

DRAFT LAW

ON

Conflicts of Laws.

CONTENTS.

- DIVISION I.** — General Provisions.
- DIVISION II.** — Obligations.
- DIVISION III.** — Things.
- DIVISION IV.** — Capacity of Persons.

DIVISION I.

[1]

GENERAL PROVISIONS.

1. — Whenever a foreign law is to govern, and such law provides that the local law shall be applied, the Siamese law governs and the foreign law shall not be applied.

Illustration.— *A question arises in a Siamese Court as to the capacity of a British subject who is domiciled in Siam. According to Section 18 the question is governed by the Law of the Nationality of the person concerned, that is to say in the present case by English law. But English law refers the question to the law of the domicile, that is to say to the Siamese law. Then, by application of the above Section the Siamese law on capacity shall govern and no further reference from that law to English law under Section 18 shall be admitted.*

2. — Whenever a foreign law would govern, and its application is contrary to the Siamese public policy or to the safety of persons or property, such law shall not govern.

3. — Whenever a foreign law would govern and the party interested cannot prove, by documentary evidence on which the Court may rely, what is the foreign law on the question at issue, the Siamese law shall govern.

4. — Any period of extinctive prescription fixed by a foreign law shall, if longer than that fixed by Siamese law in similar circumstances, be reduced in Siamese Courts to the maximum period admitted by the Siamese law.

[2]

COMMENT.

Extinctive prescription is considered as a matter of public order. It is instituted so that cases be not brought before Courts, and contests extended, indefinitely. Then, i, in a country, the law has adopted, for instance, ten years as the maximum delay for the exercise of rights by a claimant, it must be admitted that this period has been specified after the customs and precedences in this country. The adopted period must

be complied with, and the delay specified by the Local Law cannot be overruled by delays fixed by foreign laws.

If the delays fixed in the Siamese and in some foreign laws are not the same, two cases may arise : the foreign delay may be either longer, or shorter, than the Siamese delay.

As explained hereabove, the only danger for the public order in a country is that the Courts of this country should be bound to apply a delay longer than that admitted by its law: no doubt that, if the maximum period of ten years (which has been adopted by the Siamese Codes) would be eventually over-ruled by a maximum delay of thirty years which exists in some countries, such extension would cause unbearable trouble in Siam. The above section forbids this. On the contrary, if the foreign delay is shorter, the public order has no more the same ground for being interested: and, moreover, persons who have made some acts in a foreign country are deemed to know the condition of prescription there and not to have to complain when such specific foreign delay will apply.

[3]

5. — The rules provided by the present Law apply in so far as they are not inconsistent with, or contrary to, the provisions of law governing Family and Inheritance.

Illustration. — A, a French subject, has three children B, C, D. All his belongings are situated in Siam ; their value is 100,000 baht. A makes to B a gift of 60,000 baht. The gift is made in accordance with the Siamese law, and is perfectly valid in its form under Section 5. On the other hand the French law on family and inheritance decides that A, having three children, is not free to dispose by will or gift of more than 14 of his fortune, the other three quarters having to be divided equally between his children. If the future section on conflicts of law in matters of family and inheritance decide that the national law of the deceased shall govern the partition of his estate, the gift made by A to B shall, on A's death, be reduced to 50,000 baht so that C and D may get the part which is reserved to them under the French law on Inheritance.

DIVISION II.

OBLIGATIONS.

6. — The formalities of a contract or document or of any other act are sufficient if they comply with the law of the place where the contract or document is made or where the act is done.

[4]

7. — The substance and effects of an obligation are governed by the law of the place where the obligation arose, unless the parties have agreed otherwise.

Illustrations. — I. — A, living in France, has spontaneously taken care of the affairs of B, who lives in Siam but has some properties in France. The respective obligations of A and B, resulting from the management of affairs without mandate, shall be governed by the law of France (place where the obligations arose).

II. — A, who lives in England, has a branch office in Siam; B, one of A's employees in that branch office, commits a wrongful act, to the prejudice of C, within the course of his employment. The joint liability of A with B for the consequences of such wrongful act is governed by the law of Siam.

8. — Compensation cannot be claimed in a Siamese Court for an act committed in a foreign country where such act is wrongful unless it is also wrongful under Siamese Law. In no case can the compensation granted be greater than that allowed by Siamese Law.

