

# Accessory Connection by Escape Clause in Contractual Obligations — Article 4 (3) of the Rome I Regulation (summary)

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## 1. Comparison between Article 8 of the Japanese Act on General Rules for Application of Laws and Article 4 (3) of the Rome I Regulation

Article 8 (1) of the Japanese Act on General Rules for Application of Laws (Application of Laws Act) provides that a contract in the absence of choice shall be governed by the law of the country with which it is most closely connected. The most closely connected country is “presumed” in Article 8 (2) to be the place where the party who is to effect the characteristic performance has his habitual residence. As regards contract whose subject matter is a right in rem in immovable property, the place where the immovable property is situated is “presumed” in Article 8 (3) to be the most closely connected country.

In comparison with the Rome I Regulation, although Article 4 (3) of the Rome I Regulation, which is an escape clause for a contract in the absence of choice, requires the contract to be “manifestly” more closely connected to a country other than the country indicated generally to be most closely connected, it is controversial whether such “manifestly” closer connection is required to disregard the presumptions provided in Article 8 (2) and 8 (3) of the Japanese Application of Laws Act. Moreover, while Article 8 (1) of the Japanese Application of Laws Act provides “the most closely connected country” as a general connecting factor, the Rome I Regulation no longer contains such express provision.

Even if the difference mentioned above should be taken into consideration, Article 4 (3) of the Rome I Regulation should be an important material for the question as to when the presumptions in Article 8 (2) and 8 (3) of the Japanese Application of Laws Act should be disregarded.

## 2. Accessory connection by Article 4 (3) of the Rome I Regulation

The main purpose of an accessory connection between several contracts by Article 4 (3) of the Rome I Regulation can be found in avoiding the difficulties that might flow from the application of two separate instruments and in protecting the franchisee and the distributor as the “weaker party”. However, in exercising an accessory connection between

several contracts, protection of the parties' expectations should be also taken into consideration.

One of the arguments related to an accessory connection by Article 4 (3) of the Rome I Regulation is that if a case where several contracts are concluded between the same parties and a case where more than two parties are involved in several contracts should be distinguished. For example, an accessory connection of a guarantee contract to a main contract is the former case and an accessory connection of an assumption of obligation to a main contract is the latter case. According to Martiny, accessory connection should be denied between a guarantee contract and a main contract but should be allowed between an assumption of obligation and a main contract. (Dieter Martiny, Art 4 Rom I-VO, *Münchener Kommentar zum BGB*, Vol. 10 (5th ed. 2010), para. 259.) However, given the following similarities between the two cases, the reason to give such protection only to the third party is not necessarily clear. In both cases, the obligations agreed in the two contracts are entirely different and do not overlap. Furthermore, in both cases, the party whose expectation would be sacrificed by the accessory connection (guarantor, the party who assumes the obligation) is supposed to be aware of the pre-existing contract (main contract).

However, the following two cases may be distinguished from others as cases in which the accessory connection gives less damage to the parties' expectations.

If the party, whose expectation for the applicable law would be sacrificed by the accessory connection, has given a prior validity to the other contract, it may be argued that an accessory connection between those two contracts gives less damage to the foreseeability as to the law that will be applicable. For example, an accessory connection of a subcontract to a main contract may be allowed in a case where a subcontractor has agreed to give priority to the special agreement in the main contract. (Kartsten Thorn, Art 4 Rom I-VO, in *EuZPR/EuIPR* (Thomas Rauscher ed. 2011), para. 150.)

Also if one or the other of the two contracts is a comprehensive contract, it may be argued that an accessory connection between those two contracts gives less damage to the certainty as to the applicable law, since the obligations in those two contracts overlap. For example an accessory connection between a distribution contract and a sale of goods contract concluded afterward in order to implement the distribution contract should be such case.