

The Law Applicable to Tort Liability in the Act on the General Rules of Application of Laws (summary)

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The Act on the General Rules of Application of Laws was promulgated on June 21, 2006. It provides the law applicable to tort liability in Articles 17 to 22. This paper concerns the evaluation of these provisions and the interpretation to be discussed before Japanese courts in the future.

The Act does not provide comprehensively the tort liability. Above all any provision concerning the infringement of intellectual property is not in place. Despite lack of provision, Articles 17 to 22 should be excluded for the infringement of intellectual property. It should be governed in principle only by the law of the State for which the protection of intellectual property is demanded. This law should cover all the claims such as injunction, abandonment, and damages.

The general rule of the law applicable to tort liability is regulated by Article 17. According to this, the tort liability is in principle governed by law of the place where the result of the act takes place. However, when the actor cannot usually foresee the place, the law of the place where the wrongful act was committed is exceptionally applicable. Such an exception is questionable. This is because the wrongful act whose result occurs in another country is normally committed by a company. The company should generally foresee the place where the result of its act takes place. Accordingly, the exception will be recognized only in a rare case.

The special rule for product liability is prescribed by Article 18. According to this, the liability is in principle governed by the law of the place where the product was delivered to the victim. However, when the maker or the distributor cannot usually foresee the place, the law of its principal place of business is exceptionally applicable. It happens often that the product is sold everywhere in the world, and that the maker or the original distributor cannot know before a lawsuit where the product was sold and delivered to the victim. Accordingly, the exception will be recognized more frequently than under the general rule of Article 17.

The special rule for defamation is provided by Article 19. According to this, the liability for defamation is governed by the law of the place where the victim has his habitual residence. However, the demand for publication of a counterargument should be governed by the place of business of the actor, although there is no provision to this effect.

Article 20 is an exception clause. According to this, the law of the other place is applicable, if it is manifest that the case is more closely connected with the place than the one to which belongs the law applicable under Articles 17 to 19. For this purpose a judge shall consider the circumstances such as that the parties had their habitual residence in the same country at the time of the wrongful act, or that the wrongful act was committed in breaching the obligation based on the contract between the parties. In my opinion the application of the law of the place where both of the parties had their habitual residence, and the same law as the one applicable to the contract between the parties should be in principle recognized, although these circumstances are enumerated only as factors to be considered for exception. Contrary to this, unless these circumstances, the exception should be restricted to the case where the law applicable under Articles 17 to 19 is slightly connected with the case and not appropriate from the conflict of laws perspective.

The party autonomy is accepted in Article 21. According to this, the parties may change the law applicable to tort liability after the occurrence of the wrongful act. However, this change cannot be opposed to the third party when it is prejudicial to his rights. In my opinion the change of the governing law should be more restrictively recognized than for the contract. Above all the change to a foreign law and the one before a lawsuit will require an express manifestation of the parties' intent and their reasonable motivation.

Article 22 is a special reservation clause for Japanese law. Namely, the victim cannot exercise the rights accepted by a foreign law applicable under the preceding Articles when the act is not wrongful under Japanese law. Further, even if the act is wrongful under the foreign law and Japanese law, the victim can demand only recovery of damages or other remedy accepted by Japanese law. However, Article 22 should be excluded when a foreign law is applicable as the same law as the one applicable to the contract between the parties under Article 20 or

as the law varied by the parties under Article 21. This is because the reservation of Japanese law in these cases is contrary to the purpose and object of Articles 20 and 21.