Illustration. — A, a Siamese subject living in Saigon, is creditor of B, a French subject. A takes possession of a property belonging to B to prevent him from evading payment of debt. This constitutes a wrongful act according to the French Law, but not according to the Siamese Law (Obligations, Section 127).

[5]

After A has come back to Bangkok, B claims compensation from A before a Siamese Court. No compensation may be granted by such Court.

9. — The remedies of a creditor in case of non-performance, the rights of a creditor over the property of his debtor, the exercise of the right of action of a debtor

DIVISION II.

OBLIGATIONS.

by his creditor, the cancellation of acts made in fraud of the rights of a creditor, and the assessment of the compensation due for non-performance, are governed by Siamese Law.

10. — No preferential rights or rights to retain a property shall be enforced in Siam other than those admitted by Siamese Law.

11. — The place where the acceptance of the offeree reaches the offerer is the place where the contract is made.

12. — In a contract for the carriage of goods delivery is governed by the law of the place where the goods are to be delivered.

13. — A gambling or betting contract which may be valid under a foreign law shall not be valid in Siam unless it is also valid under Siamese Law.

DIVISION III.

THINGS.

14. — The law of the country where the thing is situated governs :
- (1) the classification of things as immovables or movables ;
 - (2) the specification of the real rights which may be claimed in a thing;
 - (3) the substance and effects of the rights thus recognized by the local law ;
 - (4) the formalities of contracts, documents or other acts relating to the creation or transfer of rights in an immovable thing when, according to the local law, the validity of the contracts, documents or other acts is subject to their being registered or drawn up by an official ;
 - (5) usucapion of a thing, and prescription of the right of the owner over a thing.

However the application of the law of the country where the thing is situated is subject to the exceptions provided in the following sections of the present Division.

Cf. Austria 300. Canada 6. Congo 3. Egypt, Mix. 77, Nat. 54. France 3, 2123, 2128. Germany 11, 28. Italy Preliminary 7. Japan 3, 10. Portugal 24. Spain 10.

Illustration. — (N° 4) Section 39 of the Consolidated Land Act of R. S. 127 provides that no transfer of right on a land in respect of which a land certificate has been issued is valid unless registered in the Siamese land registers.

[7]

A, a British subject, buys from B, a Siamese subject, a piece of land situated in Siam in respect of which a land certificate has been issued. The contract between A and B has been executed in the form provided by the English Law. The contract is not valid unless the sale be registered in accordance with the Siamese Land Act.

COMMENT.

The above section decides, as far as classification of things or real rights are concerned, to follow the law of the country where the thing is situated (lex loci).

The first point is to decide if a thing is either an immovable or a movable. It

appears more convenient to refer for this to the place where such thing is situated. This solution, which was admitted by a judgment of the French Court of Cassation 1887, has been taken as the best in the proposals made by Mr. Roguin in the Conference of the Hague for international law (1900).

As to the determination of the real rights, one knows that every legislation specifies, at least impliedly, which real rights are admitted in the country. The value and the management of such real rights are, as a rule, clearly indicated, as well as their substance and their effects. The criterion adopted by section 14, in conformity with the first point, is that the specification of the real rights be also determined according to the law of the country where the thing is situated.

As far as real rights over immovables are concerned, there are no serious contests as to the criterion for the determination: the French, Italian, Spanish, Japanese systems admit the criterion of "lex loci". As to real rights over movables, some foreign laws have admitted contrarily that the criterion shall be the law of the owner of the thing, or "lex personae" : Austria, France, Italy, Spain. But the most recent jurisconsults disagree to this system, at least for the being and the extent of such rights, and they are of opinion that the application of the "lex personae" is only a mistake coming from quite different considerations relating to the condition of movables in cases of marriage or inheritance, some points which have no connexion with the being or extent of the real rights. This objection, made by jurisconsults as Wharton (America), Westlake (England), Surville and Arthuys (France), Waechter, Savigny, de Bar (Germany,) Brocher (Switzerland), has been approved by many Courts. The above section adopts this system, which has been also authoritatively submitted by Mr. Roguin to the same Conference of the Hague.

[8]

The advantage of the criterion of the country where the thing is situated" is certainly a greater simplicity. The system refers to a fact, generally very easy to ascertain. The national law is fully respected for all things which are situated in the country : it governs the nature, substance and effects of the rights over them. But, when the thing is situated outside the country, there is no ground to require the application of the national law to such thing.

