The systematic positioning of the free will of the parties in private international law —— Historical development from Savigny's theory on seat (*Sitz*) of the legal relations to modern theory of private international law (summary)

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This paper addresses the systematic postioning of the free will of the parties in the context of private international, as well as the time scope of its historical analysis, in order to seek new legal stability and foreseeability for the today's global era. Starting with Savigny's theory concerning the seat (*Sitz*) of legal relations, it analyzes the free will's systematic positioning in private international law by focusing on private international law regulations in today's rapidly globalizing international society.

When exploring the connection of people to a certain territorial place in a specific legal area, instead of starting with national statutes that differ by country and are based on legal relations that exist regardless of the content of law, Savigny presented a formula for how legal territory to which it belong could be explored from the perspective of particular legal relations. To explore the connection between persons and territorial places, he summarized the academic development of *origo* and *domicilium* under Roman law, the first of which was obtained by birth and essentially determined the location of the person. By contrast, in modern law — namely Prussian law at the time of Savigny — subordinance to a specific place of law is determined by the domicile, which can be chosen according to the person's free will, meaning that the domicile, indicating subordinance by free will of the parties is decisive. Savigny picked up the common element that significantly affected any determination of the seat of legal relations: subordinance by the free will or voluntary subordinance. The seat of individual legal relations was then discussed in five areas: the status of the person in itself, law of things, law of obligations, law of succession and law of the family. In sum, not only domicile — that is, the seat of the status of the person, succession and family law relations — but also the place where the things is situated and the place of fulfilment — that is, the seat of legal relation of things and contractual obligations — was based on subordinance by the free will or voluntary subordinance.

Ernst Rabel points out that Savigny's theory concerning the seat of the legal relations

has significantly influenced subsequent private international law theory, often rephrased by scholars as "the law of the state with which the relation has closest connection" (John Westlake). Therefore, have Savigny's theory concerning the seat of the legal relations been significantly inherited? If so, how? In the light of Gebhard's first draft (1881), an 18th Germany lawyers' meeting (Deutscher Juristentag, 1886), and Gebhard's second draft (1887) regarding the codification of private international law in Germany as a sovereign national state, Savigny's theory indexed international connection standards as applicable universally, or at least to European Christian society, to subordinance due to the free will or voluntarity of the parties. However, when the legislation of private international law in Germany as a nation state was discussed, the index was replaced with the balance of applicable law policy in sovereign nation states.

The intent of the theory remained a new form of the law of the most closely connected place whose criteria for judgment are not harmonized between states. In the era of nation states from the end of the 19th through the 20th centuries, the free will was severely restricted. It was discussed primarily in terms of whether it should be considered in determining the law of the most closely connected place and, even if so, to what extent. Even Gerhard Kegel, who has flexibly interpreted statutes of private international law by applying Germany legal interest approach, found that the free will was a supplementary connecting factor, often appealed to as a last resort (*verlegenheitslösung*) when a more appropriate and objective connecting factor could not be identified.

Globalization starting at the end of the 20th century, however, has changed this tradition. A recent World Bank survey has indicated that the number of immigrants worldwide tripled from 75.5 million in 1960 to 2010, which has caused multicultural and multiethnic nation states to emerge. The principle of the free will has been deemed a legal principle that is compatible with the change. Though the free will was initially discussed primarily regarding claim contracts and is not even accepted in certain Latin American and Middle Eastern countries in matters involving claim contracts, the principle is generally recognized around the world. Experts have argued that the principle should be limited in terms of the scope of laws subject to free choice and that a special connecting theory is a mandatory provision for the protection of socially vulnerable persons such as consumers and laborers. The limited principle of the free will tends to find ground in legal relations regarding not only (i) the law of succession and (ii) law of the family, including the matrimonial property system, divorce, family name, and duty to support, but also rela-

tions traditionally governed territorially, including (i) real rights of things, (ii) intellectual property rights, and (iii) non-contractual obligations such as torts, *negotiorum gestio* (management of business), and unjust enrichment.

Considering these situations, this paper seeks to rethink Savigny's theory of the seat of legal relations in the modern context and to reanalyze the free will in the context of modern private international law.