The Amendment of Japanese Private International Law and Applicable Law on Contract (summary)

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The overall amendment of Japanese Private International Law was made in June 2006. The rule of the applicable law on contract was substantially changed by introducing the concept of characteristic performance which was adopted by Rome Convention.

It is questionable if it was necessary to make such an overall amendment at this stage in very limited time. I don't think there was such need in Japanese industries and society. Also, it is questionable if this amendment achieved its goal to contribute international harmonization and to enhance clarity and predictability. As far as the rules on contract conflict concern, the new Japanese law is different from Rome Convention in some important aspects. The introduction of totally new concept and process to determine applicable laws on contract might reduce predictability at least for some period.

Under the old law, Horei, when there is no choice of the applicable law by parties, the law of the country where the contract is made is applicable. This rule has been criticized because such a place often doesn't have significant connection to the contract. To avoid mechanical application of the law of the country where contract is made, dominant opinion and court cases enlarged the coverage of implied choice and recognized implied choices even when parties had no real intent to make such choices. In this amendment, this rule was changed. New Article 8, paragraph 1 stipulates that, in the absence of a choice by parties, the applicable law shall be the law of the place which is most closely connected to the contract. Under paragraph 2, when only one of the parties of the contract perform a characteristic performance, the law of the place in which such a party has his/her habitual residence shall be presumed to be the law of the place which is most closely connected to the contract. Different from Rome Convention, the new law doesn't require parties' choice to be expressed or demonstrated with reasonable certainty by the terms of the contract or circumstances. It is unclear

if the concept of implied choice under the new law is different from the same under the old law. It is also unclear how much weight will be put on the presumption of paragraph 2 of Article 8. In relation to Rome Convention, there are the strong model, under which the presumption should be disregarded only in exceptional cases and the weak model, under which the presumption is easily disregarded if there is another place which has more closely connected to the contract. At present, the weak model seems to get more support in Japan.

The new law introduced a special rule to protect consumers, but again it is different from the one in Rome Convention. Under Article 11, when a consumer expresses his/her intention to request application of some specific mandatory consumer protection rule of the country of his/her habitual residence, such rule will be applied cumulatively with the applicable law of the contract. Some academics criticize this rule because consumers without sufficient expertise are requested to take action to get protection under this provision.

It seems to me that sufficient attention to procedural aspects of choice of law has not been paid by academics in Japan. In this amendment, there are some issues which require more consideration from the procedural aspects. It should be considered to determine applicable law in interlocutory judgments.