The No. 4 of the above section refers to the formalities of any acts relating to rights over immovables. Frequently, not to say always, such acts are not valid, in a

[9]

DIVISION III.

THINGS.

country, if they do not comply with some formalities of writing or registering. The section decides that the law of the country where the thing is situated will also govern : the mortgage of a property situated in Siam will not be valid unless made in writing and registered as provided by the law relating thereto.

At last, usucapion and prescription of the right of the owner are also submitted to the same rule. The extinctive prescription has been already dealt with by section 4. As far as things are concerned, the extinctive prescription of the right of an owner in case of lost or stolen properties is also a question of public order, and it will be governed by the Siamese law. Usucapion—which is frequently called acquisitive prescription, and may be considered as the other side of the right of prescription—is no less a matter of public order : the conditions or delays allowing a person to claim acquisition of a thing by way of usucapion, in a country, must be governed, in the same conditions and for the same reasons, by the law of the country where such thing is situated.

15. — When a movable has been removed from a country in order to elude the application of the law of that country, such law shall nevertheless govern.

See : “Acts Conference of the Hague, 1900”, p. 69.

16. — The rights in a ship and the validity of their transfer as regards third persons are governed by the law of the place where the ship is registered.

COMMENT.

[10]

Ships are registered movables in every country, as far as we know; and they are likely to be subject to important real rights, chiefly to be mortgaged. On another hand, a feature of this kind of movables is that they are displaced frequently, by nature, going from a country to another very easily. The international law has had to consider which law shall govern them in case of creation of real rights, transfer of ownership, etc.

Supposing the mortgage of a ship, what may happen?

If the ship is mortgaged when in a place of the country to which it belongs, no difficulty because there is no conflict of laws. But if the ship is mortgaged in the

course of a trip, when in a place outside the country to which it belongs, is it the law of the place where the contract of mortgage is executed, or the law of the place where the ship has been registered which shall govern? Of course, the best solution of this question is this one which will offer the best guarantees to the parties in the contract. If, in this case, we would admit that the law of the place "where the thing is situated" will govern. some obvious danger may arise. A is the owner of the ship "Protea" which is registered in Singapore : the "Protea" being in the harbour of Bangkok. A mortgages her to B, such mortgage being made according to the Siamese law and valid; then the Protea" goes along to Shanghai, where A sells her to C; if C is a man of ordinary prudence, he wishes to know if there are not some real rights upon the ship. a mortgage for instance, and, as he cannot take references in ten or fifteen countries where the "Protea" may have called previously, he will refer to Singapore ; but if in Singapore there is no notice of the mortgage made in Bangkok, C will be deceived.

[11]

The consequence is that, as far as ships are concerned, and owing to the special position of this kind of things, the law of the place where the ship is situated, if governing, could deceive very easily the parties. Such law, which presents great advantages in case of immovables or ordinary movables, loses its convenience in case of movables so easily removed. The interested persons may be made aware easily of the country to which the ship belongs, of the nationality she enjoys, and of the flag she hoists: and, as a consequence, they will know without difficulty which place is, as a fact, the place of registration of the ship. If the owner of the ship, when creating a real right whatsoever upon her, has been obliged to comply with the law of such place of registration, the register will be a book of birth-and-life of the ship where any interested person will find at once all the particulars he needs about the thing. This consideration has a great importance in matter of sales of ships: sales of ships are always made under some conditions of publicity, and there is in every sea-port a general roll of the sales relating to the ships registered in this sea-port; if sales could be made outside the sea-port, according to all the foreign laws of all these foreign countries where the ship may happen to stay, the general roll would be incomplete and inaccurate, and such inaccuracy would deceive the third persons who use to refer to this roll.

The solution which is adopted by the above section avoids such troubles. (See, in conformity, Despagnets, Droit international privé, p. 723 and foll.)

Meaning of the word "place." In the above section, the word "country" is substituted by the word "place." In some cases, Consulates of the State A, which are established in sea-ports of the State B, are empowered to deliver certificates (at least provisional certificates) of nationality to a ship the owner of which wants such ship to take the nationality of the State A. In these cases, the word "country" would have meant the State B; the word "place" means the Consulate of the State A, which is really the interesting spot for third persons having to refer to the place of registration.

[12]

17. — The law of the residence of the debtor of an obligation governs the transfer of such obligation, and the formalities to be complied with in case of loss or theft of the written instrument of obligation.

ILLUSTRATION AND COMMENT.

