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INTERCOUNTRY ADOPTION IN TAIWAN

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Abstract

Under the current choice-of-law rule concerning the intercountry adoption in the Taiwanese Private International Law Act, the adopter and the child should be governed by their national law respectively. The application of this rule is known as a distributive approach and the rule was made by reference to the old Japanese private international law. However, in 1989, Japanese law revised the choice-of-law rule on intercountry adoption and abandoned the distributive approach, due to the reason that such an approach tended to be construed as a cumulative approach by Japanese courts. Consequently, the formation of intercountry adoption in Japan turned out to be more difficult under the application of the cumulative approach. It made the adoptive parent governed not only by his or her national law, but also by the child's national law, and vice versa for the child. Thus, this complicated approach has become the main reason for Japan to make a law reform on intercountry adoption in 1989 amendment of private international. The same situation is happening in Taiwan. Most Taiwanese courts falsely construe the choice-of-law rule on intercountry adoption as a cumulative approach. Unfortunately, the latest amendment on intercountry adoption in the Taiwanese private law act made no substantial change to the new provision. This article also argues that the application of hidden renvoi to intercountry adoption cases is not only contradictive to the objects of the theory of renvoi but also lacks theoretical justifications in private international law methods.

Keywords *: intercountry adoption, cumulative application (approach), distributive application(approach), renvoi, hidden renvoi*

Abstract

Di bawah aturan pilihan hukum saat ini mengenai adopsi antar negara dalam Undang-Undang Hukum Perdata Internasional Taiwan, pengadopsi dan anak harus diatur oleh hukum nasional mereka masing-masing. Penerapan aturan ini dikenal sebagai pendekatan distributif dan aturan tersebut dibuat dengan mengacu pada hukum internasional swasta Jepang yang lama. Namun, pada tahun 1989, hukum Jepang merevisi aturan pilihan hukum tentang adopsi antar negara dan mengabaikan pendekatan distributif, karena alasan bahwa pendekatan semacam itu cenderung ditafsirkan sebagai pendekatan kumulatif oleh pengadilan Jepang. Akibatnya, pembentukan adopsi antar negara di Jepang ternyata lebih sulit di bawah penerapan pendekatan kumulatif. Hal tersebut membuat orang tua angkat diatur tidak hanya oleh hukum nasionalnya, tetapi juga oleh hukum nasional anak, dan sebaliknya untuk anak. Dengan demikian, pendekatan yang rumit ini menjadi alasan utama Jepang untuk melakukan reformasi hukum tentang adopsi antar negara pada tahun 1989 dalam amandemen hukum perdata internasional. Situasi yang sama terjadi di Taiwan. Sebagian besar pengadilan Taiwan secara keliru menafsirkan aturan pilihan hukum tentang adopsi antarnegara sebagai pendekatan kumulatif. Sayangnya, amandemen terbaru tentang adopsi antar negara dalam hukum perdata Taiwan tidak membuat perubahan substansial pada ketentuan baru tersebut. Artikel ini juga berpendapat bahwa penerapan renvoi tersembunyi pada kasus adopsi antar negara tidak hanya bertentangan dengan objek teori renvoi tetapi juga tidak memiliki justifikasi teoretis dalam metode hukum perdata internasional.

Keywords *: adopsi antarnegara, pendekatan kumulatif, pendekatan distributif, renvoi, renvoi tersembunyi*

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I. INTRODUCTION

Adoption is the process that creates the relationship of parent and child between persons who are strangers in blood. The parent-Child relationship is formed accordingly and the permanent legal transfer of all parental rights from one person or couple to another person or couple. Adoptive parents have the same rights and obligations as biological parents and adopted children have all the same rights and benefits as biological children.

The evolution of adoption on substantive law has been in gradual progress from "the adoption for the family", "the adoption for the parents" to "the adoption for the child". Because the child's interests are paramount, adoption is safeguarded as it generally is by a court or an administrative authority to protect the child.[1] Now, in the best interest of the child[2] is not only paramount in substantive law but also a worldwide accepted general principle on private international law.[3] The interest of the child is made clear in the objects of the Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption. In Article 1 (a),"to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognized in international law"[4].

The following news article introduces a great example of what "the best interest of a child" is, "U.S citizen Haity adopted a 6-month-old Taiwanese baby Maile 7 years ago. Haity and her husband quit their jobs in Seattle and moved to Taiwan for Maile to have a better environment to learn the Chinese language so that she would not forget her roots in Taiwan. The transnational and cross-racial adoption just made their love for each other quite different from ordinary mothers and children. Maile always reaches out her arms for a hug when she sees her mom Haity. She holds her mom tight face to face and wouldn't let go. Mom Haity's love for Maile is revealing. Haity holds Maile's hands to comfort her and help her release nervousness. Maile also hides herself in her mom's arms and acts like a baby. Now, Maile can write her name in Chinese characters and speaks in some simple Chinese.[5] This is merely one of the thousands of adoption cases. Hopefully, every intercountry adoption could do as well as this story.

