

New Japanese conflicts rule on torts (summary)

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The General Act on the Application of Laws (Act No.78 of 2006; hereinafter GA) was promulgated on June 21st in 2006. This act has substituted “Horei” (Act No. 10 of 1898), which also contained the choice of law rules (from Art. 3 to the end), from January 1st, 2007. Art.17-22 GA chose the applicable law to the international tort cases. Art. 21 GA allows party to agree ex post the applicable law to their tort dispute. Art. 20 GA constitutes the exceptional clause to Art. 17, 18 and 19 GA, and declares to consider a contractual relationship previously existing between the parties and a common habitual residence of the parties in order to examine the law manifestly more significantly related to the case than otherwise designated to the tort general, the product liability and the defamation. On the other hand, Art. 22 GA retains the so-called “special ordre public” clause, which applies the Japanese law cumulatively to the applicable foreign law to the tort, as Art. 11 II and III Horei. Art. 17 GA designates the applicable law to the tort general, Art. 18 to the product liability and Art.19 to the defamation. In this paper, I will focus on these 3 provisions and explain their aim and scope of application.

1. For the tort general, the *lex loci delicti* rule is maintained as Art. 11 I Horei provided. For so-called distant torts, Art. 17 GA adopts the place where the interest to be protected is directly damaged (hereinafter the place of damage) as a principle-connecting factor. The indirect consequence is irrelevant. The place of damage is in many cases equally foreseeable to tortfeasor and victim. The law of the place is mostly adequate to regulate the tort generally from the view of the function of the substantive tort law. Not only the law of the place of the harmful conduct or event, but also that of the place of damage has a great interest in regulating the conduct of the (potential) tortfeasor and in preventing from the damage caused by him. The function of the regulation and the prevention is united with that of the protection of the legal interests under a single tort law. These two functions of the law of the place in which the legal interests locates

(the place of damage) shall be also taken into consideration.

In the same time, Art. 17 GA rejects in the latter part the principle connection, if the place of damage could be “ordinarily” unforeseen. Instead, the law of the place where the harmful conduct or event occurred (hereinafter the place of conduct) shall be applied. If the Art. 17 GA latter part would protect the interest of tortfeasor in foreseeing the application of law, the following 2 problems could be took place: The tortfeasor could invoke the unforeseeability; In consequence, he could choose, depending on invoking that or not, the application of the law of the place of damage or that of the place of conduct. This consequence advantages the tortfeasor much more in comparison with the victim. And, I can find no reason, why the foreseeability of the damage should prefer tortfeasor than the victim. Even if the tortfeasor could not foresee the place of damage, the victim might not be able to expect the application of the law of the place of conduct at all. The circumstance of the tortfeasor (e.g. the rule of safety and conduct of the place of conduct which he relied on) can be considered in applying the law of damage. Therefore, the application of the latter part of Art. 17 GA should be interpreted as strictly as possible.

2. As to product liability, Art. 18 GA designates the law of the place in which the product is acquired. The victim acquires the product normally where he resides habitually, and expects the application of the law of this place to the product liability. The producer(s) and his insurer can also foresee or even expect the application of that law. On the other hand, the place of the habitual residence of the victim is not so appropriate as a connecting factor, if he acquires the product outside the country he lives. In this case, the application of the law of his habitual residence would be mostly impossible to expect for the producer. In many cases, the application of the law of the place in which the product is acquired is neutral both to the producer and the victim in the field of the product liability. In case that the producer could not foresee the place of the acquisition, Art. 18 GA latter part provides that the law of place in which the producer has his main office shall apply. This connecting factor seems to be adopted, because the place of conduct is mostly very difficult or even impossible either for the producer(s) or the victim to identify in the product liability cases. If the law of the office of the producer applies, one might think that the interest of the victim is subordi-

nated to that of the tortfeasor, when the former could not also foresee the main office of the latter. It cannot be helped, because the victim can seek the remedy not only to the producer but also the other persons (e.g. the importer from whom the victim purchased the product).

For the victim who did not acquire the product (so-called bystander), the application of the law of the place where the direct damage took place is justified, as Art. 17 GA. On the other hand, the place of conduct is inadequate connecting factor in the field of the product liability, as is mentioned above. Therefore, Art. 18 latter part shall be applied correspondingly also to the product liability in which the bystander sustained damage from the product.

3. As to the defamation, Art 19 GA designates the law of the habitual residence of the victim. The application of this law is mostly expectable both to the mass media etc. and the victim. In some cases, this connecting factor is not appropriate; e.g. if the habitual residence of the victim could not be identified, unforeseeable to the press, or irrelevant to the defamation. In such cases where the application of that law shall be inadequate, we can rely on the exceptional clause of Art. 20 GA. In other cases, the application of the law of the victim could be to contrary to the fundamental right of mass media such as freedom of press and so on. Then, especially Japanese media can rely on Art. 22 GA.