The rights and liabilities arising out of an obligation may be transferred (see Draft Civil and Commercial Code : Transfer of Obligations). A, creditor of B for a sum of five hundred baht, may sell to C his right to recover the sum from B. Transfer of shares or debentures are very frequent.

The obligation being created in a country, what will happen if such obligation is transferred to another person in another country? Shall the law of the place where the obligation was created, (that is to say the place of the residence of the debtor) apply? Or is it the law of the place where the transfer (sale, gift, etc.) is made?

If, in this case, we would admit that the law of the place where the thing (viz. the written instrument of obligation) is situated will govern, dangers will arise for the transferees. A is creditor of B for a sum of 500 baht. Both live in Siam. A goes in a foreign country and transfers to C, who is living there, the instrument of the obligation. There may be in the foreign country no law about the validity of such a transfer; while in Siam it is valid only if notified to the debtor. C makes no notification to B who, on A's return, pays him his debt. Then C comes and claims from B, by virtue of the transfer, payment of the same debt. If the law of the country where the

[13]

transfer takes place was to govern, the transfer would have to be declared valid, notwithstanding the lack of notification, and B would have to pay his debt a second time to C. On the contrary, if the law of the residence of the debtor is to govern, the transfer shall be declared invalid and B will not have to pay a second time. It seems only just that the debtor should not be bound to pay a second time when his first payment was valid under the law of his residence; in so doing he has committed no imprudence while the transferee ought to have enquired, before accepting the transfer, whether he had, or not, a good recourse against the debtor.

The same rule is advisable also in the case where the written instrument of the obligation has been lost by, or stolen away from, the owner. The owner, as a rule, hastens to comply with all formalities which will enable him to find back the instrument, and also to forbid any finder or offender to transfer it dishonestly to third persons. These formalities are specified in every country, chiefly as far as shares and debentures are concerned. For the same reasons as set up above it is necessary to decide that the formalities to be complied with are those of the country of the residence of the debtor, because the debtor is the person who more than anyone else must be made aware of any opposition to the performance of his obligation; any other person can easily find out whether or not there is any opposition notified to such debtor, either personally or by means of advertisements as the case may be; while should the formalities of any other country be declared, sufficient, neither the debtor nor any transferee of the instrument could ever be sure that there is no opposition in some country of the world.

[14]

DIVISION IV.

CAPACITY OF PERSONS.

18.—The capacity of a person is governed by the law of his nationality.

But if an alien does an act in Siam for which he would have no capacity under the law of his nationality, he is deemed to have capacity for it in so far as he would be capable under Siamese Law.

Cf. Austria 4, 34. Congo 2. France 3. Germany 7. Italy 6. Japan 3. Portugal 24, 27, and Commercial Code 12. Spain 9. Swiss 7, 7b. Hague, Bills, 83.

Illustration. — *A, a French citizen of full age, is interdicted as a spendthrift and provided with a curator the assistance of which is required by French Law for the validity of any contract of sale of A's property. Interdiction of spendthrifts is not known to Siamese Law. If A comes to Siam and sells there his yacht to B without the assistance of his curator, such sale shall be valid.*

[15]

19. — If the nationality of a person is unknown or cannot be proved, the law of his residence is deemed to be the law of his nationality.

Cf. Germany 29. Japan, Law concerning the Application of laws, 27, 28.

20. — If it is uncertain whether an alien having property in Siam is living or dead, a Siamese Court may, according to Siamese law, appoint a manager of his property, and make an order declaring that such person has disappeared, but only in regard to property in Siam or to such legal relations as are subject to Siamese law.

Cf. Austria 276. Germany (introductory Act to the Civil Code) 9. Japan (Law on application of Laws in general) 6.

21. — Representation of minor by parent and management of the property of the minor by his parent are governed by the law of the nationality of the parent.

Cf. Congo (decree of the 20th February 1891) 6. Germany 18, 19, 20. Japan 20. Switzerland (law 25th June 1891), 7, 8, 9.

22. — The cases in which the minor having no parent, or a person of full age, may be placed under guardianship, and the duties and the power of the guardian, are fixed by the law of the nationality of such minor or person.

[16]

However a Siamese Court shall not appoint a guardian to a person of full age except for a cause admitted by Siamese law.

Cf. Germany 8, 25. Japan 4, 5, 23, 24. Sweden (Law respecting International legal rights). Switzerland 10-18, 29, 30, 33. Conventions Hague 13 June 1902, 1-8, and 17 July 1905, 1-13.