"The Act Governing the Choice of Law in Civil Matters Involving Foreign Elements" is the primary source of choice of law rules in Taiwan's private international law

[1] Yen Hui Tai, *Qinshu Fa* 親屬法 [*Family Law*] (Taipei, Taiwan 2011), 361-368; Feng Shian Gao, *Qinshufa: Lilun yu Shi Wu* 親屬法：理論與實務 [*Family Law: Theory and Practice*], 5th ed. (Taipei: Wunan, 2005), 280-281; Qi Yan Chen, Zong Leh Huang and Zhen Gong Guo, *Min Fa Qinshu XinLun*民法親屬新論 [*New Theory on Civil Law Family Law*], 5th ed. (Taipei: San Min, 2005), 318-319.

[2] Thirty years ago, Professor Chen Long-Sjiu has indicated that the adopted child's interest is the only and paramount value and policy in intercountry adoption. Adoption in common law jurisdictions must be granted by a court. Thus, Adoption is a procedural matter in common law jurisdictions. See Long-Sju Taie Chen, *Bijiao Guojisifa* 比較國際私法 [*Comparative Private International Law*] (Taipei, Taiwan: Wunan, 1989), 290-291.

[3] Tie Zheng Liu and Rong-chwan Chen, *Guojisifa Lun*國際私法論 [Private International Law], 6th ed. (Taipei: San Ming, 2018), 463; Tieh-Cheng Liu, "Guojisifa Shang Shouyang Wenti Zhi Bijiao Yanjiu" 國際私法上收養問題之比較研究 ["A Comparative Study on Adoption in Private International Law"] in *Private International Law, National Chengchi University Law* 13 (Taipei: Chengchi University, 1990), 183.

[4] "Conventions and Instruments," Hague Conference on Private International Law, accessed 11 May 2022, https://www.hcch.net/en/instruments/conventions/full-text/?cid=69.

[5] Lian Pei Bai Lai Wenzhong "American couple adopts girl and moves to Taiwan for her to study," *CTS*, 31 August 2010, http://news.cts.com.tw/cts/general/201008/201008310551979.html.

(hereafter Taiwanese PIL Act).[6] The work on a comprehensive amendment started in 1998, and a brand-new codification was enacted on 25 May 2010 and entered into force a year later.

The provision on intercountry adoption is in Article 54(1). It provides:" The formation and termination of an adoption of a child are governed for the adoptive parent and the adopted child by their respective national laws." Article 54(1) is the extension of the old law of Article 18(1) in the Taiwanese PIL Act. No substantial modification to the rule concerning intercountry adoption is made but merely the number of the provision changed in the 2010 amendment.[7]

II. ADOPTIONS ON PRIVATE INTERNATIONAL LAW

A. Adoptions in Substantive Law

There are two major regimes in which national laws recognize adoption. One is that the formation of adoption is based on the consent of the adoptive parents and the child's guardian, and the intervention of judicial or administrative authority is merely to secure the adopted child's interest. The other regime is that adoption is granted only by the decision of courts or other authorities of government.[8]

There are three primary leading principles of substantive law on adoption. The first is the adopted child's interest. The second is the distinction between the adoption of an adult and a child. The third is the supervisory intervention of judicial or administrative authorities.[9] The adopted child's interest and the supervisory intervention of authorities are the principles widely accepted by most substantive laws and private international laws. Under the principles described above, the best interest of the adopted child shall be understood in the sense that making the formation of adoption easier conforms to the policy of intercountry adoption, whereas imposing strict limitations is not in line with the primary value of intercountry adoption, as long as the abduction, the sale of, and the traffic in children are prevented.

B. Guiding Principles in HCCH 1993 Adoption Convention

The *Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption* is concluded at the Hague Conference on 29 May 1993 (hereinafter, HCCH 1993 Adoption Convention)[10], entry into force in 1995 and ratified by most of the countries in the world[11]. The main object of this convention is to fulfill the United Nations Convention on the Rights of the Child.[12]

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[6] China (Taiwan), Act Governing the Choice of Law in Civil Matters Involving Foreign Elements, 2010. The English translation of the Act is available at https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=B0000007.

[7] The general commentary on the amendment in a family matter, see Huei-Yi Shyu, "Lun Shewai minshi falv shiyongfa xiuzheng caoanzhong youguan shenfenfazhi neirong yu jiantao/ 論涉外民事法律適用法修正草案中有關身分法之容與檢討[On Amendments To The Law Applicable To Foreign-related Civil Legal Status Of The Draft Law On The Content And Review]," *Taiwan Law Review* 160 (September 2008):151.

[8] Yoshiaki Sakurada, Kokusaishihou 国際私法 [*Private International Law*], 5th ed. (Tokyo, Japan: Yuhikaku有斐閣, 2006), 289.

[9] Tai, *Qinshu*, 361-68.

[10] "Adoption Section," Hague Conference on Private International Law, accessed 15 January 2022, https://www.hcch.net/en/instruments/conventions/specialised-sections/intercountry-adoption.

[11] "Conventions and Instruments," Hague Conference on Private International Law, accessed 15 January 2022, https://www.hcch.net/en/instruments/conventions/full-text/?cid=69.

[12] Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (en-

Since Taiwan is not a member state of the Hague Conference and does not ratify the 1993 Adoption Convention, the regulations set forth in HCCH 1993 Adoption Convention is not binding for Taiwanese courts. Discussing any specific provision provided in the convention would be of no meaning to Taiwan. However, the reference to the guiding principles set forth in this convention remains of immense magnitude either in practice or in academic research in Taiwan.

