

Matrimonial Property Agreements for International Marriages in the Republic of Korea

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Abstract

A dramatic growth in the inflow of foreign nationals is transforming Korea into a multicultural society,¹ with an increasing number of international marriages.² Legal matters, i.e. formation and validity of marriages and divorces, are important yet challenging issues for international couples and thus merit extensive research. This paper seeks to identify the legal implications of matrimonial property agreements as defined under the Korean Civil Act, which is applied to international marriages in Korea.

1. Governing Law for a Matrimonial Property Regime under the Korean Private International Act

Under the Korean Private International Act, the same governing law for the general validity of a marriage applies to a matrimonial property regime, which includes a marital property agreement (Private International Act, Article 38-1).³ This is because it is appropriate to apply the constitutional principle of gender equality and to apply the same set of laws to both general and property aspects of a marriage. In addition, the principle of party autonomy has been adopted for the matrimonial property regime, whereby spouses are allowed to choose a governing law and the chosen law prevails (Article 38-2). However, the laws eligible to be considered governing law are limited in scope considering the personal and practical aspects of the regime (Article 38-2-1, 2, 3). Furthermore, for clarity of the selection, the law mandates a written and dated contract with the parties' names and seals or signatures (Article 38-2, proviso).

¹ Under the Multicultural Families Support Act, enacted in 2008 for social cohesion, foreign nationals residing in Korea who had or have marital relationships with Korean citizens are defined as "marital immigrants." Yoon Cheol CHOI, Legislative Response to Transformation to a Multicultural Society, p. 12, 8th Korea Jurists Congress, Social Cohesion and Role of Law, October 10, 2012.

² An international marriage, in general, refers to a "marriage between a man and a woman of different nationalities." International marriages in Korea may include marriages between Korean and foreign nationals and marriages between foreign nationals.

³ There are three approaches to a matrimonial property regime in terms of the governing laws: personal laws, the movable-immovable separation principle, and an intention-oriented approach. In personal laws, marital property is treated as a personal issue just as any other personal matters of the parties involved would be treated. Adopting this approach, the Korean Private International Act, as the governing law of a marital property regime, applies the same law that effectuates the marriage or an equivalent standard. Under the movable-immovable separation principle, movable property falls subject to the law of the domicile of the couple, while immovable property is subject to the law of the location of the property. In an intention-oriented approach, the party autonomy rule is applied to marital property, as in debt agreements. Chang Seop Shin, Private International Act, Sechang Publish, 2011, p. 281.

The rationale behind applying the party autonomy rule to a marital property regime is that it is appropriate, given its strong financial nature, to allow the spouses to freely establish and manage property relationships in accordance with their intentions. Another rationale behind allowing a couple to select the governing law is to ensure a high level of predictability of circumstances. Where the law of a country “most closely related” to a couple may be selected as an objective governing law, in a cascading order of distance, which reduces predictability. In addition, in the Korean legal system, which allows alteration⁴ of the reference time point, the party autonomy rule respects a couple’s desire for clarity and stability in their property contracts.⁵ Meanwhile, a marital property regime also impacts the interests of third parties as counterparties in transactions. Selection of a foreign law as the governing law, in particular, gives rise to a concern for protection of domestic transactions. For this, a separate clause was added to ensure that if a marital property agreement, concluded under a foreign law, is registered in Korea, it may be claimed against a third party (Article 38-4). However, if the agreement is not registered in Korea, or if the legal property regime is not relevant to registration and a foreign governing law is selected, a claim cannot be made against a bona fide third party in relation to a juristic act conducted in Korea or to property located in Korea. If such is claimed by a third party, the laws of the Republic of Korea shall prevail (Article 38-3).

