

Issues on Application of Overriding Mandatory Rules; from a Perspective of Cooperation between Substantive Laws and Conflict of Laws (Summary)

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It has been generally recognized some rules shall be applied whatever the law applicable to a legal issue, such as a contract, is and such rules are named as overriding mandatory rules. The theory on overriding mandatory rules has been originally developed in Germany and, as it says, a country's interest in upholding such rules may require that they should be applied even though the issue is governed by a different country's law selected by normal choice of law rules. By now, the Rome Convention (Art. 7), the Rome I Regulation (Art. 9) and Rome II Regulation (Art. 16) have adopted the concept of overriding mandatory rules, thereby creating an exception to the normal choice of law rules.

As above-mentioned, an overriding mandatory rule pushes away an applicable law selected through the normal choice of law process. The requirements for an overriding mandatory rule have been discussed in Germany for a long time. The first requirement is that the rule in question should have its own intent to apply internationally ("die internationale Geltungswille" in German). And, the second one is that a legal issue, to which the rule is thought to be applied, should have close connections with a country that legislated it. Where the first requirement concerned, the rule is required to have such strong public interest that it penetrate through the legal issue with crowding out the competent applicable law. An overriding mandatory rule's intent to apply itself internationally could be based on its public interest, which is easy to be recognized especially where the rule is provided with penal sanction.

Even though the theory on overriding mandatory rules has been prevailing, it still remains difficult to answer clearly the following questions: to what extent rules would be qualified as overriding mandatory ones and in what cases they must be applied. Moreover, heated controversy has been provoked over the legal issue how the mechanism of applying overriding mandatory rules works. This paper focuses on such issues related to application of overriding mandatory rules, emphasizing the necessities of cooperation between substantive laws and conflict of laws when those issues are to be discussed.

The application of overriding mandatory rules should be discussed into the following

two parts: the first one is whether an alleged overriding mandatory rule requests to apply itself irrespective of an applicable law selected by normal choice of law rules, and the second one is to what geographic extent an overriding mandatory rule could be applied. The first part deals with the rule's intent to apply itself to the relevant substantive legal issues, taking precedence over the applicable law. This part is categorized as a substantive laws matter, not as a conflict of laws one, and therefore should be entrusted onto a country that has legislated the rule in question. On the other hand, the second part is thought to be related to conflict of laws as well as substantive laws. The forum country has no need to obey unconditionally the overriding power the legislating country has given the rules, and then the forum country's conflict of laws also acts an important role when it decides to apply either an applicable law or an overriding mandatory rule. In conclusion, as regards to geographic limitation on application of legal provisions, the following two categories exist: limitation on the level of conflict of laws and that on the level of substantive laws, but we find it practically difficult to separate them from each other.

Moreover, the relationship between public order clauses and overriding mandatory rules has caused wide-spread dispute, particularly in Germany, and this paper also refers to this point. One theory has said that both should be thought as equivalent and alternative to each other because they both have the same value indispensable for their jurisdiction. This theory finally leads to the conclusion that either of them would be unnecessary. On the other hand, there are some theories focusing on their differences. Especially, the opinions pointing out the differences in their application stances and practical functions seem to be plausible. This paper also emphasizes their differences as follows. Public order clauses rely on justice of a forum country's substantive laws order and modify the conclusion that stems from the application of foreign legal clauses as an applicable law. On the other hand, overriding mandatory rules are based on justice of the forum country's conflict of laws order, applying itself without checking over the conclusion deriving from the application of foreign laws.