The guiding principles of the HCCH 1993 Adoption Convention are made clear in the preamble. Prior to adoption, the priority is to enable the child to remain in the family of origin, to ensure that the child grows up in a family environment with love and happiness. Intercountry adoption should be considered only if a suitable family cannot be found in the state of origin for the child. The intercountry adoptions must be made with respect for the child's fundamental rights and in their best interests (also in Art. 1 (a)). Abduction, the sale of, or traffic in children should be prevented (also in Art. 1(b)).

In one of the domestic cases, Taipei District Court 91(2002) Adoption-motion No 273 Ruling denied the motion of adoption on the ground that it deviates from the best interest of the child to make them leave the family of origin. The factors such as the family's economic status and the relationship between family members were taken into consideration by Taipei District Court in this case. Since the family relationship and economic status are stable, the family of origin is the warmest and the most familiar place for the child, where they were born with the love and care of their parents. The only reason for the child to be adopted by his mother's sister is because of the mother's sister's female infertility. Obviously, this adoption is made on account of the adults' demand rather than the child's interest and therefore the motion is denied. The denial is maintained by the Taiwan High Court 91(2002) Family-Appeal No 330 Ruling. The reasoning for ruling on this case is consistent with the guiding principles set forth in HCCH 1993 Adoption Convention.

In contrast with the case described above, on the ground of the best interest of children, Taiwan High Court (family-appeal) No 276 Ruling denied the appeal on a motion for revoking the adoption. In this case, the mother of origin has concluded adoption contracts with Dutch adoptive parents for her son and daughter. Her daughter has already moved to Holland and lives with her adoptive parents. When her son was about to leave with the adoptive parents, the mother of origin refused to hand over her son due to her grandmother's unwillingness to let go of her grandson. Taipei District Court investigated the connecting factors between the parent of origin and the adoptive parents in Holland such as the social and economic status, occupations and income, the purpose of adoption and family environments in respective countries, intergenerational education issues in Taiwan, criminal records, social welfare supported by the Dutch government, etc. Due to the fact that the mother and the grandmother of origin both have criminal records in possession, use, and sale of narcotics. In addition, the mother has not finished her enforcing abstinence program and the father of origin is still imprisoned on a narcotics charge, therefore, the motion for revoking adoption is rejected and the appeal was denied by Taiwan High Court.

As a result, when the court recognizes that the intercountry adoption may offer the advantage of a permanent family environment to children for whom a suitable family cannot be found in Taiwan, it deviates from the best interest of the child even the parents of origin changed their minds after the adoption contract has been concluded.

tered into force 2 September 1990).

III. INTERNATIONAL JURISDICTION

It is commonly accepted in practice and by academic commentators that no codification exists concerning the international jurisdictional to adjudicate on transnational litigations in civil and commercial matters in Taiwan. In family matters, there is only one provision provided for transnational marriage in Article 53 of the Family Act.[13] In general, the majority of the court cases apply domestic jurisdiction provisions in civil codes or Family Act by analogy to transnational cases.

Family Act Article 114 (1) provides, "With regard to matters concerning recognition of adoption, the jurisdiction to hear the proceedings exclusively belongs to the court for the place of the domicile of the adopter or the adoptee; where the adopter does not have a domicile in the territory of the R.O.C. (Taiwan), the jurisdiction to hear the proceedings may be exercised by the court for the place of the domicile of the adoptee."

Applying Article 114(1) to intercountry adoption cases by analogy, Taiwanese courts will have exclusive international jurisdiction when either the domiciles of adoptive parents or of the adopted child locate in Taiwan. In other words, even if the adoptive parents' domicile is not in Taiwan, a Taiwanese court will still have international jurisdiction as long as the child's domicile locates in Taiwan.

IIII. THE DETERMINATION OF APPLICABLE LAW

A. Raising the issue

The provision concerning intercountry adoption is provided in Article 54(1) in Taiwan PIL Act. This 2010 amendment of the Taiwanese PIL Act does not make any substantial revision to the formation of intercountry adoption as described above. Thus, the commentaries on the old provision of Article 18(1) and regarding court cases remain justifications for the new provision of Article 54(1).

Take Taiwan High Court 82(1993) family-Appeal No 4 Ruling for an example. A Taiwanese national man marries an Indonesian Woman and files a motion for the adoption of her son. The motion was rejected on the ground that the would-be adoptive father's age is over 45 years old and the adopted son's age is over 5 years old. It violates Indonesian law if the adoptive parents are over 45 years old and the adopted children are over 5 years old. The motion was rejected by the District Court and the appeal was denied by the High Court as well.

Should the Taiwanese adoptive father's age-or any other requirements to be an adopter-be governed by Indonesian law pursuant to Taiwan PIL Act? It is necessary to review the reasoning behind Taiwan High Court's Ruling on this case:

"1. The formation of an adoption of a foreign child is governed by his national law. It

[13] Article 53 provides: Courts of the Republic of China (R.O.C.) shall have jurisdiction to hear proceedings of marriage matters in one of the following circumstances:1. where either the husband or the wife is an R.O.C. national;2. where neither the husband nor the wife is an R.O.C. national but they have a domicile or have joint residence within the territory of the R.O.C. for a duration of more than one year;3. where either the husband or the wife is a stateless person but has habitual residence within the territory of the R.O.C.;4. where either the husband or the wife has habitual residence within the territory of the R.O.C. for a duration of more than one year. Nonetheless, the foregoing provision does not apply to circumstances where a decision made by the court of the R.O.C. is manifestly likely to be unrecognized in the jurisdictions to which either the husband or the wife belongs.The provisions in the preceding paragraph do not apply to circumstances where it is manifest that the defendant will have difficulties in appearing before a court in the R.O.C.

is provided in Article 18(1). The Court shall not grant the motion for the adoption if it was not legal pursuant to the national law of the foreign party.

