

The function of substantive rules in the law applicable to torts — In comparison of American conflict-of-laws and Rome II

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Governmental interest analysis of Brainerd Currie and the law of direct application (*lois d'application immédiate*) in the continental law appeared almost simultaneously, while having had no connection, in the conflict of laws study in the United States and Europe of the both sides of the Atlantic Ocean, and in fact in the core portion have congeniality nature. The continental law has the positive equipment or the concept of corresponding partially to interest analysis, by way of the application of overriding mandatory rules of a forum, the consumer or worker protection in contract (the theory of special connection) and the consideration (application) of overriding mandatory rules of a third country. It is the important conclusion of the American Conflict Revolution that *dépeçage* of the determination of liability (act-regulation rules) and damage (loss-distribution rules) in tort should be made.

The Rome II regulation is founded on the traditional jurisdiction selecting method of the continental law and has not adopted the rule selecting method like interest analysis based on the content of law and the result of applying, which owing to the legislation process the exception clause of Article 4 (3) will not be interpreted to use as a factor in order to specify the law of the closer relation. The specification is made about the whole tort case concerned, and the selection for every point at issue is considered not to be made. The amending opinion of the European Parliament about *dépeçage* of liability and damage was also refused. However, it is necessary to have regard to Article 17 and Preamble 33 of the regulation. Rome II remains neutral of value except for Article 7 of the environmental damage.

As EU legislation, the fundamental purpose of Rome II is the unification of conflict of laws in the area within EU. In this meaning, compatibility with other common documents will become important, and unification of the interpretation in each country will serve as a subject. And the interpretation which buries a gap with Rome II and Hague Conventions about traffic accident and product liability may be requested. If that is the case, it will be interpreted bringing as possible as the same result through the general ex-

ception provision or the special rules of the regulation.

The following five points are mentioned as the function of the substantive policy in choice-of-law rules : namely, the criterion of defining a unit of the legal relation, the function of generating choice-of-law rules, the criterion of range and of selection of the connecting factor, and the standard of interpretation of choice-of-law rules.

The criterion of defining a unit of the legal relation

A choice-of-law rule is to be made to function perfectly based on a set of living facts for which the legal relation in the substantive law is usually referred to. In this meaning, substantive policies become one of the criterions of defining a unit of the legal relation of the choice-of-law rule. It is demanded to be suited well the policies underlying the substantive law. Only if that happens, it might function perfectly in a set of living facts, i.e., a unit of the legal relation, which is to be a legislative purpose (*the generation function*). In EU, the choice-of-law rules might be legislated for the realization of EU common substantive policies.

The criterion of range and of selection of the connecting factor

In making choice-of-law rules, substantive policies define the range of and determine the selection of possible connecting factors, which is not the numeration of quantitative factors but the determination of qualitative importance. Nevertheless only substantive policies do not necessarily determine the selection. It cannot be overemphasized that other conflicts legislative policies, for example, protection of just expectation of the party concerned, prevention of forum shopping, unified determination, and ease of application, etc. must both be taken into consideration.

The standard of interpretation of choice-of-law rules

The substantive policy incorporated into the legislative purpose of the choice-of-law rules is set to one of the interpretative standards for characterization or determination of the connecting factor in which stage the concrete facts would be applied.

The above-mentioned might be usually carried out on the occasion of legislation and interpretation of a choice-of-law rule. If it sees in this way, the substantive policies underlying the particular field of law could, I think, be functioning in collaboration with other conflicts policies.

It seems that, when interpreting the general exception provision of Article 4 (3) of Rome II, qualitative selection may be made in consideration for the character of tying in the general substantive policy underlying the particular field with the connecting factor,

instead of the closer relation in a meaning of mere accumulation. For example, in the case of an automobile accident to which according to Article 4 (2) the law of the common habitual residence of a driver and a fellow passenger applies, a theory exists that according to Article 4 (3) the law of the place of accident which is also the place of registration applies. It would be the possible reasoning that it is chosen qualitatively from the character of tying in the substantive policy underlying the compensation system with the connecting factor, i.e., the place of registration.

In the applicable law of the product liability of Article 5, connection of the substantive policy and the place of market is substantial, and it has the extremely important meaning when determining the place of market.

The overriding mandatory rules of a forum are specified also in Rome II. Without doubt they would continue to be applied as a necessary evil in each country in EU. It is considered that interest analysis could be utilized in this field.