

Torts in the Act on General Rules for Application of Laws (summary)

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Tort law is one of the areas that have been subjected to the most significant substantive changes through the recent enactment of “*Ho no Tekiyo ni kansuru Tsusokuho*” (Act on General Rules for Application of Laws, the “new Act” hereafter). This paper reviews the choice-of-law rules on torts in the new Act.

Under the framework of Article 11 of the *Horei*, the old Act, the general rule as set forth in Paragraph 1, prescribes that the governing law to be applied in a tort action is the law of the place where the tort was committed (“the *lex loci delicti* principle” hereafter), with the application of this rule being limited by the provisions of Paragraphs 2 and 3, which require the legal rules of the forum to be applied cumulatively (i.e., the double actionability rule). Under Article 17 of the new Act, the *lex loci delicti* principle remains as the fundamental principle, while this Article precisely clarifies the treatment of so-called trans-jurisdictional tort cases by prescribing the general rule that claims arising in tort shall be governed by the law of the place where the results of the tortious act are produced. This place should be understood as the place where legally protected rights or interests were actually injured, and should not include the place where indirect or consequent damages occurred.

The new Act provides special rules for particular types of torts. Article 18 of the new Act provides special rules for product liability. According to Article 18, based on the so-called marketplace principle, as a general rule the law of the place where the product is delivered to the victim applies. The marketplace principle can be understood as a variation of applying the law of the place of the infringing act. However, Article 18, which takes the place of the injury as the starting point of its variant form, also takes into consideration the applicable market.

Article 19 lays down a special rule for defamation, prescribing the application of the law of the victim's habitual residence. Article 19 should be considered to be based on a position according to which in a defamation case the resulting in-

jury can theoretically occur in many countries, but usually the most significant result occurs in the country of the habitual residence of the victim, and so that country's law will apply.

Article 20 prescribes that if a tort is manifestly more closely connected to some other than the place of the applicable law as determined under the three articles that precede Article 20, as an exception to the general rule, the law of the more closely connected place will apply. The rule set forth in this provision is based on the principle the law most closely connected to the case should apply. Article 20 expressly enumerates two circumstances that trigger its provisions; the existence of a common habitual residence between the parties, and the fact that the tort at issue arose from a breach of obligations under a contract existing between the parties.

Article 21 introduces recognition of party autonomy in the area of tort law and thereby promotes dispute resolution. However, Article 21, which is entitled "Change of Governing Law by the Parties," stipulates that "the parties to a tort may, *after the tort has occurred*, change the governing law," [emphasis added] which means that the law recognizes the parties' right to make an *ex post* choice, but denies them the ability to make an *ex ante* one.

Article 22, the successor provision to Article 11, Paragraphs 2 and 3 of the *Ho-rei*, provides for cumulative application of Japanese law, which limits the establishment and consequences of tort claims in certain ways. Article 22 could spoil the purposes pursued by the provisions of Articles 20 and 21, so this Article should be interpreted restrictively.