2. The interlocutory appeal petitioner X files a motion for adoption for the petitioner X1, and obtains the consent of his guardian in a written contract. Nevertheless, X1 is an Indonesian national with an Indonesian passport and has no domicile in Taiwan. The adoptive parents' age must be under 45 years old and the adopted children must be under 5 years pursuant to Indonesian Law. The fact-finding that X is over 45 years old and X1 is over 5 years old has been evident to this Court. Consequently, it does not meet the requirements set forth in Indonesian law. This Court has no choice but to reject the motion for the adoption. Even the fact that X1's mother has become man and wife with X and has acquired Taiwan nationality yet does not change the fact that X1 is an Indonesian national and the application of Indonesian law shall not be excluded."

Is the provision provided in Article 18(1)" The formation of adoption is governed by their respective national laws" a distributive connecting approach or a cumulative connecting approach? Under the distributive connecting approach, the adoptive father's age should not be governed by the Indonesian law but should be governed by his national law, i.e. Taiwanese law only. Namely, the limitation on the age of 45-year-old is not binding to Taiwanese adoptive parents. However, if Article 18(1) is construed that the adoptive parents and the adopted child should be governed by Taiwanese law and Indonesian law simultaneously, it is a provision set forth under the cumulative connecting approach.

The interpretation of Article 18(1) by Taiwan High Court 82(1993) family-Appeal No 4 Ruling is obviously problematic. Moreover, it is not just a single intercountry adoption case that Taiwan High Court misinterprets the law with the wrong approach. As a matter of fact, a single Taiwan High Court case with a correct interpretation of the intercountry adoption rule was nowhere to be seen before 2012 after careful case analysis in Taiwan by the author.[14]

B. Legislation and Interpretation

An influential academic commentator indicates that the approach that Article 18(1) adopted refers to the distributive connecting approach and this provision was inspired by old Japanese conflict-of-law rules "*Houre*i" Article 19(1).[15] What is the distributive connecting approach? It is the key to interpreting the law correctly:

1. The connecting approach of applicable law

The sole connecting factor approach was broadly adopted by traditional conflict-of-law rules. It particularly refers to the conflicting rules concerning status and capacity. There are quite a few examples of sole connecting factor rules in the Taiwanese PIL Act, such as the parties' nationality and the location of a property. The sole connecting factor refers to the theory of the most significant relationship, i.e., the connecting factor with the closest relationship from the competing jurisdictions shall be chosen as the core to determine the applicable law.[16]

[14] Hua-Kai Tsai, "Guojisifa Shang De Shouyang/ 國際私法上的收養[Adoption on Private International Law]," 政大法學評論*National Chenchi University Law Review* 126, (April 2012): 57-104.

[15] Tieh-Cheng Liu, "Guojisifa Shang Shouyang Wenti Zhi Bijiao Yanjiu," 176.

[16] Shouichi Kidana, "Kokusaishihou Gaisetsu/ 国際私法概説 [An Introduction to Private International Law]," in *Kihonnhou Komenta-ru Kokusaishihou* 基本法コンメンタール国際私法[Basic Law Commentary

Nevertheless, the determination of all legal relationships via a mere sole connecting factor is such a vexed question in reality. Setting forth a sole core as a medium of a connecting factor in advance to determine the applicable law is no longer regarded as appropriate to modern private international law. That the applicable law shall be chosen from multiple connecting factors has been broadly accepted in codifications and academic commentaries in most countries. The classification of modern approaches regarding the connecting factors varies among individual academic commentators. However, the followings are the common ones that with no disputes[17];

a. Distributive Connecting Factor Approach (Application)

In the distributive connecting factor approach *(*distributive *Anknüpfung;* also known as *gekippelte Anknüpfung*), a sole legal relationship is connected to two applicable laws via two separate factors respectively. The provision on transnational marriage is a typical example. Taiwanese PIL Act Article 46(1) provides: "The formation of a marriage is governed by the national law of each party. "For the formation of a marriage, the husband has to meet the requirements pursuant to his national law; the wife has to meet the requirements set forth in her national law. As a result, this sole legal relationship (marriage) is connected to two applicable laws (husband's national law and wife's national law) via two factors (husband's nationality and wife's nationality) respectively.

b. Cumulative Connecting Factor Approach (Application)

The cumulative connecting factor approach is called accumulating connecting factor approach *(häufende Anknüpfung)* as well. Under this approach, a sole legal relationship is connected to multiple applicable laws and the multiple applicable laws must be applied to it simultaneously and repeatedly. In other words, under this approach, the sole legal relationship will not be recognized to be established until it meets all the requirements pursuant to all the multiple chosen laws at the same time. A typical example was the old provision of torts in Article 9 of the Taiwanese PIL Act:

> *"An obligation arising from a tort is governed by the law of the place where the tort was committed. However, if it is not a case in tort pursuant to the law of R.O.C (Taiwan), the law of the place where the tort was committed does not apply."*

It provided that the transnational torts must meet the requirements not only the place where the tort occurred but also the requirements of Taiwanese law in torts.

