorable law, there are no guiding principles by which the Chinese courts can select the correct governing law out of the various alternative connecting factors. This is more so where one of the alternative connecting factors is the closest connection principle. For example, Article 39 provides that negotiable instruments shall be governed by either the law of the place where any right relating to negotiable instruments is exercised or the law, which is most closely connected with negotiable instruments. The relationship between the two connecting factors is difficult to understand. Assuming that the place where the right is exercised points to the law of country X, while the law of country Y has the closest connection with the negotiable instrument, should the Chinese courts apply the law of country Y or could they still apply the law of country X instead? A similar question arises in the context of the law applicable to contracts since Article 41 introduces the closest connection principle as an alternative connecting factor for the determination of an objective governing law of contracts.

On the other hand, where the CPILA combines the alternative connecting factors with the principle of more favorable law, the Chinese courts have only to apply the more favorable law. In such cases, the Chinese courts have to conduct comparative analyses of two or more laws in order to determine the applicable law, which would be very burdensome for the Chinese courts, thereby practically discouraging them from applying the CPILA. In addition, comparative analyses always entail the difficult task of evaluation. For example, it would be very onerous for the courts to decide which law is more favorable, where the law of country A is more favorable to party X in certain aspects, while the law of country B is more favorable to party Y in other aspects.

In short, the CPILA's introduction of flexible connecting factors under certain circumstances is very much welcomed. However, it should be observed that some guiding principles for the Chinese courts should also be given by the CPILA, so that they are able to make the correct determination.

## 5. Consideration of the Values of Substantive Law

The traditional private international law rules of the 19th century of the European continent designated applicable laws solely on the basis of their geographical and spatial connection with the case or legal issue at hand, without taking into account the contents of the substantive law to be applied. However, the CPILA introduces some special connecting factors intended to protect the interests of consumers and employees generally regarded as socio-economically weaker parties. By taking account of whether the substantive laws are favorable for the particular party, the CPILA elevates the protection of the interests of the weaker parties to the level of private international law, which is to be welcomed. For example, as a means of protecting the interests of consumers, the party autonomy is limited (Article 42). As for the employment contracts, the party autonomy is totally excluded (Article 43), which is very much stricter than the KPILA (Article 28) and even the SIPRG (Article 121).

## 6. Total Exclusion of Renvoi (Article 9)

From the Korean law perspective, it is noteworthy that unlike Article 9 of the KPILA, which has substantially expanded the scope of *renvoi* (remission) to Korean law, Article 9 of the CPILA excludes the *renvoi* in its entirety.<sup>17</sup> Article 9 appears to be consistent with the existing judicial interpretation of the Supreme People's Court, i.e., Article 178(2) of the "Opinions on Application of the General Principle of Civil Law".<sup>18</sup> However, given the practical value of *renvoi*, the Chinese legislators may consider permitting the direct *renvoi* to Chinese law, which will definitively alleviate the burden of the Chinese judges to be caused by the application of foreign law. Article 9 of the KPILA permits *renvoi* under certain circumstances. The Chinese judges who will be required to apply foreign law under the CPILA might be pleased to be

<sup>17</sup> On the contrary, Article 8 of the PIL Society Draft allows *renvoi* for matters relating to personal status of a natural person and matters relating to family and succession.

<sup>18</sup> Paragraph 2 provides that "upon handling the cases involving foreign elements, the People's Court shall determine the applicable substantive law according to the regulations of Chapter VIII of the GPCL." *Huo Zhengxin*, supra note 4, p. 291.

able to apply Chinese law based upon the doctrine of *renvoi* in certain limited cases.

## 7. Habitual Residence as a Principal Connecting Factor for Personal Status, Family Law and Succession Law Matters

In contrast to the KPILA, which retains the principle of national law in matters of personal status, family law and succession law, the CPILA adopts the principle of habitual residence in those matters. While introducing habitual residence as a new connecting factor for several legal issues, the KPILA gives 'nationality' priority over 'habitual residence'.<sup>19</sup> Although the KPILA does not define the term habitual residence, it is generally understood as referring to the place where a person has his 'center of life' and thus similar to the concept of domicile which Article 18(1) of the Civil Code of Korea defines as the 'center of a person's life', without requiring the existence of the subjective element, i.e., *animus manendi*.

