Confusion Arising in European Private International Law on Consumer Contracts (summary)

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The most important source of European private international law on consumer contracts is the Rome Convention of 1980 on the law applicable to contractual obligations, which was initiated in expectation that conflict rules pertaining to contracts would be harmonized. Without detracting from the convention's prominence though there are many EC Directives on consumer contracts, which deal with conflict of law problems as well.

In such situations, Member States seem to encounter difficulties because of the proliferation and dispersion of rules having an impact on the applicable law. This situation could be called confusion. For example, they may face some problems in implementing article 6(2) of the Directive on unfair terms in consumer contracts. This paper deals with these problems in order to bring to light several of the current legislative issues at hand.

Article 6(2)

Member States shall take the necessary measures to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law of a non-Member country as the law applicable to the contract if the latter has a close connection with the territory of the Member States.

Member States may implement this Article differently with respect to the following points.

1. Should only the choice of the law (the subjective designation of the law) be regulated?
2. Should the choice of the law of a Member State also be regulated?
3. Should a State which belongs to the EEA but not to the EU be considered as a "non-Member country"?
4. What is meant by "close connection"?
5. Should the principle of "comparison of benefit" be adopted? : Should the court applying the law compare the law selected by the parties with the

law of the Member State to which there is a "close connection" and then apply the law most beneficial to the consumer?

6. What is the applicable law? : Should a unilateral or multilateral approach apply to determining this?

This paper deals with points of 1 4 and 5 above which seem to be especially important in reference to Japan.

First, the objective designation of the law should also be regulated. Because it does not seem just that there should be a possibility of having different consumer protection between the subjective and the objective designations of the law of the same non-Member country.

Second, as far as the concept of "close connection" is concerned, the German implementation could be considered skillful. This is because it may demonstrate its flexibility and certainty in combining the general clause and presumption clause.

Third, it may be said that the principle of "comparison of benefit" is preferable to better consumer protection. However, "comparison of benefit" may task the judge with a difficult balancing of interests. As one possible legislative solution, the consumer should be afforded the opportunity to take the initiative in determining which law offers better protection.

In 2003 the EU Commission has published the Green Paper on the conversion of the Rome Convention. Now it is expected that European private international law on consumer contracts will emerge from the confusion and enter into the harmonization originally anticipated. The conflict of laws methodology for this harmonization could also be a good example to Japan on legislation.