Before the amendment of the 2010 Taiwanese PIL Act, the cumulative connecting factor approach has been criticized severely by academic commentators and is no longer adopted in the Taiwanese PIL Act now.

c. Alternative Connecting Factor Approach (Application)

Under this approach, multiple applicable laws are listed in the provision regarding the specific legal relationship, and only if one of the requirements of these listed applicable laws is met, that legal relationship will be formed.[18] A typical example is Article 16 concerning the formal requisites of a juridical act: "The formal requisites of a juridical act are governed by the law applicable to the act. However, a juridical act

on Private International Law] (Tokyo, Japan: Yuhikaku有斐閣, 1994), 2.

[17] Shouichi Kidana, "Kokusaishihou Gaisetsu/ 国際私法概説 [An Introduction to Private International Law]," in *Kihonnhou Komenta-ru Kokusaishihou* 基本法コンメンタール国際私法[Basic Law Commentary on Private International Law] (Tokyo, Japan: Yuhikaku有斐閣, 1994), 2.

[18] Lee Hou Cheng, *Shewai minshi falv shiyongfa* 涉外民事法律適用法 [*Private International Law*], (Taipei: Wunan, 2010), 46-52.

that conforms to the formal requisites provided for in the law of the place where the act was undertaken is also effective; where a juridical act is undertaken at different places, it is effective if it conforms to the formal requisites of the law of any one of the places. "In other words, the formal requisites of a juridical act are effective pursuant to either the law applicable to the act or the law of the place where the act was undertaken. This alternative connecting factor approach makes the legal relationship easier to be formed.

d. Step-by-Step Approach (Application)

Multiple connecting factors are listed in the order in a provision, and the determination of the applicable law regarding the certain legal relationship follows those connecting factors in order. In other words, when the first connecting factor listed in the provision does not apply, the application goes to the second connecting factor, and it goes to the third connecting factor when the second one is lacking.

Take divorce for an example, Taiwanese PIL Act Article 50 provides: "Divorce and the effect of divorce are governed by the national law common to the spouses at the time they reach an agreement of divorce or when a suit is brought for the divorce; in the absence of a common national law, by the law of domicile common to them; in the absence of a common law of domicile, by the law of the place most closely connected with the marriage relationship." In this provision, the common national law is the first connecting factor, the common domicile is the second connecting factor and the most closely-connected place is in the third stage. The determination of the applicable laws on divorce goes in these three connecting factors in sequence. This approach is known as a step-by-step approach (*Anknüpfungleiter, Kaskadenanknüpfung*).[19]

e. Facultative Approach (Application)

Party autonomy is the core principle of the facultative approach. Under the principle of party autonomy, the applicable law is chosen at the parties' own will. Namely, the connecting factor is the parties' own choice. In sum, those provisions which provide that the applicable laws are chosen by the parties' own choice are based on party autonomy and adopting a facultative approach.

The governing law on a contract is a typical example of a facultative approach. Taiwanese PIL act Article 20(1) provides: "The applicable law regarding the formation and effect of a juridical act which results in a relationship of obligation is determined by the intention of the parties."

After the basic introduction to the connecting approach of applicable law, it is necessary to review the legislation and the interpretation in Japanese law for the reason that the intercountry adoption rule on the Taiwan PIL Act is an extension of Japanese law.

2. The Legislation and Interpretation in Japan

Prior to 1989, the old choice-of-law rules "*Hourei"* in Japanese PIL Article 19 provides that the requirements of adoption are governed by the respective national laws of the parties.[20] It is commonly accepted by academic commentators that the provision should be construed in the distributive application. Namely, the adoption is formed when the adoptive parents meet the requirements of their national law,

[19] Yoshio Tameike, *Kokusaishihou kougi*国際私法講義 [Lectures on *Private International Law*], 3rd ed. (Tokyo: Yuhikaku有斐閣, 2005), 85.

[20] *Ibid.*, 86.

and the adopted child meets the requirements of his or her national law. However, in practice, Article 19 is commonly construed in the application of the cumulative approach and made the intercountry adoption in Japan quite difficult at that time. Therefore, in the amendment of 1989, the intercountry adoption in the Japanese PIL Act was revised to be governed by the national law of the adoptive parents,[21] this revised enactment extends the same rule to the 2007 amendment of the Japanese PIL Act.

In June of 1989, the comprehensive amendment to the choice-of-law rules regarding family matters such as marriage and parent-child relationships was made and the new rules entered into force in 1990. The amendment was for the purpose to make "the implementation of gender equity, the unification for the determination on choice-of-law in international society and the easier formation of family relationships by making the choice-of-law rules simpler".[22]

In 1986, the Ministry of Justice of Japan made "The Interim Report Regarding the Amendment of "*Hourei* "in public. In this report, the principle regarding the choice-of-law rule on intercountry adoption has been made to be established on the personal law (*lex personalis*) of the adoptive parents. Yet, if the consent of the child or the third person to the formation of the adoption is provided as one of the requirements pursuant to the adopted child's national law, that requirement must be met.[23] This new rule is in line with the rules set forth in the HCCH Convention.[24]

The major reason to abolish the distributive approach for the 1989 Amendment of Japanese law ascribes to the reason that such an approach deviated from the primary and fundamental purpose of the amendment to make the formation of status easier via the simpler choice-of-law rules.