While the consequences of a divorce regarding marital property, i.e. dissolution of property relations and attribution of property, are subject to Article 38 of the Private International Act (Marital Property Regime), matters related to post-divorce property division fall under Article 39 (Divorce).⁶

2. Features of Marital Property Agreements for International Marriages

The governing law of a matrimonial property regime applies to both marital property agreements and the legal property regime in determining whether a marital property contract is legally recognized and if so, when it must be concluded, what information is to be included, and whether revision or alteration is permitted. Regarding the capacity to sign a marital property contract, some argue that if a person, including a minor, who has the capacity to enter into a marriage, is deemed to have the capacity to enter into a marital property contract, the matter is more of a marital property issue rather than a general capacity issue, and thus, the governing law of the matrimonial property regime must prevail. However, it can be safely countered that the capacity to enter into a marital property contract falls under the capacity to property execution, and thus, pursuant to Article 13 of the Private International Act (Capacity), the laws of the home countries of the two spouses at the time of the contract must apply. In the same manner, Article 17 of the Private International Act (Method of Juristic Act) must apply⁷ instead of the governing law of the marital property regime, to what, how, and when of the contract. Meanwhile, if a matrimonial property agreement is not legally recognized or if a couple did not conclude an agreement, the couple must follow the legal property regime (Civil Act, Article 830 or 833) pursuant to the governing law of the marital property regime. As the parties to a marital property agreement are permitted to choose the governing law under the party autonomy rule, it may be that the marital property agreement defined in the Korean Civil Act applies.

⁴ Referencing the same governing law for the general validity of a marriage to a marital property regime requires determination of a reference time point: whether to reference the law “at the time of the marriage” (alteration prohibited) or “at present” (alteration permitted). Amending the Conflict of Laws, the Korean Private International Act adopted the latter approach. The spirit of the former under the Conflict of Laws was to respect the permanent nature of matrimonial property and to protect the wife and any third party from disadvantages arising from the husband’s arbitrary change of nationality and the consequential change in the governing law. However, the new Private International Act adopts the latter, because the marital property regime and the general validity of a marriage share the same governing law and thus, aligning the effectuation time points is appropriate. Furthermore, as both spouses’ personal laws duly apply under Article 37 of the Private International Act, one spouse’s arbitrary change of nationality creates a minimal, if any, legal benefit for him/her.

⁵ Gwang Hyun Seok, Interpretation of the 2001 Amendments of the Private International Act, Jisan, 2003, pp. 323-324.

⁶ In Ho Kim, Analysis of Precedents in the Private International Act, Parkyoungsa, 2004, p. 205.

⁷ This is the majority’s theory as found in Jong Jin Yoon’s, Amended Contemporary Private International Act, Hanol, 2003, p. 446; Yeon Kim, Jeong Ki Park, In Yu Kim, Private International Act, Bobmunsa, 2003, p. 329; Chang Seop Shin, p. 284; Hee Won Seo, Lectures on the Private International Act, Ilchokak, 1990, p. 277; Yong Han Kim, Myung Rae Cho, Private International Act, Jungil Publishing Co., 1991, p. 321. For an opposing view, see Chang Seon Shin, Private International Act, Fides, 2006, pp. 330-331.

In addition, regarding a marital property agreement concluded under a foreign law but registered in Korea, such may be enforced against a third party pursuant to the Korean Civil Act, which allows for registration of matrimonial property agreements in Korea (Civil Act, Article 829-4). Even an agreement concluded under a foreign law, if registered in Korea, can be used to make a claim against a third party. This is to protect foreign nationals in transactions conducted in Korea. As such, the party autonomy rule plays a critical role in the Private International Act. For instance, Article 8 of the Hague Convention on the Law Applicable to Maintenance Obligations of 1973 may be waived by a local law⁸ by means of the spouses' selection of their governing law. In other words, if a couple's marital property agreement defines property matters post-divorce, then the couple may choose their agreement over the governing divorce law by affirming their agreement.

The current trend of the conventions on private international laws is in favor of the party autonomy rule. The concept is also gaining momentum in the realm of family law. One of the rationales for expansion of the party autonomy rule in Korea is that it contributes to legal stability.⁹

3. Formation and Effect of Matrimonial Property Agreements under the Korean Civil Act

(1) Significance of Marital Property Agreements

A marital property agreement is a contract, entered into by the parties to a marriage prior to formation of the marriage that defines general property relations between them after the marriage (Civil Act, Article 829-1), and it is different from marital contracts formed between two spouses during the marriage. If the agreement is not registered with the official registrar prior to the formation of marriage, it may not be enforced against the couple's successor(s) or a third party (Article 829-4). Once determined, the content of the agreement may not be altered unless in the presence of a justifiable reason (Article 829-2). However, in the event one spouse manages the property of the other and the property concerned is jeopardized due to his/her mismanagement, the other party may file a claim with the court for his/her own management of the property and may make a claim to split the property if the property concerned is jointly owned (Article 829-3). However, if not registered, the agreement may not be enforced against a third party (Article 829-5). A couple who has not entered into a marital property agreement is subject to a separate property regime and joint liability for the debts of their household affairs (legal property regime). Despite the stipulation of a matrimonial property agreement and a legal property regime in the Civil Act for the purpose of defining property relations between spouses, the agreement is rarely practiced¹⁰ and most of the marital property relations in Korea today are governed by the legal property regime. A marital property agreement may be complementary to a legal property regime,¹¹ particularly the separate property system, as the latter creates a set of concerns related to property division claims in divorce cases.

