

Evasion of the Law and Its Related Problems in Private International Law (summary)

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Evasion of the law, or *fraude à la loi*, is the improper manipulation of connecting factors by a party or parties to a certain legal relationship with the intention of evading the application of the law designed by private international law rules. It derives from a French Court of Cassation case in 1878, in which the Court declared a divorce in Germany and remarriage by the Princess of Bauffremont to be unopposable to the Prince Bauffremont because she acquired German nationality in order only to evade the prohibition of divorce under the French law at the time.

According to the French doctrine on private international law, the formation of the evasion of law is generally examined from the viewpoint of three elements: (1) objective element, (2) subjective element, and (3) legal element. The first is a manipulation of connecting factors by a party or parties to a certain legal relationship. Some authors refer, as connecting factors possibly used for the evasion of law, to a nationality and a domicile for marriage or divorce, and a location of tangible goods for *in rem* rights. The second is a subjective intention to improperly circumvent the law. This element is decisive for formation of the evasion of law because it makes improper a manipulation of connecting factors by a party or parties. The third element is concerned with the law that is evaded. Under the contemporary French private international law, the evasion of the foreign law is generally criticized as well as that of the domestic law. And French authors generally focus on mandatory rules as legal norms to be evaded.

It should be noted that the French private international law argues evasion of the law or *fraude à la loi* by means of the improper manipulation of characterization. This derives from a French Court of Cassation case in 1985. It criticized the application of U.S. law manipulated by the deceased who sold his immovable in France to a U.S. company owned by him with the intention of evading the application of French law by characterizing the succession of an immovable to be that of shares of the company, that is, movables.

Sanction against the evasion of law is discussed in France. It is suggested that an improper manipulation of connecting factors or characterization obtained by the evasion of law is considered to be unopposable to the other persons. According to prevailing view, its

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consequence, such as divorce and remarriage, is considered to be inexistent.

Besides the determination of the applicable law, the concept of evasion of the law or *fraude à la loi* in French private international law can be invoked in the context of international civil procedure law. It involves the improper manipulation of grounds for international adjudicatory jurisdiction, the judgment obtained by fraud, the evasion of law as a ground for refusal of foreign judgments, *etc.* Also, Many French authors discuss the difference between evasion of the law and forum shopping.

Japanese private international law has no provision formulating the general prohibition of evasion of law, nor prevailing doctrine of sanctioning it. There seem no court cases dealing with the evasion of law. However, from the viewpoint of theories, no sanctioning such evasion may undermine the fundamental principles of private international law to apply the law of the place having most close relationship. The French approach should be taken into consideration for developing the Japanese private international law in this regard.