

The Material Time to Decide the Contrariety to *ordre public* in Private International Law (summary)

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At what point in time should the contrariety to *ordre public* be decided? This question arises where the notion of *ordre public* and/or the factual circumstances have changed between the time when the facts in dispute occurred and when the proceedings take place.

The present legal doctrines in Japan are divided into two opposing positions whereby one maintains that material time should be based on the present and the other asserts that it should be the time when a legal relationship begins. A notable example is the judgment of the Tokyo District Court on March 29, 1991 regarding the application of an Egyptian Islamic law that prohibited marriage between a Muslim man and a Buddhist woman, it was judged as contrary to *ordre public*, although the matrimony had already ruptured.

Most authors in France have assumed since the end of the 19th century that *ordre public* has a contemporary character (*actualité de l'ordre public*), such that, where it has changed, the court should take the contemporary *ordre public* into account. A decision from an early case by the *Cour d'appel de Paris* on January 2, 1936 held that the adoption of a child which had been found to be contrary to *ordre public* based on the standards at the time of the adoption was not contrary in the light of the current legal criteria. These days, there also exists the opinion that the intertemporal provisions of the new law should be considered.

In Germany, there are three theories on this subject. One maintains that contrariety to *ordre public* should be decided based on present conditions; another insists that a case-by-case approach is necessary; and the third asserts that this issue should be resolved according to the general principle of the intertemporal law. To refer to some cases, the Hamm *Oberlandesgericht* on November 10, 1958 decided not according to the factual circumstances of the time when the marriage in dispute was celebrated but according to the current factual circumstances. The *Reichsgericht*, on October 10, 1935, adopted the notion of *ordre public* at the time of a proceeding and judged it as not contrary to *ordre public* to retroactively annul a marriage between a Christian woman and a Jewish man.

The opinion supported in this paper is that the present is the appropriate material time. The opinion that considers the time when a legal relationship occurred as material is ques-

tionable. According to the latter opinion, a legal evaluation is set at that time. Therefore, for example, even if a marriage — which was originally contrary to the *ordre public* — lasts for a long time, the marriage would be judged contrary and null even today because the length of the marriage would not be considered. This result could harm legal stability. The factual circumstances which continue so long are an important factor to be worthy of respect. Thus, in principle, it is better to set the present as the material time.