(2) Practicing Matrimonial Property Agreements

1) Parties to the agreement

⁸ For the original text and interpretation of the Convention, refer to the Hague Convention on Private International Law, Ministry of Justice. Pursuant to the above Convention, Korea mandates that "in divorces conducted or endorsed in Korea, maintenance obligations between the divorced parties shall be subject to the governing law applied to the divorce, despite the stipulations in Paragraph 1" (Private International Act, Article 46-2).

⁹ The Private International Act of Korea adopts the party autonomy rule not only in the marital property regime (Private International Act, Article 38-2) but also in inheritance matters, albeit limited in scope (Article 49-2).

¹⁰ As of 2005, only 12 marital property agreements were registered in Korea. Young Ho Shin, Current Status and Challenges of the Marital Property System in Korea, Legal Studies, Vol. 17-3, Institute for Legal Studies, Yonsei University, 2007, p. 295. As of the first half of 2008, a total of 40 marital property agreements were registered. Woo Il Yoon, Ways to Promote Marital Property Agreements, Law Review, Vol. 29, Institute of Legal Research, Soongsil University, 2013, 1, p. 329.

¹¹ Proposed ideas for further promotion of marital property agreements include: mandating full disclosure of the assets and liabilities of each spouse as a precondition for the agreement; allowing the agreements to be concluded during marriages; introducing a notary and consideration period; providing detailed information on the agreement through helpdesks or guidance; allowing couples to alter or terminate the agreement by consensus without going to court; adopting a more convenient (easier and faster) system of issuing certified copies of the register; allowing one spouse to make a joint-ownership registration; and legislating special conditions for nullification or cancellation of the agreement, reflecting the special nature of the agreement. Woo Il Yoon, p. 334.

Parties to a matrimonial property agreement are the prospective husband and wife who will enter into a marriage. Conclusion of the agreement after marriage or conclusion of the agreement with person(s) other than the parties to the marriage is not recognized as valid under the Civil Act. Although a matrimonial property agreement is an ancillary contract arising from a marriage, it nevertheless is a juristic act related to property, and hence the question arises of the parties' capacity to sign a valid contract.¹² In light of the fact that the agreement is a juristic act related to property matters and that it defines attribution of the property to be acquired in the future as opposed to the property owned at the time of the marriage, ensuring adequate capacity of the parties is deemed necessary.¹³ Therefore, for minors, separate consent must be obtained for a marital property agreement, in addition to consent for the marriage.¹⁴

2) Form of the agreement

The Korean Civil Act does not specify a method for concluding marital property agreements. One may thus argue that any form is acceptable. However, for registration of the agreement – for enforceability against the couple's successor(s) or a third party – a couple is required to attach the agreement document, and thus, it is advised that a written agreement be prepared, even if the actual conclusion of the agreement took place earlier (Administrative Guidelines for Registration of Matrimonial Property Agreements, Registration Regulation No. 1416).

3) Time and alteration of the agreement

Regarding the time for concluding a matrimonial property agreement, the Korean Civil Act follows the French law and recognizes as valid only those concluded prior to marriage. In other words, for a marital property agreement to be valid and effective against a third party, it must be concluded and duly registered prior to marriage. However, there is an argument in favor of allowing in-marriage contracts, because most of the contentious points regarding marital property agreements are related to the attribution of property acquired during the course of a marriage.¹⁵

Furthermore, under the Civil Act, the content of the agreement, once concluded prior to marriage, cannot be altered, on principle, during the marriage.¹⁶ However, in the presence of a justifiable reason, the agreement can be altered upon approval from the Family Court (Civil Act, Article 829-2, proviso).¹⁷

¹² There is a report on three legislation cases regarding matters related to the capacity required for a matrimonial property contract. For details, refer to Byung Doo Kim, *Theory of Matrimonial Property Agreements*, Family Law Studies, Vol. 16-1, 2002, p. 133.