In this regard, the two questions described below arise.

First, the question relates to the definition of habitual residence under the CPILA. I understand that Article 9(1) of the "Opinions of the Supreme People's Court on Several Issues concerning the Implementation of the General Principles of the Civil Law of the PRC" (For Trial Implementation)<sup>20</sup> which has taken effect as of April 2, 1988 defines the habitual residence as described below.

*The place where a citizen lives for over one year consecutively after leaving the domicile is the habitual residence, excluding the case when the citizen lives in the hospital for medical treatment. Before a citizen moves to another place after moving out of the place where his residence is registered and has no habitual residence, the place where his residence is registered shall still be the domicile.*<sup>21</sup>

Given the elevated importance of habitual residence under the CPILA it is not certain whether the above definition, which relies solely on the specific length of residence without considering the relevant person's intention, could be generally justified under the CPILA.

Secondly, in many cases 'habitual residence' has priority over 'nationality' as a connecting factor under the CPILA, which is quite the opposite of the KPILA (for example, Articles 21 on marriage, Article 23 on personal relationship between spouses of the CPILA). However, in some cases the habitual residence has the same priority as nationality.<sup>22,23</sup> In this regard the CPILA appears to be inconsistent.

## 8. Localization of Legal Relationship

Several provisions of the CPILA presuppose that certain legal relationships could be localized. Proviso of Article 16(1) provides that the civil relationship between the principal and the agent shall be governed by the law of *the place where the agency relationship is established*. Similarly, Article 17 provides that in the absence of the parties' choice of law applicable to trust, the law of the place where the trust assets are situated or *the place where the trust relationship is established* shall apply. However, I do not really know how the localization of such a relationship could be effected. For example, if the principal is located in China and the agent is located in Korea and the civil relationship between them has been established by a contract which has been entered into by exchange of emails, is the civil relationship established in China, Korea, or China and Korea? It would be preferable if the CPILA did not try to localize the legal relationships, since this could be a source of dispute.

## 9. Closest Connection Principle

### a) Declaration of the Closest Connection Principle

Article 2 of the CPILA, which corresponds to Article 3(2) of the Draft provides as follows:

*In case there is no regulation on law applicable to civil relationships involving foreign elements in this law or other laws, the law that has the closest connection with the civil relationship shall be applicable.*

This provision expressly declares that the 'closest connection principle' is the paramount connecting principles underlying all the choice of

<sup>19</sup> For example, Article 37 of the KPILA with the heading of General Effects of Marriage provides that the general effects of a marriage shall be governed by the law designated in the following order: 1. the national law of the spouses if they have the same national law, 2. the law of the habitual residence of the spouses if they have the same law of the habitual residence; and 3. the law of the place with which the spouses are most closely connected.

<sup>20</sup> 最高人民法院关于贯彻执行《中华人民共和国民法通则》若干问题的意见。

<sup>21</sup> 公民离开住所地最后连续居住一年以上的地方,为经常居住地。但住医院治疗的除外。公民由其户籍所在地迁出后至迁入另一地之前,无经常居住地的,仍以其原户籍所在地为住所。

<sup>22</sup> Under Article 30 of the CPILA guardianship shall be governed by the law of the habitual residence or the national law of any of the parties, whichever is more favorable to protect the rights and interests of the ward.

<sup>23</sup> Under the Draft in yet other cases nationality rather than habitual residence was used as a connecting factor. Article 30 on adoption of the Draft which provided as follows was a good example:

"The conditions for and the procedure of adoption shall be governed concurrently by the national law of both the adopter and the adoptee. The effect of the adoption shall be governed by the national law of adopter that is in effect at the time of the adoption. The termination of adoption shall be governed by the national law of the adoptee or the law of the forum that is in effect at the time of the adoption."

The connecting factor under Article 30 of the Draft has been corrected to habitual residence in the CPILA.

law rules applicable to all the civil relationships involving a foreign element.

