Concepting the Privatisation of Private International Law and the Will of Parties: Preliminary Study for Clarifying Legal Thoughts on the Subjective Connections in Conflict of Laws (summary)

Takaya Ito
Associate Professor, Faculty of Law, Aoyama Gakuin University

Party autonomy in choice of law, which allows the parties to a legal relationship to choose the applicable law, has been admitted mainly in the process of determining the governing law of contracts. Since the second half of the last century, party autonomy in choice of law has been attempted to be extended to torts and other non-contractual obligations, and it has been proposed that party autonomy would be extended to some issues in the field of family law. For example, in the EU, Article 5 of the 2010 Rome III Regulation and Article 22 of the 2012 Regulation of European Succession explicitly adopt the limited party autonomy.

In addition to such attempts to expand the scope of the adoption of party autonomy in choice of law rules, at the beginning of this century, there have been clear advocates of the principle of subjective connections in the process of determining the applicable law. Recently, some have argued that it is appropriate to recognize the will of the parties in as wide a range of legal relations as possible and to regard subjective factors as the principle of the connections in the choice of law rules rather than objective factors. Shoichi Kidana discussed the necessity of the reestablishment of the intention of the parties in private international law, going back to the choice of law theory by Friedrich Carl von Savigny, and recognized the common ground between the respect for the intention of the parties latent in the traditional objective connections and the party autonomy in choice of law.

There is another trend to argue for the principle of connection based on the will of the parties alongside this position, which can be called a return to the Renaissance. Ralf Michaels has pointed out that party autonomy represents nothing less than a new paradigm in choice of law. Matthias Lehmann argues that the widespread adoption of party autonomy in the deciding applicable law process will trigger the true revolution in choice-of-law theory. Lehmann and other attempts to create a new Copernican revolution, which has in common the principle of subjective connection in the choice of law rules in general, and the individualization or privatisation of the discipline of conflict of laws in general to

achieve this. The common thread that runs through all of these trends is the recognition that it is necessary to change the structure of conflict of laws by privatising the discipline in general.

In this paper, I would like to refer to the privatisation of choice of law that has been proposed one after another since the beginning of this century. Then, I will examine whether the concept of privatisation of choice of law can be a necessary and effective basis for the principle of subjective connection advocated in the new Copernican revolution.