¹³ There are conflicting views regarding the capacity requirement for conclusion of a marital property agreement. The conflict arises mainly from the fact that the agreement is concluded prior to marriage – for which one may call for consent by a legal representative as in any other contracts under the Civil Act. On one hand, a marital property agreement may be treated as a status-changing act, i.e. marriage (a minor may marry after reaching marriage age), and thus, the absence of the generally defined capacity of a person who has reached marriage age must not hinder the validity of the agreement. On the other hand, the agreement, albeit ancillary to marriage in nature, defines property relationships between spouses and thus requires capacity to enter into a property contract, quite separate from the capacity to enter into marriage.

¹⁴ Kang Won Lee, *Marital Property Contract*, Review of Family Court Cases [Special Edition for 40th Anniversary of the Seoul Family Court] Book 1, Court Documents Vol. 101, p. 37. An opposing argument is that a minor, if entering into marriage with consent from a parent(s), etc., has the capacity to conclude a marital property agreement. Joo Soo Kim & Sang Yong Kim, *Act on Domestic Relations, Inheritance, and Family*, 10th Edition, Bobmunsa, 2013, p. 136.

¹⁵ Woo Il Yoon, p. 10; Kang Won Lee, p. 37; Seung Wan Ha, *Current Practice of Matrimonial Property Agreements and Proposal for Improvement*, Legal Studies, Vol. 33, February 2009, p. 204; Kyung Keun Jeon, *Marital Property Agreement under the Civil Act: Issues and Improvement*, Family Law Studies, Vol. 19-1, 2005, pp. 177-219.

¹⁶ However, the French Civil Law renounced the non-alteration principle in 1965. The French rationale behind the amendment was that the non-alteration principle did not reflect the change of times in light of the possible change in social, economic, or occupational status of a couple after marriage. The amendment sought to ensure flexibility and adaptability to the changed environment. With another amendment in 2006, the law now allows a part or the entirety of a marital property agreement to be altered, via a notarial document, for the benefit of the family if a couple so agrees after two years of a marital property regime (Code Civil des Francais, Article 1397). Both the legal property regime and the property contracts may be altered.

¹⁷ A Non-contentious Family Litigation Case, RA-No. 5, filed by both spouses (Family Litigation Rule, Article 60). This claim for alteration of the marital property contract was seeking approval from the Family Court of the prior agreement of the two spouses on alteration of the contract. Joo Soo Jeong, *Practices of Non-Contentious Litigation Procedures*, Law Book Center, 2011, p. 407.

In addition, if an agreement pre-defines matters related to a change of property managers or a division of the property in joint ownership, these changes may take place pursuant to the contract. In the event a couple fails to reach a consensus on the alteration of the marital property agreement, one spouse may file a claim against the other spouse for a change of the property manager or for a division of the jointly-owned property, as stipulated in Article 829-3 of the Civil Act. Such claim, however, only pertains to alteration of the specific clauses relevant to the designation of a property manager in the matrimonial property agreement, so as to take over the management of his/her peculiar property from the other spouse.¹⁸ If an agreement mandates registration of the transfer as a method of splitting the jointly owned property, this must be conducted accordingly.

4) Enforceability

For a matrimonial property agreement concluded prior to marriage, to be enforceable against the couple's successor(s) or a third party, it must be registered before the formation of marriage. The agreement must be registered, as governed by the Non-Contentious Case Litigation Procedure Act, on the Marital Property Agreement Registry.