### b) General Escape Clause (Article 3(1) of the Draft)

Article 3(1) of the Draft read as follows:

*The law applicable to civil relationships involving foreign elements shall have the closest connection with the civil relationship.*

Although it is not quite clear, this provisions appears to operate as a 'general escape clause' that goes one step further than Article 3(2) of the Draft, which declares the closest connection principle. However, this provision has been deleted in the CPILA, which is unfortunate.<sup>24</sup>

## IV. Comments on the Individual Provisions of the CPILA

Further to the general observations regarding the CPILA discussed in the latter sections, the commentary herein below address specific issues that relate directly to the individual provisions of the CPILA.

### 1. *Ordre Public* (Article 5)

Article 5 provides that in case the application of foreign law would damage the social public interest of the PRC, PRC law shall apply. In order to clearly show that Chinese courts could resort to the *ordre*

*public* clause in very exceptional cases only, it would be desirable to add 'manifestly' between the words "would" and "damage".

### 2. Ascertainment of Foreign Law (Article 10)

Article 10 provides that in case the parties have chosen to apply a foreign law, the parties shall ascertain the foreign law; where parties have not made such a choice, the people's court, arbitration institutions or administrative agencies shall ascertain the law.

First, there are difficulties for non-Chinese speakers to understand the meaning of '查明' (chaming) and how it differs from '證明' (zhengming). Literally, 查明 could mean the combination of examination and proof.

Secondly, Article 10 appears to distinguish the cases depending upon whether the parties have chosen the governing law or not. According to Article 10, in case the parties have chosen a foreign applicable law, the court is not required to, and in fact cannot, ascertain the foreign law on its own motion and the burden to ascertain the foreign law is on the parties. Article 10 appears to be consistent with Article 9 of the Rules of the Supreme People's Court on the Relevant Issues concerning the Application of Law in Hearing Foreign-Related Contractual Dispute Cases in Civil and Commercial Matters ("Contract Dispute Rules"), which have become effective as of August 8, 2007.<sup>25</sup> Alternatively, it would be more appropriate to apply the same principles irrespective of whether the parties have chosen the applicable law or not.

Moreover, in the future it would be more sensible to insert choice of law rules for arbitration institutions in the Arbitration Act of China and the rules of the relevant arbitration institutions.

### 3. Personal Law of Legal Person (Article 14)

Article 14(1) adopts the so-called 'incorporation/registration theory' by providing that various matters of legal persons are governed by the law of the place of incorporation/registration. On the other hand, Article 14(2) provides as an alternative connecting factor the so-called 'real seat theory' by stipulating that in case the principal place of business of a legal person is different from its place of registration, the law of its principal place of busi-

<sup>24</sup> My comments on Article 3(1) of the Draft which have been deleted in this paper read as follows:

"All the connecting principles adopted by the KPILA purport to designate as governing law the law that is most closely connected with the legal relationship or legal issues. That is also the case with the Draft. However, there may be situations where the application of the private international law rules of the KPILA fails to achieve this desired result in a concrete case. To implement the 'appropriate connecting principle' by applying the most closely connected law in such situations, the KPILA has adopted a 'general exception clause'. Article 8(1) of the KPILA provides that, if the governing law designated by the KPILA is only slightly connected with the legal relationship concerned, and it is evident that the law of another country is more closely connected with the legal relationship, the law of the other country shall apply. Article 8(1) has been modeled after Article 15 of the SIPRG, which has taken effect in 1989. In this regard, I am very pleased to find a similar provision in the Draft. Article 3(1) of the Draft provides that the law applicable to civil relationships involving foreign elements shall have the closest connection with the civil relationship. However, after a careful reading of the provision, I am not quite sure whether Article 3(1) is also a declaration of the 'closest connection principle' or it purports to serve as a general escape clause like its Korean and Swiss counterparts. If the intention of the drafters is to make it serve as a general escape clause, it would be more sensible to make Article 3(1) clearer. In this sense, Article 6 of the PIL Society Draft which is designed to serve as a general escape clause is more preferable.

In addition, if Article 3(1) of the Draft is so modified, I believe that several exceptions need be added where the 'closest connection principle' should concede for other values, such as the party autonomy and protection of socio-economically weaker parties. For example, Article 8(2) of the KPILA provides that the provisions of paragraph (1) shall not be applicable where the parties have chosen the governing law by agreement. Although it is evident that the introduction of the exception clause would cause greater legal uncertainty, it is a means of achieving the paramount goal of applying the law most closely connected with the case at hand."