As a result of the 1989 amendment, the distributive approach applies to the formation of marriage only, while the requirements for the application to the adoption and the acknowledgment of paternity were abolished.[25] Based on the ground that the distributive approach connects two different applicable laws and thus makes the application of laws complicated. The academic commentaries have indicated that Japanese case law frequently and falsely construed the intercountry adoption provision with a cumulative approach to intercountry adoption cases. [26]

3. The Legislation and interpretation in Taiwan

Concerning whether the approach Article 18 (1) adopted a distributive application or a cumulative application was, quite a few academic commentates have made the interpretations clear in Taiwan. Prof. Jia-Yi Liu pointed out,

> *"... it is the application of the distributive approach, not a cumulative approach. Therefore, with respect to the formation of adoption, the requirements to the adoptive*

[21] In the original Japanese language, it was stipulated as 養子縁組ノ要件ハ各当事者ニ付キ其本国法ニ依リテ之ヲ定ム.

[22] Tameike, *Kokusaishihou Kougi*, 505; Sakurada, *Kokusaishihou*, 290; Kidana Shouichi, Hiroshi Matsuoka and Satoshi Watanabe, *Kokusaishihou Gairon*/国際私法概論 [*Introduction to Private International Law*], 5th ed. (Tokyo: Yuhikaku有斐閣, 2007), 233-234.

[23] Toshihumi Minami, *Kaisei Hourei No Kaisetu*改正法例の解説 [*Explanatory Comments on The Amendment of Hourrei*], (Tokyo, Japan: Housoukai法曹会,1992), 40-41.

[24] Minami, *Kaisei Hourei No Kaisetu*, 21-31.

[25] *Ibid*., 42.

[26] *Ibid*., 50.

parents are governed by the adoptive parents' national law, and the requirements to the adopted child are governed by the child's national law."[27]

Prof. Tie-Zheng Liu indicates that the provision emulated the Japanese law "*Horrei*" Article 19(1), and adopted the distributive approach.[28] Prof. Hui-YI Hsu[29] and Prof. Hou-Zheng Lee[30] consider that the approach Taiwanese law adopts is the distributive application as well.

In sum, the academic commentary which stands for the position that Article 18(1) on intercountry adoption in the Taiwanese PIL Act adopts the application of the cumulative approach is nowhere to be seen in Taiwan.

After careful high courts cases analysis, no correct interpretation of Article 18(1) of court rulings was found before 2012. As a result, in intercounty adoption cases in Taiwan, the adoptive parents qualify when they meet the requirements provided in the adopted child's national law in addition to their own national laws, and the adopted child qualifies when he or she meets the requirements provided in the adoptive parent's national law in addition to his or her own national law. This situation has made the intercountry adoption in Taiwan much more complicated and harder to be granted by courts.

Take some Taiwan High Court cases for example. In Taiwan High Court Taichung Division 96(2007) non-litigation appeal No. 370 Ruling, the cumulative approach was applied again:

"That the formation and termination of an adoption of a child are governed for the adoptive parent and the adopted child by their respective national laws is provided in Article 18(1) on PIL Act. In the case before this Court, the fact that the adoptive parent is a national of Taiwan and the adopted child is a national of Nepal, is evident by the copies of their identification documents already. According to the provision described above, the formation of this adoption relies on the national laws of the adoptive parent and the adopted child. Namely, the formation is governed by laws regarding adoptions in Nepal and Taiwan."

High Court denied the appeal on the ground that the age of the Taiwanese adoptive parent exceeds the limitation provided in the law of Nepal.

In Taiwan High Court Taichung Division 94 (2005) family- appeal No. 63 Ruling, High Court quoted the Department of Justice 71 (1982) Law No 14788 Interpretation, repeatedly and falsely construed the application of Article 18 (1) by ruling that:

''if one party of an adoption case is a foreigner, the formation and termination of an adoption of a child are governed for the adoptive parent and the adopted child by their respective national laws. Namely, the formation will not be recognized until the adoptive parent meets the requirements of his or her national law and the requirements of the adopted child's national law, and the adopted child meets the requirements of his or her national law and also the requirements of the adoptive parent's national law at the same time."

Again, High Court denied the appeal and maintained the dismissal of the application

[27] Tameike, *Kokusaishihou Kougi*, 505; Sakurada, *Kokusaishihou*, 290; Shouichi, Matsuoka and Watanabe, *Kokusaishihou Gairon*, 233-234.

[28] Liu Jia Yi, *Guojisifa*國際私法 [*Private International Law*], 2nd ed. (Taipei: San Ming, 1995), 310.

[29] Tieh-Cheng Liu, "Guojisifa Shang Shouyang Wenti Zhi Bijiao Yanjiu," 176.