Meanwhile, one controversial scenario exists regarding the disclosure on the real estate register. If real estate is acquired during a marriage and registered under the title of one spouse, the real estate register would indicate only the title holder, not his/her marital property agreement and the attribution of the property thereof. Will the matrimonial property agreement be enforceable in such a scenario? By way of real estate transaction practices in Korea, parties to a transaction verify only what is disclosed on the real estate register, not what is not indicated, i.e. the marital property agreement of the title holder. One argument is that a marital property agreement is enforceable against a third party only if and when separate claim procedures are utilized, because the agreement governs not only property relations between the spouses prior to marriage, but also the property relations altered after registration of the marriage. Because registration of the agreement is not sufficient for a third party to fully identify the altered property relations between two spouses during marriage in relation to real estate, the agreement *per se* should not be the sole grounds for any claim against a third party unless separate claim procedures are utilized for each registered property.¹⁹ An opposing argument is that the registration of a marital property agreement itself qualifies one party (the non-title holder) with a right to any property registered under the title of the other party, and this is enforceable against a third party.²⁰

While registration of a marital property contract and registration of real estate share the common aspect of disclosing the property rights and obligations of individuals for the safety of the transaction, they are completely different in terms of registration procedures, competent offices, and registration documents. This is why, for instance, a creditor of a couple may not be able to identify, based only on the real estate register, if the property concerned is, in effect, jointly owned by both spouses pursuant to their marital property agreement. In such case, he/she may even be subject to unexpected damages if the agreement is enforced against him/her. All in all, it would be appropriate to state that because real estate registration falls under the Act on Special Measures for the Registration of Real Estate, the mere existence of a registered matrimonial property agreement pertaining to real estate does not enable a couple to make a claim against a third party, unless a separate real estate registration has been conducted.²¹

5) Termination

A matrimonial property agreement may be terminated in two scenarios: first, by the termination of a marriage; and second, by the mutually agreed upon termination of the agreement during the marriage. Termination of a marriage can be further broken down into a divorce, nullification of marriage, or expiration (death) of one spouse. In the first two circumstances, marital property is divided in accordance with the agreement. In the third case, however, where the agreement is terminated due to the expiration of one spouse, the surviving spouse becomes

¹⁸ This refers to a Non-contentious Family Litigation Case, MA-No. 2: Claim for Change of a Marital Property Manager, which is filed by one spouse. Joo Soo Jeong, p. 784.

¹⁹Seung Woo Lee, Matrimonial Property Agreement, Family Law Studies, Vol. 3, 1989, pp. 82-83.

²⁰Byung Doo Kim, p. 160.

²¹ Kang Won Lee, p. 47. Thus, it is argued that the marital property agreement registry should be abolished altogether and that the relevant information should be disclosed in the real estate register. Ki Tae Kim, Marital Property Agreement and Its Registration, Judicial Officials Journal, July 2001, p. 291.

the sole owner of his/her share of the property and inherits the legal percentage from the share of the deceased spouse. If a couple agrees to terminate the marital property agreement during the marriage, any property acquired after the termination will be governed by a separate property regime (legal property system) in terms of its attribution or division.

(3) Types of Matrimonial Property Agreements

1) Common Property System

A common property system considers as joint property any income arising from the couples' inherent property during the marriage and any property acquired by means other than gift or inheritance. Under the system, disposition of the common property is restricted for the purpose of protecting the right of a spouse to claim liquidation, which may be jeopardized in the event the other spouse arbitrarily disposes of the property concerned during the marriage.²² The system allows a couple to register immovable property that is newly acquired during the marriage under common or joint ownership. It further allows a spouse to file a claim against the other spouse, who registered such property solely under his/her name, for registration of the transfer of his/her share on the grounds of the marital property agreement. Regarding negative property, a couple may enter into an agreement that designates as common liabilities only those debts arising from the formation of common property or de facto common property during the marriage or debts incurred by one spouse with the consent of the other spouse.

2) Individual Property System

On the other hand, an individual property system attributes to a single spouse any inherent property that he/she owned prior to the marriage, any income arising from such property, and any property acquired during the marriage. To a certain extent, it is similar to a separate property system, which is a legal property regime in Korea, but it is different in that it prevents a non-title holder spouse from claiming title trust relationships during the marriage. While a couple may enter into an agreement that attributes any unattributed (ownership unidentified) property to a single spouse during the marriage, the possibility exists that inherent property owned by a single spouse from before the marriage, any income arising from such property, or any property acquired during the marriage may be counted as de facto common property, if achieved through cooperation with the other spouse during the marriage. In such a case, validity of the individual property agreement becomes limited and the property concerned may be subjected to liquidation upon dissolution of the marriage. However, for couples with individual property agreements, it may be difficult to recognize one spouse's contribution to the formation of the other spouse's peculiar property.

