

Subsequent Agreement on Governing Law in the German International Contract Law (summary)

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1. Introduction

The Act on General Rules for Application of Law (came into effect on 1.1.2007) specifies the change of governing law by the parties themselves in the international contract law. Article 9 of this Act provides as following: “The parties to a juristic act may change the law governing the formation and effect thereof. However, if the change of the governing law would prejudice the rights of a third party, the change may not be asserted against such third party.” Although the provision solved some interpretational problems of the text in the former Act (Horei), new point at issue of the change of the governing law needs more consideration. In this article, the following problems of the subsequent agreement on governing law are examined with referring to argument in the German International Contract Law. First, what are the requirements which establish this subsequent Agreement? Second, if the subsequent agreement enters into force, does changed applicable law have effects only prospectively (*ex nunc*), or retrospectively (*ex tunc*)? Third, how is a third party which has no relation to the subsequent agreement protected?

2. Requirements of the Subsequent Agreement

EGBGB and the Rome I Convention (repealed in 17.12.2009), which had been the sources of law in the German international contract law, also accepted that the parties were able to determine the law applicable to their contract anytime. Subsequent choice of law can be exercised by an explicit or a tacit agreement. A tacit agreement, however, must be “demonstrated with reasonable certainty”. Therefore the agreement of *lex fori* in the court proceeding is to deny when parties vaguely set the specific provision of *lex fori* as the premise on the merit. The judge, on the date for an oral argument etc., in order to clarify the matters relating to the choice of law problem, must ask a party about the question or encourage him/her to show the proof with regard to the agreement on the governing law (Authority to Ask for Explanation: § 139 ZPO).

It is prescribed in Art. 27 para. 4 of EGBGB that the existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance

with the provisions of Art. 31. In accordance with this provision, the existence and validity of the subsequent agreement on governing law is determined by this law.

3. Effect of the Subsequent Agreement

EGBGB does not clarify the point of the *inter-partes* effect of subsequent agreements. Submitting to the German standard theory, this effect is dependent on the party's will. When it is not clear, the theory in principle presumes that the contract party intends in favor of retroactivity, because it is difficult for the court and parties to apply two applicable law on *ex nunc* change. Nevertheless, a small number of theories admits only *ex nunc* change or proposes an exception of *ex tunc* effect, as *ex tunc* change strongly affects party's right from the time he concluded the contract to the time of the subsequent agreement on governing law.

The rights of third parties which are vested under initial applicable law are protected (Art. 27 para. 2 EGBGB). However, the most of theories will not extend this protection to rights to which third parties are more advantageous under the subsequent applicable law than under the previous one. Therefore the court must examine whether subsequent governing law is substantively preferential law for the legal position of third parties or not.

4. Conclusion

The theory of interpretation on subsequent choice of law in the German international contract law is available for the argument in Japan.

In conclusion, German major theory may also hold true in the Japanese international contract law, with the exception of the third parties. Even if the change of governing law made third party more favorable, in my opinion the initial applicable law should be uniformly applied in the relation between contract parties and third party.