<sup>25</sup> Relevant part of Article 9 reads as follows:

"The parties choosing a foreign law to govern a contractual dispute or modifying a choice of law governing a contractual dispute to a foreign law shall provide or prove the relevant content of the foreign law. In determining a law applicable to a contractual dispute based on the principle of most significant relationship, the people's court may ascertain the foreign law on its own motion, or require the parties to provide or prove the content of the foreign law."

ness may apply. Article 14(1) appears to be applicable to cases where the principal place of business of a legal person is same as its place of registration. However, where the principal place of business is identical with place of registration, the distinction between the 'place of registration' and the 'principal place of business' is of no use. Therefore, it is difficult to reconcile the relationship between Articles 14(1) and 14(2). Taken together, Article 14 effectively applies the law of the place of either the 'incorporation/registration' or the 'real seat'. Accordingly, it would be more sensible to combine Articles 14(1) and 14(2) together.

In addition, here the problem of alternative connecting factors mentioned above (III. 5.) arises.

#### 4. Personality Right (Article 15)

Article 15 provides that the particulars of the personality right shall be governed by the law of habitual residence of the rights holder. It remains to be seen whether the family name of a natural person (for example, whether a wife could maintain her original family name even after marriage) falls within the personality right and the scope of application of Article 15.

#### 5. Voluntary or Consensual Agency (Article 16)

According to Article 16, the civil relationship between the principal and the agent shall be governed by the law of the place where the agency relationship is established. However, the meaning of the place where the agency relationship is established is not sufficiently clear. As mentioned above (III. 8.), in fact it is not apparent how such place could be identified. Perhaps, it would be more appropriate to provide that the civil relationship between the principal and the agent (namely, the internal relationship) shall be governed by the law, which is applicable to the legal relationship. In fact this is the position taken by Article 18(1) of the KPILA.

As a matter of structure of the CPILA, the situation of Article 16 (currently in Chapter 2 on Civil Subjects) appears to be a little out of place. It is considered that the position of the KPILA which places a corresponding article on voluntary agency in the chapter on juridical acts (法律行为) is more appropriate. The Article on the formal validity of a juridical act (including a contract) is also placed in the chapter on juridical acts under the KPILA. In this regard, it appears that the CPILA does not contain a separate provision on the law applicable to the formal validity of a juridical act or a contract. In this respect the PIL Society Draft is preferable.<sup>26</sup>

#### 6. Trust (Article 17)

Under Article 17 a party or parties<sup>27</sup> may choose the law applicable to a trust; in the absence of such choice, the law of the place where the trust assets are situated or the place where the trust relationship is established shall apply.

First, as to the objective governing law applicable to the trust in the absence of the parties' choice, the closest connection principle adopted by Article 7 of the "Hague Convention on the Law Applicable to Trusts and on their Recognition", which took effect on January 1, 1992 is preferable to Article 17. Article 17 is too rigid in that it does not allow the courts to apply the most closely connected law after considering the totality of the case in question. In fact Article 59 of the PIL Society Draft followed such a closest connection principle, similar to the Hague Trust Convention.

Secondly, the fact that Article 17 is placed in Chapter 2 on Civil Subject is interesting, while that provision was inserted in Chapter 7 on Contract under the PIL Society Draft. Theoretically, it would be appropriate to make a separate chapter on trust and place it between Chapter 5 on Real Rights (物权) and Chapter 6 on "Claims (债权)". If it is against the practice of Chinese legislation for a chapter to have only one article, other provisions found in the Hague Trust Convention may be added.

#### 7. Parent-Child Relationship (Article 25)

As a matter of logic, it would be more appropriate to place the current Article 25 after the current Articles 26 and 27 and immediately before Article 30 dealing with adoption. Article 25 relates to the parent-child relationship, whereas Articles 27 and 28 dealing with divorce fall within the category of provisions on husband-wife relationship.