(4) Liberty and limitations of a marital property agreement

On the appearance, legislation without specific restrictions or exhaustive illustrations regarding a matrimonial property regime, as in the case of Korea, may seem quite liberal, granting freedom to couples in matters related to the content of their marital property agreements. Nonetheless, a matrimonial property agreement is rarely practiced in Korea. In fact, it is one of the most unfamiliar systems for Korean couples, in the light of the local custom and practice. Most of the marital property in Korea, therefore, falls under the legal property regime. While this system provides some freedom to spouses regarding their marital property, it may also de-motivate a spouse from entering into any contract at all if he/she does not have the basic information needed to enter into such a contract.

This phenomenon should not be discounted as a natural or inevitable consequence of the liberty of contract. On the contrary, it should be regarded as an infringement upon one's liberty of contract. Although the Civil Act leaves the content of a marital property contract entirely up to the contracting parties, there are certain limitations arising

²² Under the current Civil Act, a separate property system is applied as a default legal property regime to couples without specific marital property agreements. It means that, unless specified otherwise, a spouse may make an arbitrary disposal of any property in his/her ownership without obtaining consent from the other spouse. This creates several concerns, e.g., a spouse's arbitrary disposal of property may result in the other spouse's eviction from his/her residence, or a spouse may intentionally dispose of property prior to initiating divorce proceedings so as to restrict the other spouse's claim for property division. In this context, a bill was submitted for amendment of the relevant laws to restrict the disposal of marital property during marriage. Jin Soo Yoon, Review of Proposed Amendments to the Civil Act Regarding the Marital Property System, *Family Law Studies*, Vol. 21-1, 2007, p. 109.

from the interpretation of the Civil Act and other general regulations. Examples of such limitations may be if the content of a marital property agreement is *contra bonos mores* or against other social orders; if the essential elements of the marriage are not sound; or if an agreement violates the spirit of gender equality. In such cases, validity of the marital property agreement shall not be recognized.²³ Because a marital property agreement only defines property rights and obligations between the spouses and does not pertain to non-property rights or obligations during the marriage, and as the Civil Act distinguishes the general effect of a marriage from its marital property agreement, general (non-property related) elements of a marriage should not be included in the marital property agreement.²⁴

One argument is that a marital property agreement does not pertain to property relations before or after marriage because it comes into force only with formation of the marriage and loses validity with dissolution of the marriage.²⁵ Of course, for a marriage dissolved after the expiration of a spouse, the marital property shall be disposed of pursuant to the inheritance laws. However, a divorced couple, as the argument goes, should not use their marital property contract to define property division, economic contributions, alimony, post-divorce support obligations, and child support payments. On the other hand, property division is a matter of liquidating property rights and obligations formed during the marriage, and thus, if two spouses were able to agree prior to the marriage on matters regarding property acquired during the marriage, such agreement on the division of their property after the dissolution of the marriage must be duly recognized.²⁶

Furthermore, some argue that a marital property agreement that uses a foreign law as its governing law is not valid because it is unreasonable to require a transacting counterparty to understand the foreign law concerned, and thus, it undermines the safety of the transaction. However, in the Korean legal system, where the content of a marital property agreement is at the liberty of the spouses, a couple should be allowed to refer to legislation from other countries in the formation of their property relations. Thus, selection of a foreign law as the governing law must not be viewed as an issue.²⁷

(5) Overcoming limitations

An application for registration of a marital property agreement is reviewed by a registration official regarding its lawfulness for the prevention of fraud or falsification.²⁸ On principle, only the content relevant to the marital property should be registered (Registration Case 200607-6, Registration of a Marital Property Agreement). However, the Administrative Guidance to Registration of Marital Property Agreements (Registration Regulation No. 1416) requires registration of the same information as indicated in the agreement.

Clearly, the latter contradicts the former – the latter would mean that even an agreement *contra bonos mores* or against another social order or an agreement relevant to a third party's property (designating one spouse as the manager of a third party's property or exercising rights to a third party's property) should be registered as is. This

²³ For instance, marital property agreements of the following nature shall be deemed invalid: those that exempt support obligations between spouses; those that exclude a spouse from joint liability for home affairs obligations; those that entirely waive a spouse's economic obligations; those that transfer all of the property of one spouse to the other spouse; or those that mandate one spouse to obtain consent of the other spouse for every legal act.