COMMENT.

Questions relating to guardianship are essentially questions of capacity, a person under guardianship being more or less incapacitated. They must therefore be governed by the national law of the party concerned.

The second paragraph of section 22 is directly connected with the second paragraph of the above section 18. If the consequences of a status of incapacity unknown to Siamese law are not admitted in Siam, it follows a fortiori that the Siamese Courts cannot be expected to decree such a status. The second paragraph of section 18 is intended for instance to protect persons residing in Siam against the consequences of the incapacity of a spendthrift who has been interdicted by his national Courts. The interdicted spendthrift shall be considered as capable by the Siamese Courts. It is self-evident that if the Siamese Courts do not recognize the incapacity of a person who has been interdicted abroad as a spendthrift, they cannot be expected to place an alien under guardianship on the ground that he is a spendthrift.

23. — A juristic person lawfully constituted according to a foreign law shall enjoy civil personality in Siam, subject to the restrictions provided by sections 24, 25 and 26.

[17]

Cf. Germany 10. Belgian Commercial Code 128. Spain (Civil Code) 28 and (Commercial Code) 15 21. Italy (Commercial Code) 230.

See Comment under section 26.

24. — A juristic person lawfully constituted according to a foreign law and which sets up a principal office in Siam, or fulfils its principal object or does its principal

business in Siam, cannot take advantage of its civil personality in Siam, unless it satisfies to the requirements of the Siamese Law as to the formation, registration, management, dissolution and liquidation of a juristic person of the same kind or of the kind most resembling to it.

Cf. Belgium (Commercial Code) 129. Germany 10. Japan (Commercial Code) 258, 259. Spain (Commercial Code) 15, 21. Italy (Commercial Code) 230, 231, 232.

See Comment under section 26.

25. — A juristic person lawfully constituted according to a foreign law and which sets up a branch office in Siam cannot take advantage of its civil personality in Siam unless it has satisfied to the requirements of the Siamese Law as to the registrations and public notifications to be made by a juristic person of the same kind or of the kind most resembling to it.

Cf. Belgium (Com. Code) 130. Japan (Com. Code) 255, 257, 360. Spain (Com. Code) 13, 21. Italy (Com. Code) 230 to 232.

See Comment under Section 26.

26. — Section 23 shall apply to the juristic persons constituted according to the law of a foreign country only if the juristic persons lawfully constituted according to Siamese Law enjoy in a like manner civil personality in such foreign country.

[18]

COMMENTS

to sections 23 to 26.

The sections 23, 24 and 25 concerning juristic persons embody the theory contained in section 10 of the German Law and in sections 255 to 258 of the Japanese Commercial Code.

As to the general lines of the system, section 23 lays down the principle in the matter, viz. that the Government of this country are ready to grant to a juristic person lawfully constituted under a foreign law the same status as a juristic person enjoys in Siam. Sections 24 and 25 are restrictions required by public order, because, as soon as a juristic person has in Siam its principal office or a branch, or does in Siam important business, it becomes essential that this juristic person complies at least with the regulations of this country which concern public order.

Under this system what will be the position of the parties?

1° *A juristic person lawfully constituted under a foreign law has no good reason to complain, as it is assimilated to the Siamese juristic person and enjoys the same juristic position (section 23), and has to comply with the requirements of the Siamese law, which is not a drastic one, only as to the questions of formation, management, registrations, etc.;*

2° *By section 23 the Siamese Government does not grant to a juristic person constituted under a foreign law more rights than to a Siamese juristic person. It submits a juristic person whose principal office is in Siam to the common rules of this country as to its formation, management, registration, etc.*

[19]

However, the Law on the Conflicts of Laws lays down, by section 26, a principle of reciprocity.

Of course no Government is bound to grant the national status to juristic persons constituted under a foreign law : the more so if the foreign country does not grant its own status to juristic persons constituted under the law of this Government.

27. — The nationality of a juristic person is that of the country where this juristic person has its principal office.

COMMENT.

Nothing in sections 23 to 26 deals with the question of nationality of the juristic persons, and nothing will allow a Siamese Court to decide that the interested juristic person must be considered under section 23, 24 or 25 as being of Siamese nationality.

However as it may be important to know which is the nationality of a juristic, as well as of a natural person, section 27, dealing with this point, embodies the criterion which prevails at present in private international law: “the place where is the principal office of the juristic person.”