#### 8. Divorce by Litigation (Article 27)

Under Article 27, divorce by litigation shall be governed by the law of the forum. This rule is different from the rules of the KPILA. Articles 39 and 37 of the KPILA follow the so-called simplified *Kegel's* ladder by subjecting the divorce firstly to the national law of the spouses if they have same national law, secondly, absent such law, to the law of the habitual residence of the spouses if they have

<sup>26</sup> There was a separate article (Article 26) on the formal validity of a juridical act in the PIL Society Draft, which is similar to Article 17 of the KPILA, which follows the principles of *favor negotii*. Namely, a juridical act or a contract is formally valid, if it satisfies the requirement under the law governing the substance of the juridical act or the law where the juridical act or contract is effected (the so-called principle of *locus regit actum*).

<sup>27</sup> The Chinese text refers to '当事人'. Since the law could be selected by the settlor, I translated it to 'a party or parties'.

same habitual residence, and thirdly, absent such law, the law of the place with which the spouses are most closely connected.

In this regard, it is noteworthy that Article 27 would cause the Korean courts to resort to the doctrine of hidden renvoi. In fact, the judgment of May 26, 2006<sup>28</sup> of the Supreme Court of Korea has expressly acknowledged the doctrine of 'hidden renvoi' under the KPILA.

In the case in question, under the KPILA the law applicable to the issue of divorce would have been the laws of the State of Missouri of the United States being the common national law of the spouses if the Supreme Court had not considered the doctrine of hidden renvoi. However, the Supreme Court held that the law applicable to the case was Korean law by way of the doctrine of hidden renvoi. Article 9(1) of the KPILA provides that if a foreign law is designated as the governing law under the KPILA and the law of such country provides that Korean law shall apply, Korean law (other than the rules of law determining the governing law) shall be applicable. The Supreme Court held that the courts of the State of Missouri would have applied the law of the forum based upon its choice of law rules if this issue was presented before this court. Accordingly, even if there was no express choice of law rules of the State of Missouri which remitted the issue of divorce to Korean law, choice of law rules hidden in the rules of international jurisdiction of the State of Missouri could be viewed as remitting the issue of divorce to Korean law if Korea had international jurisdiction pursuant to the jurisdictional rules of the State of Missouri.

Accordingly, when a divorce case between a Chinese husband and a Chinese wife arises before a Korean court, the Korean court will ultimately apply Korean law to the divorce if Korea had international jurisdiction pursuant to the jurisdictional rules of China, even though Articles 39 and 37 of the KPILA refer the divorce to the common national law of the couple.

### 9. Succession (Article 31)

Article 31 follows the 'principle of scission' treating succession<sup>29</sup> of movable property and succession of immovable property differently. Succession of movable property is governed by the law of the habitual residence of the deceased in effect at the time of his death, while succession of immovable property is governed by the law of the place

where the immovable property is situated. This position is consistent with English law.<sup>30</sup>

Alternatively, Article 49 of the KPILA follows the 'principle of unity' by subjecting the succession to the national law of the deceased, according to which the entire estate of the deceased is subject to one and the same law regardless of whether it comprises immovable or movable property. This is because the national law is considered to be best suited to ensure legal stability and certainty and to protect the interests of the parties concerned. In addition, the KPILA introduces party autonomy to a limited extent, based upon the rationale that succession concerns not only the status of the deceased but also the passage of his property to his family or other persons entitled to succession.

### 10. Law Applicable to Movable Property (Article 37)

The first part of Article 37 of the CPILA is unique in that it allows the principle of party autonomy to the real rights (物权) in movable property. It appears to be similar to Article 104 of the SIPRG. However Article 37 of the CPILA is more liberal than the Swiss counterpart by virtue of the following three aspects.

First, Article 104 of the SIPRG allows party autonomy only for acquisition and loss of real rights in movable property, while the content and exercise of such real rights are governed by the *lex rei sitae* (Article 102(2)).<sup>31</sup> Secondly, under Article 37, any law could be chosen as the governing law while under Article 104 of the SIPRG only the law of departure or destination or the law applicable to the contract underlying the acquisition or loss of such rights could be chosen. Thirdly, Article 104(2) of the SIPRG expressly provides that the law chosen by the parties cannot be set up against third parties, while Article 37 of the CPILA does not know such limitation. In conclusion, the scope of Article 37 is too broad.

