

Mandatory Rules Applicable to the Employment Contract in the Japanese Private International Law (summary)

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The Act on General Rules for Application of Law (hereafter called the 'new Act'), which entered into force on 1 January 2007, newly establishes the special rules for the employment contract (Article 12). The provision consists of the following rules: the choice of law made by the parties shall not prevent the employee from invoking the application of the mandatory rules of the law of the place which is most closely connected with the contract; the law of the place which is most closely connected with the contract shall be presumed to be the law of the place in which the employee habitually carries out his/her work in performance of the contract (or, if this place is not clearly identifiable, the law of the place of the business through which the employee was engaged is situated); and this law is applicable in the absence of choice. This provision appears to be enacted, modelled upon Article 6 of the Convention on the Law Applicable to Contractual Obligations (hereafter called 'the Rome Convention'). As Article 6 of the Rome Convention does, Article 12 of the new Act provides that the law chosen by the parties will apply to the contract, subject to the mandatory rules of the law which, but for the choice of the parties, would be the governing law. However, there seems to be an important difference between the two articles: while Article 6 of the Rome Convention requires the court to apply, *ex officio*, mandatory rules more favourable to the employee, such mandatory rules, under the Japanese private international law, apply only on condition that the employee asserts their application.

The new Act does not explicitly lay down what kind of rules fall into the category of the mandatory rules in the sense of Article 12. What mandatory rules does Article 12 envisage? More specifically, does that provision envisage 'internationally mandatory rules' ('overriding rules,' 'lois de police,' or 'Eingriffsnormen')?

It seems that a distinction must be drawn between the mandatory rules which are subject to the normal multilateral choice-of-law rules and those which apply pursuant to their own unilateral choice-of-law rules as different from normal

multilateral choice-of-law rules. It is submitted that the mandatory rules in the sense of Article 12 of the new Act would only envisage rules of the former kind, and that they would not include rules of the latter kind, namely internationally mandatory rules. How should the Japanese court make the distinction between those two categories of the mandatory rules within the framework of that provision? The court should examine whether a rule has its own unilateral choice-of-law rule, taking into consideration the nature and the purpose of the rule and the policies to which it seeks to give effect. In addition, the court should bear in mind that the mandatory rules in the sense of Article 12 will not apply *ex officio*, their application being left to the disposition of the employee. This would be an important mark for the distinction.

Under the previous Act, it was generally accepted that mandatory rules of Japanese law concerning industrial safety and hygiene which can be regarded as being so-called 'rules of public law,' were internationally mandatory. On the other hand, there seems to have been a tendency to classify mandatory rules of contractual nature into the category of the internationally mandatory rules, presumably out of the fear that being subject to the principle of party autonomy, such mandatory rules might be evaded simply by a choice-of-law clause being inserted into a contract in favour of a foreign system of law. If this observation is correct, such a classification would not be necessary under the new Act, because its Article 12 provides the mechanism to reserve to some extent the application of mandatory rules of Japanese law. It appears that most of mandatory rules of contractual nature would be subject to Article 12. The employee can assert their application so long as Japan is the place which is most closely connected with the contract.