General Rules on Contract in the New Private International Law of Japan (summary)

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This paper aims to examine an appropriate operation and interpretation of the provisions of the new Code of Private International Law which provides general choice-of-law rules on contract.

This paper's analysis on the operation and interpretation of the legal text are based upon the following standpoints. First, from the view point of legitimacy, the wording of a legal text should be highly respected. Second, however, there is a room for interpretation of a legal text within the limit of the wording. In the process of interpretation of the legal text, we should accurately find practical needs in the real world and respond to them as far as possible.

From these standpoints, this paper focuses on four problems relating to the operation and interpretation of the provisions as follows : Implied Choice of Law under the Article 7 (Chapter II), Dépeçage under the Article 7 (Chapter III), Varying the Governing Law under the Article 9 (Chapter IV) and Characteristic Performance and Presumption under the Article 8 (Chapter V). And this paper presents its Final Remarks (Chapter VI).

In the Chapter II, this paper examines the Japanese courts' possible operation of the Article 7 using a "party's purely hypothetical will". In the law-making process of the new Code, it was actually proposed to insert the following passage into the relevant provision : "the choice must be expressed or undoubtedly clear by the circumstances relating to the juristic act." It aimed to remove a room where a purely hypothetical will can be used. The passage is a similar one to the first Paragraph of the Article 3 of the Rome Convention. However, it was not adopted in the new Code. Nevertheless, some commentaries present their forecast that Japanese courts will hardly use a hypothetical will in the new Code because the rules for the determination of the governing law in the absent of parties' choice of law are drastically changed. Is the forecast true? Which law did the Japanese courts actually apply using the concept of "party's implied will" ? This paper examines the actual data of the Japanese courts' decisions about this issue and

clarifies the real intention of the Japanese courts in their application of a hypothetical will. And this paper proposes to use Article 9 appropriately in order to avoid a hypothetical will in the court proceedings.

In the Chapter III, this paper examines a possible certain limitation for dépeçage under the Article 7. In the law-making process of the new Code, it was actually discussed about the provision of dépeçage like the first Paragraph of the Article 3 of the Rome Convention. However, it was not adopted in the new Code. There is no practical need for dépeçage in general but a strong need in a specific business scene to apply different laws to the part of formation and the part of effect in a single contract. There should be a certain limitation, however, for splitting the inside of a single contract. And different laws are applied to the different parts of a single problem, under the new Code, only when express provisions require doing so. From this viewpoint, the wording of the Article 7 should be paid attention to. It expressly divides a juristic act into two parts : "formation" and "effect". As a reasonable interpretation of the Article 7, this paper proposes that a certain limitation for the dépeçage should be found in this line.

In the Chapter IV, this paper examines the change of governing law by the parties under Article 9 which is the substantially same as the second Paragraph of the Article 3 of the Rome Convention. What is an occasion on which the change may not be asserted against a third party if the change of the governing law would prejudice the rights of such third party? One State law is different from the other State law in details even when they resemble each other in appearance. The detailed consequence of the application of the *ex post* governing law is almost always different from the one of the application of the original governing law. As a result, the Article 9 works in reality as a provision to authorize the retrospective application of the *ex post* governing law only between contracting parties. Is there any significance in practice? It is usual to adopt the way of novation of contract when the contracting parties want to change something between them. However, there is a significant need in the court proceedings. As already explained in the Chapter II, the Japanese courts had a tendency to apply Japanese law as *lex fori*. The procedural merits for the application of *lex fori* should be respected as long as the both of the parties agreed about it in the court proceedings under the Article 9.

In the Chapter V, this paper examines the presumption provision based upon "the theory of characteristic performance" under Article 8 which determines the governing law in the absence of the parties' choice. How should we consider the strength of the presumption? One commentary estimates that Japanese courts would directly determine the law of the most closely connected regardless of the presumption provision. Other commentaries points out that there will be several types of contract not suitable for the presumption. However, having considered 25 years experiences under the Article 4 of the Rome Convention, which is similar to the Article 8 of the new Code, the proposed draft of the Rome I adopts "shall be" instead of "presumed to be" and lists of the governing law by types of contract in order to enhance predictability. From this viewpoint, the presumption using the concept of characteristic performance should be strongly respected in the operation of the Article 8.

In the Chapter VI, the basic standpoints for interpretation used by this paper are emphasized again for the further discussion of the issues this paper examined.