In addition, it would be more desirable for the CPILA to contain private international law rules for the real rights in 'means of transportation'.<sup>32</sup> Article 20 of the KPILA provides that real rights concerning aircraft shall be subject to the law of its nationality and real rights concerning rolling stock shall be

<sup>28</sup> Docket No. 2005 Meu 884.

<sup>29</sup> Article 33 referring to 'statutory succession' appears to mean intestate succession. *Huo Zhengxin*, supra note 4, p. 305.

<sup>30</sup> However, the CPILA which refers to the law of the habitual residence of the deceased is different from English law which refers to the law of domicile of the deceased.

<sup>31</sup> This is because many civil law countries stick to the principle of *numerus clausus* of real rights, according to which the type and substance of the real rights are limited to what is provided for under the law.

<sup>32</sup> This is probably because separate laws such as the Maritime Act of 1993 and the Civil Aviation Act of 1996 have private international law rules for the real rights for means of transportation.

subject to the laws of the country approving its traffic service. Article 60 further provides that the ownership, mortgage, maritime lien and other real rights in a ship shall be governed by the law of the country of the ship's registration. In this respect, the PIL Society Draft, which set out separate provisions for the real rights in ship and aircraft in Articles 46 and 47, is preferable.

### 11. Law Applicable to Negotiable Instrument (Article 39)

Article 39 provides that negotiable instruments shall be governed by the law of the place where the rights in negotiable instruments are exercised or the law, which is most closely connected to negotiable instruments.<sup>33</sup> It is not clear whether the "negotiable instrument" refers to the rights embodied by the negotiable instrument or to the negotiable instrument as such in the form of a paper. In addition, I would like to point out that negotiable instruments in bearer form should be treated differently than other negotiable instruments. Acquisition and loss of negotiable instruments in bearer form should be treated like acquisition and loss of movable property. In fact, this is the position taken by Article 23 of the KPILA.

### 12. Law Applicable to Contract (Article 41)

Consistent with the widely recognized private international law rules for contracts, Article 41 of the CPILA adopts the principle of party autonomy.<sup>34</sup> Under Article 41 of the CPILA, in the absence of such choice, (i) the law of the habitual residence of the party who is to effect the performance characteristic of the contract, or (ii) the law which is most closely connected with the contract shall apply.

Article 41 bears resemblance to Article 26 of the KPILA in that both rely on the concept of characteristic performance in determining the objective governing law of a contract. But there are still several differences as described below.

First, in connection with the alternative connecting factor mentioned in (i) above, Article 41 of the CPILA introduces a fixed rule, while Article 26 of the KPILA closely follows the approach of the Rome Convention. Namely, under Article 26 of the KPILA, absent a choice of law by the parties, the

contract shall be governed by the law of the country with which the contract is most closely connected. Article 26 goes on to introduce a rebuttable presumption based upon the characteristic performance as in Article 4 of the Rome Convention and Article 117 of the SIPRG. A contract is presumed to be most closely connected with the country where the party who is to effect the characteristic performance has his habitual residence (or central administration) at the time of the conclusion of the contract. In this regard, the CPILA, which does not employ the rebuttable presumption, is close to Article 4 of the Rome I.<sup>35</sup>

Secondly, unlike the KPILA and the Contract Dispute Rules, which rely on characteristic performance only, Article 41 of the CPILA introduces as an alternative connecting factor the closest connection principle.<sup>36</sup> This means that all the various contractual issues such as formation, formal validity, interpretation and effect (i.e., rights and obligations of the parties) of a contract as a package are governed by either of the two laws. It is not possible for the court to split a contract and for example, subject formation and formal validity of a contract to the laws of country X, while subjecting interpretation and effect to the laws of country Y. In other words, blending of governing laws is not permitted. Having said that, there is uncertainty as to the principles which will guide the Chinese courts in selecting the law applicable to a contract out of the two candidates.

As mentioned above (III. 4.), the relationship between the two connecting factors is not clear. Assuming that the law of the habitual residence of the party who is to effect the performance characteristic of the contract points to the law of country X, while the law of country Y has the closest connection with the contract, should the Chinese courts apply the law of country Y or could they still apply the law of country X?