²⁴ Therefore, matters related to co-habitation, support, spousal fidelity, or rights/obligations to parents or offspring are not included in marital property agreements.

²⁵ Joo Soo Kim & Sang Yong Kim, p. 137. Kang Won Lee (p. 44) states that a matrimonial property agreement serves only as a key factor in property division decisions. The right to a claim for property division, economic contributions, the right to a legal reserve of inheritance, and the right to inheritance shall not be waived in advance.

²⁶ Woo Il Yoon, p. 338; Seung Wan Ha, p. 198. For reference, a property division agreement refers to an agreement between two spouses who have divorced or are yet to divorce, regarding the division of property accumulated during the marriage by means of mutual cooperation. If two currently married spouses agree to divorce by consensus in the future and agree on property division under the assumption of such divorce, the agreement shall be effective only when and if they divorce by consensus as agreed, Supreme Court Ruling, May 8, 2001, No. 2000-DA-58804.

²⁷ HyeJeong Jeon, Contents of Marital Property Agreements in Official Registrations, Family Law Studies, Vol. 20-1, 2006, p. 253.

²⁸ For a marital property agreement submitted for registration, Article 71 of the Non-Contentious Case Litigation Procedure Act (Application of the Registration of Real Estate Act) applies amended provisions of the Registration of Real Estate Act related to reviews by registration officials (Reasons for Rejection/Dismissal). See Article 29, Paragraphs 1-5 and Paragraphs 8-10. Specifically, if a submitted agreement falls under any of the predefined categories and if the applicant fails to correct the flaw concerned, a registration official must reject the application with a stated reason.

will not only disrupt sound judiciary order but will also undermine the credibility of matrimonial property agreements and their registration in general. As such, the above-referenced sections of the Regulation should be deemed invalid. Thus, if a marital property agreement *contra bonos mores* or against another social order or in violation of a peremptory norm – and thus invalid – is submitted for registration, it should be regarded as irrelevant and rejected by a registration official under the authority of his review.²⁹ However, a registration official is endowed with only the authority to conduct a formal review—checking whether a given application, the attached evidence, and a registry certificate fulfill the legal requirements for registration. He/she does not have a substantial amount of authority to review whether a given application is lawful against the substantive law (Supreme Court Ruling, 1990.10.29, 90 MA 722). Therefore, in such cases where validity of the agreement under the substantive law is in doubt, couples are advised to first submit their applications for registration.³⁰

4. Conclusion

The last topic to address is the legal force of a marital property agreement entered into in Korea by two spouses of different nationalities and signed under the Civil Act.³¹ Firstly, the two spouses should, as parties to the agreement under the party autonomy rule, select a governing law. A Korean law may be selected on the grounds of one spouse's nationality or of the couple's habitual residence. The agreement must be in written form, dated and signed, with names or signatures. Of course, the capacity to enter into a marital property agreement shall be governed by the national laws of the respective parties at the time the contract was signed, but the form of the agreement may be valid under the principle of *lex loci commissi* and a couple may choose to enter into a contract under the Korean Civil Act. As for the extent of the legal force of the agreement, the right of one party to select a governing law should be restricted, even with a foreign law selected as the governing law, if a peremptory norm is required for the protection of the other party. If a peremptory norm does not exist in writing, the court may recognize and apply the norm based on its interpretation. The same approach should be used for registration in Korea of a marital property agreement signed under a foreign law.

²⁹ According to the Supreme Court ruling, “‘Irrelevant to Registration,’ as specified in Article 55-2 of the Registration of Real Estate Act, refers primarily to cases where it is clear that a given application for registration, by its intention, cannot be permitted by law” (Supreme Court Ruling, November 30, 1989, MA-645). In practice, if a registration official rejects an application on the grounds of its unlawfulness, the applicant concerned may file an appeal under the Registration of Real Estate Act, enforced by Article 71 of the Non-Contentious Case Litigation Procedure Act, for a court decision regarding its lawfulness.

³⁰Seung Wan Ha, Review of Registration of Matrimonial Property Agreements, Civil Act Studies, Vol. 46, September 2009, p. 614.

³¹ The Supreme Court included in the 2011 amendment to the Registration Regulation (Administrative Guidance for Registration to Marital Property Agreements) cases where parties to a contract are Koreans residing overseas (without a Korean residential identification number) or foreign nationals.