[30] Huei-Yi Shyu, "Lun Shewai minshi falv shiyongfa xiuzheng caoanzhong youguan shenfenfazhi neirong yu jiantao", 151.

from the U.S and Taiwanese adoptive parents for the adoption of a Taiwanese child.[31]

In Taiwan High Court 93(2004) family-appeal No 58 ruling, the motion for the adoption of an Indonesian child by a Taiwanese couple was denied on the ground that the adopted child's national law and the adoptive parents' national law should be applied cumulatively. This ruling indicates that:

> *"the formation of intercountry adoption pursuant to Article 18 (1), is governed by the adoptive parent's national law and the adopted child's national simultaneously. The reason stated in the appeal petition argues that the adoptive parent is only governed by his or her national law is an obvious misunderstanding."*

Would the results of those cases described above reverse if Taiwanese courts correctly interpret the provision in line with the purpose of legislation under the distributive approach? The answer would be affirmative. At least it would make the formation of intercountry adoption in Taiwan in a positive direction. In Taiwan High Court Taichung Division 96 (2007) non-litigation appeal No. 370 Ruling, the formation of the adoption would be recognized since there is no upper bound for the age of the adoptive parent in Taiwanese law, and the adoptive parent (the Taiwanese mother) should've been governed by Taiwanese law only under the distributive approach. The upper bound of 75 years old for the age of the adoptive parent in the law of Nepal should not have been applied to the Taiwanese adoptive parent in this case. In the other case, a Taiwanese father would like to adopt the Indonesian wife's son in Taiwan High Court 93 (2004) family-appeal No 58 Ruling. Under the cumulative approach, the Taiwanese court rejected the adoption on the ground that the formation of the adoption must meet the 5-year marriage between the adoptive parents under Indonesian law. This Taiwanese father is not governed by Indonesian law under the distributive approach if the High Court correctly interpreted the provision.

The new provision Article 54 (1) of the 2010 amendment of the Taiwanese PIL Act extends the same rule set forth in the old provision of Article 18 (1). Thus, the practice in Taiwanese case law would keep making the formation of intercountry adoption in Taiwan in a difficult situation if Taiwanese courts maintain derailing from the correct interpretation of the law.

V. *RENVOI* AND *HIDDEN RENVOI*

In some forum states, the application of choice-of-law rules of another state may refer back to the law of the forum state or the law of a third state. This doctrine is known as *"renvoi*".

Taiwanese PIL Act Article 6 provides: "Where this Act provides that the national law of a party is applicable, but the national law of the party indicates that another law should govern the legal relation in question, such other law is applied. However, if the national law of the party or the other law indicates, in turn, the law of the Republic of China (Taiwan) as applicable, the internal law of the Republic of China (Taiwan) is applied." There is no dispute that the *hidden renvoi* is not included in this provision among academic commentaries.

One of the academic commentaries indicates that as the formation of adoption is governed by the national laws of the adoptive parents and the adopted child respectively, *renvoi* applies: "For example, in the case that a U.S domiciled citizen adopts a Taiwanese child, Taiwanese law applies to the formation of the adoption

[31] Lee, Hou Cheng, *Shewai minshi falv shiyongfa*, 366.

whereas the U.S conflict of laws adopts *lex fori* to the adoption".[32] This opinion is widely accepted in the practice. Taiwan High Court 94(2005) family-Appeal No.63 Ruling takes such a position and the reasoning states: "the adoptive parent X and X1 are U.S citizens and the adopted child is a Taiwanese national, the U.S law and Taiwanese law are applicable to this case. However, *lex fori* is adopted in U.S conflict of laws concerning adoption, therefore, the governing law shall be Taiwanese law pursuant to the provision of *renvoi*"

Before commenting on whether *renvoi* or *hidden renvoi* is justified to apply to intercounty adoption cases, it is necessary to understand the meaning of the U.S conflict of law adopt*ion of lexi fori* in adoption cases. In the U.S conflict of laws, courts refer to the "jurisdictional approach" when they address cases in family matters such as adoption. In the U.S.A, when an intercountry or an interstate adoption case falls into the forum's jurisdiction, the court applies the substantive law of the forum state without considering conflict of laws. Hence, the choice-of-law issue does not occur in adoption cases.[33] However, jurisdiction is a procedural issue whereas *renvoi* is an issue of the application of the law. On what grounds that *renvo*i is applied in conjunction with jurisdiction remains unclear.

The *hidden renvoi* is applied to the cases in family matters such as divorce or parent-child relationship disputes when the applicable law is designated to the common law by the private international law of civil law states - most of the cases involved the U.S parties - and the jurisdictional approach is adopted in common laws concerning family matters. The common law forum will apply their substantial law directly without raising the choice-of-law issue as long as they have jurisdiction to adjudicate under the jurisdictional approach (*lex fori in foro proio*). Therefore, a legal argument in German[34]and Japanese case laws have become more and more influential, claims that a choice-of-law rule is hidden in such jurisdictional approach. Namely, the law of the place where the parties' domicile is hidden in the rule of jurisdictional approach. Consequently, if the forum state has jurisdiction based on the domicile of the parties and the governing law designated to the common law, the applicable law refers back to the law of the forum state under the theory of *hidden renvoi*. Quite a few *hidden renvoi* cases are also available in Taiwanese court cases. The famous international child abduction case (Taipei District Court 95 (2006) Guardianship No 84 Ruling) is a good example of it.[35] In Japan, quite a few academic commentators and court cases are in favor of *hidden renvoi*, especially with regard to the divorce cases between Japan and U.S.A.[36]

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[32] Of particular importance, in this case, is that *hidden renvoi* was referred to as the applicable law on one of the would-be adoptive parents who is a national of U.S.A. And High Court jumped to conclusion that the applicable law on the U.S would-be adoptive parent should be Taiwanese law due to the reason that *lexi fori* is adopted by the U.S law on intercountry adoption. This issue will be discussed at V. of this article.