Finally, there arises a question concerning the relationship between Article 41 and the existing Contract Dispute Rules. The Contract Dispute Rules enumerate 17 types of contract and provide a governing law for each of them respectively. Article 54 of the PIL Society Draft also enumerated the same 17 types of contract,<sup>37</sup> while the CPILA does not list such types of contract. It is presumed that

<sup>33</sup> Article 39 of the Draft permitted the parties to choose the law applicable to a negotiable instrument. However this provision has been deleted in the CPILA.

<sup>34</sup> As to the current private international law rules on contract, refer to *Xiao Yongping/Long Weidi*, Contractual Party Autonomy in Chinese Private International Law, Yearbook of Private International Law, Volume 11 (2009), p. 193 ff. and the Contract Dispute Rules mentioned in the text above.

<sup>35</sup> Rome I refers to the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.

<sup>36</sup> Article 43 of the Draft adopted as an alternative connecting factor the place of performance instead of the closest connection principle.

<sup>37</sup> However, Article 54 of the PIL Society Draft refers to the place of business of the parties who are to effect the characteristic performance, whereas the Contract Dispute Rules refer to the place of domicile of such parties.

Contract Dispute Rules will continue to supplement Article 41 of the CPILA even after April 1, 2011. Since the existing Contract Dispute Rules are inconsistent with Article 41 of the CPILA,<sup>38</sup> it seems appropriate that the Contract Dispute Rules will be amended correspondingly. In fact, the Committee Report expressly mentions that the Supreme People's Court may provide for detailed rules through its judicial interpretation. However, from the viewpoint of having a comprehensive private international law act, the PIL Society Draft is preferable in that it provides a complete set of choice of law rules for contractual matters. Once well-organized and detailed private international law rules in the form of a statute such as the CPILA are in place, the role of the judicial interpretation of the Supreme People's Court should be relatively limited.

### 13. Tort (Article 44)

#### a) Distanzdelikt

The first sentence of Article 44 provides that tort liability shall be governed by the law of the place of tort. I understand that Article 44 has adopted the *lex loci delicti* principle.<sup>39</sup> Under Article 44 the determination of the law applicable to tort in the case of so-called *Distanzdelikt* in which the place where the injury (or damage) occurs is different from the place where the tortious act is committed is left to the discretion of the judges. On the other hand, according to the first sentence of Article 46 of the Draft, tort liability shall be governed by the law of the place where the injury (or damage) occurs or the law of the place where the tortious act is committed.

Two questions arise in this respect. The first question is whether the place of tort should be interpreted to mean both the place of injury and the place of the tortious act. If the answer to this question is in the affirmative, the second question is whether the injured party has the right to select the law more favorable to him, or whether selection of the applicable law is up to the court, so that the court could select *ex officio* the law more favorable to the injured party. Depending upon the answers to these questions, Article 44 could be considered as being against the recent trend, which tends to focus

on the place of injury (or damage).<sup>40</sup> It would be interesting to clarify the intent of the legislators on this point.<sup>41</sup>

The KPILA has not introduced a special rule dealing with the *Distanzdelikt* either. However, the Korean Supreme Court has held that in such instances the court can apply the law of either of the two places. Under Korean law it is also unclear whether the injured party may select the law more favorable to him, or whether it is up to the court to select *ex officio* the law more favorable to the injured party. Recent lower court decisions have expressly taken the position that the injured party may select the law more favorable to himself.

The CPILA is more advanced than the KPILA in that it contains special rules for several types of special tort (e.g., Articles 45 and 46) even though the number of special rules under the PIL Society Draft has decreased.

#### b) Accessory Connection

As an additional rule to lessen the strictness of *lex loci delicti*, Article 32 of the KPILA has introduced the so-called principle of accessory connection (*akzessorische Anknüpfung*). If the tort violates an existing legal relationship between the tortfeasor and the injured party, the tort shall be governed by the law applicable to the legal relationship. Accordingly, if a contractual relationship between the parties is prejudiced by a tortious act, the tort is subject to the governing law of the contract, i.e., the tort law of the country whose contract law is applicable to the contract. Article 4 of the Rome II and Article 20 of the JPILA have also introduced similar rules. However, unlike the KPILA and Article 133(3) of the SIPRG, which are more straightforward, the Rome II and the JPILA employ a more indirect method requiring the courts to apply more closely connected law.<sup>42</sup>

It remains to be seen whether the Chinese courts could introduce such an accessory connecting principle under the CPILA or not.

