

## **Agreement on Applicable Law Other Than The One Designated by The Choice-of-law Rule: In comparison with Conflict of Laws in France (summary)**

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The object of this article is to examine what effect an agreement on applicable law between litigants would have in Japanese civil procedure, in comparison with French conflict of laws.

It has been generally considered that there is no room where the parties' autonomy governs in the choice-of-law process, except the article 7 relating to the contract of *Horei*, the Japanese choice-of-law rule. That is, in an international legal relationship, an applicable law would be determined in a mandatory manner, and a court would, in principle, have to seek for such an applicable law without any consideration for the agreement on applicable law which litigants have concluded during the civil procedure.

However, such an attitude, which has been accepted with little doubt for a long time, is not always common to other countries like Germany and France, in which parties could designate by their ex post agreement an applicable law in matters of which they freely dispose.

Recently, under the influence of these discussions in such countries, some writers doubt the traditional interpretation of Japanese choice-of-law rule and claim the validity of parties' ex post agreement on applicable law in such matters as tort or property rights.

If such an interpretation is possible even in limited matters, it would be convenient to parties, and the burden of courts in applying foreign laws, which practitioners have highly criticized, would become less heavy than now. Then, is such an interpretation possible in Japan? If it is possible, how are the conditions and scope for that? These questions are what this paper deals with.

In France, litigants may agree upon the application of a legal system other than the one designated by the choice-of-law rule, if the right can be freely disposed of by the parties. The French Supreme Court, in a judgment of 19 April 1988 ("*Roho*") , established this rule and reaffirmed it in two recent judgments

of 6 May 1997 (“*Soc. Hannover International*”) and of 1 July 1997 (“*Karl Ibold GmbH*”). *Roho* refers to article 12, paragraph 3, of New French Code of Civil Procedure, as the legal basis of such agreements, which allows parties to limit the characterisation and legal issues to be examined in a suit. French doctrine, in principle, classifies it as “procedural agreements” and welcomes these judgments, while there are some convincing criticisms one of which criticizes their broad interpretation about article 12, paragraph 3, and refers to the free disposability of right as the new legal basis.

Such a procedural point of view would have a certain implication in Japanese conflict of laws in which the effect of an agreement on applicable law between litigants has been discussed, but solely from the viewpoint of the interpretation of *Horei*. However, it is doubtful that article 246 of Japanese Civil Procedure Code relating to principle of parties' free disposition of rights could be construed in such a way as to allow litigants to agree upon applicable law, because the court could not apply, of its own accord, a law including *Horei* in an erroneous way.