[33] Liu and Chen, *Guojisifa Lunm*, 470.

[34] "The conflict of laws issues involved relate, first, to the particular court's jurisdiction to grant an adoption and, second, to the effects (incidents) of the adoption in another forum. Choice of law issues are not involved in the adoption itself as the court applies the law of the forum", see Eugene F. Scoles and Peter H. Hay, *Conflict of Laws* (St. Paul, United States: West Group, 1992), 559.

[35] Hai-Nan Wang, "Lun Guojisifazhong Guanyu Fanzhi Zhi Shiyong/論國際私法中關於反致之適用 [On Private International Law Applicable in Respect of Renvoi]," in *Essays in Honor of the 80th Birthday of Professor Herbert Han-Pao Ma* (Taipei, Taiwan: Angle, 2006), 23.

[36] Hua-Kai Tsai, "Woguo Juyou caipanguanxiaquan?: Lun Tai mei jian zhengduo zinv Shijian/ 我國具有國際裁判管轄權？–論台美間爭奪子女事件[Do We have International Jurisdiction to Adjudicate?: A Comment on Child Abduction Case between Taiwan and the USA], *Chinese (Taiwan) Review of International and Transnational Law* 中華國際法與超國界法評論 3, no.2 (December 2007): 223-257.

Due to the contradiction concerning the criteria to determine personal law between civil law states and common law states, i.e., the law of nationality and the law of domicile, *renvoi* is regarded as a solution to resolve the contradiction under traditional private international law.

It is problematic whether *hidden renvoi* remains justifications to be applied to the intercountry adoption. The pros and cons of the *hidden renvoi* should be examined in conjunction with the primary and fundamental objects of *renvo*i itself since *hidden renvoi* is one of the types of *renvoi* doctrine. The jurisdictional approach that common law states adopt, is an approach of unilateral rule that applies forum substantive law directly without taking into consideration foreign law. Nevertheless, the application of *renvoi* is applicable only when the bilateral rules apply pursuant to choice-of-law rules.[37] Moreover, the common law approach simply provides that the forum applies its own law as long as the jurisdiction has been found, which differs from the primary objects of *renvoi* that are regarded as a solution to attain the uniformity of the application of conflicting laws.

Under *hidden renvoi,* civil law jurisdictions like Taiwanese courts will apply Taiwanese substantive law on the ground that the party's domicile locates in Taiwan. However, the national law of the party where the U.S courts would apply their own substantive law over the identical case. The conflicting results and judgments, therefore, occurred between Taiwan and U.S.A. This consequence apparently undermines the primary and fundamental objects of *renvoi,* or rather, *renvoi* is the major reason that causes conflicts between civil law states and common law states. As a matter of fact, *renvoi* and *hidden renvoi* work for the very only one object that could not be admitted with justification, that is, a perfect excuse for courts to apply forum law of their own.[38]

VI. CONCLUSION

After 2012 in Taiwan, some modifications to the false interpretation by Taiwanese courts have been found, such as cases in Taiwan High Court Tainan Division and Keelung District Court. The Supreme Court of the Republic of China (Taiwan) 108 (2019) Taiwan-Appeal No 1668 Judgment also made an accurate interpretation of Article 54(1) with a distributive connecting factor approach although intercountry adoption is a preliminary question in this succession case.

Nevertheless, law reform could not rely only on the courts' authentic interpretation. Further modification to the choice-of-law rules concerning intercountry in Taiwan is necessary. As to the core connecting factor of the choice-of-law rules on intercountry, the personal law of the adoptive parent is widely accepted[39]. The justifications for the personal law of the adoptive parents refer to the fact that, after the formation of the adoption, the new life of the adopted child would be developed in the center of the place, i.e., the domicile/habitual residence or the nationality of the adoptive parents. It is essential to meet all the criteria required by the personal law of the

[37] Hiroshi Taki, "Kakureta Hanchi/ 隠れた反致 [Hidden Renvoi]," in *Issues in Private International Law*国際私法の争点 (Tokyo, Japan: Yuhikaku 有斐, 閣1996), 84.

[38] *Ibid.*

[39] Prof. Liu indicates that the connection between uniformity and *renvoi* is extremely weak and works quite limited to resolve the conflicts between judgments rendered by different forums over identical cases. Liu, Tieh-Cheng, the Renvoi Clause and the Uniformity of Results, in Private International Law, National Chengchi University Law (13), at 212,1990. And Prof. Wang also stands for imposing a certain limitation on the application of *renvoi*. see Wang, "Lun Guojisifazhong Guanyu Fanzhi zhi Shiyong," 24-25.

adoptive parents so that the parent-child relationship would go well in their family life. Moreover, once the adopted children become the family members of the adoptive parents, that plural adopted children are governed by the identical applicable law is considerable. The justification is further enhanced on the ground that it is quite common that the nationality of the adoptive parents would automatically be given to the adopted child as well.

The distributive connecting factor approach shall be abolished and the personal law of the adoptive parents shall be adopted instead in the further modification of the choice-of-law rule concerning intercountry adoption in the Taiwan PIL Act.

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