<sup>38</sup> For example, the Contract Dispute Rules do not subject a contract to the place of performance, whereas Article 43 of the Draft introduces as an alternative connecting factor the place of performance. In addition, the Contract Dispute Rules mention the principle of most significant relationship in Article 5, while Article 43 of the Draft does not mention the principle.

<sup>39</sup> The current private international law rules under Article 146 of the General Principles of Civil Law refer to the *lex loci delicti*, national law or *lex domicilii*, and double actionability principles. *He Zisheng*, Recent Development with Regard to Choice of Law in Tort in China, *Yearbook of Private International Law*, Volume 11 (2009), p. 213.

<sup>40</sup> For example, Article 4(1) of the Rome II reads as follows:

"Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur"

<sup>41</sup> It is noteworthy that the Draft included relatively elaborate private international law rules for torts.

<sup>42</sup> For example, Article 4(3) of the Rome II reads as follows:

"Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question."

#### 14. Intellectual Property Rights (Articles 48 to 50)

Chapter 7 of the CPILA dealing with the applicable laws of disputes involving intellectual property rights classifies the disputes into three categories; namely, (i) disputes on intellectual property rights as such (Article 48), (ii) contractual disputes on intellectual property rights (Article 49) and (iii) disputes on infringement of intellectual property rights (Article 50). The approach of the CPILA is to be generally welcomed. Article 48 provides that ownership and content of intellectual property rights shall be governed by the *lex protectionis*.<sup>43</sup>

Article 51 of the Draft, which has been replaced by Article 48 of the CPILA, referred intellectual property rights to either *lex protectionis* or *lex originis*. These conflicting connecting factors would cause problems. The CPILA is definitely preferable to the Draft.

#### 15. Missing Provisions

The CPILA does not provide for any private international law rules for the assignment of a claim ( 债权 ), especially the rule for the effect of the assignment of a claim vis-à-vis the debtor and third parties. However, given the increasing importance of assignment of claims or receivables and the international discussion surrounding the United Nations Convention on the Assignment of Receivables in International Trade adopted in December 2001, the CPILA's failure to set forth the private international law rules for this issue is not desirable. Article 34(1) of the KPILA modeled after Article 12 of the Rome Convention<sup>44</sup> provides that "the legal relationship between the assignor and assignee of a contractual assignment of a claim shall be governed by the law applicable to the contract between the assignor and assignee; however, the law governing a claim to be assigned shall determine its assignability and the effect of assignment vis-à-vis the debtor and third parties". As to the law applicable to the effect of assignment of a claim vis-à-vis the debtor and third parties, Article 23 of the JPILA takes the same position as the KPILA.

#### V. Concluding Remarks

The CPILA follows the tradition of the private international law of the European continent in that it purports to set forth in the form of statutory pro-

visions concrete rules, rather than a mere approach, although there are several provisions which follow the English private international law rules. This method has the advantage of ensuring legal certainty and predictability in the context of private international law. On the other hand it has drawbacks, i.e., loss of a certain amount of flexibility.

By adoption of the CPILA China has succeeded in codifying substantial parts of its private international law rules. The adoption of the CPILA definitely constitutes the important first step towards the modernization of the Chinese private international law rules, thereby serving to promote the rule of law. However it is apparent that what is as important as codification is for the Chinese courts to actually comply with the CPILA in concrete cases, thereby making the CPILA function as norms for courts.

I would like to conclude by emphasizing that academic exchanges among private international law experts of China, Korea, Japan and other countries should be more active and deepened in the future.

<sup>43</sup> It is also referred to as '*lex loci protectionis*'.

<sup>44</sup> The KPILA went one step further than the Rome Convention in that KPILA expressly provides for the law applicable to the effect of assignment of a claim vis-à-vis the debtor and third parties while the Rome Convention was silent on that issue.