Choice of Law in Contract under the Act on General Rules for Application of Law (summary)

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It is widely accepted that under the Act on General Rules for Application of Law (hereafter called the "Act"), which entered into force on 11 January 2007, rules of contract choice of laws were designed to contribute to enhance the foreseeability of the parties and to ensure adequate protection for the party who from the socio-economic point of view may be regarded as the weaker in the contractual relationship. The Act provides that a contract is, in principle, governed by the law chosen by the parties at the time the contract is made (Article 7) or afterwards (Article 9), and where the parties have not chosen the law to be applied the contract is governed by the law of the country with which it is most closely connected (Article 8). In relation to the protection of the weaker party, the Act makes special provisions for consumer contracts (Article 11) and employment contracts (Article 12). This paper discusses whether, and to what extent rules of contract choice of laws of the Act enhance the foreseeability of the parties and improve the protection of consumers and employees, through the examination of the cases.

Prior to the entry into force of the Act, the courts have tended to use implied choice of law too often in the absence of an express choice of law, sometimes inferring a choice of law that the parties might have made where they had no clear intention of making a choice. This approach was criticized for undermining the foreseeability and it is commonly understood that under Articles 7 and 9 an implied choice must be real and intended; the courts should examine all the circumstances of the case to see if the parties did make a choice even though they did not expressly set this out in the contract. It seems, however, that the approach of the court has not changed a lot after the entry into force of the Act. For in nearly half of the cases the courts inferred a choice by the parties of the applicable law from the mere fact that the contract had a connection with a particular country, taking into account such factors as the nationality of a party, the principal place of a business and the nature of a contract.

In the absence of a choice of law, Article 8 (1) provides that the contract is governed by the law of a country with which it is most closely connected. With a view to improving foreseeability in relation to the closest connection test, the Act has recourse to presump-

tions to be applied in identifying that connection. After reviewing all cases in which the law of a country most closely connected to the contract is applied, it becomes apparent that whilst the court examined whether to depart from the special presumptions for employment contracts (Articles 12 (2) and (3)), it did not do so when the general presumption introducing the doctrine of characteristic performance (Article 8 (2)) was at issue. It would therefore be reasonable to conclude that except in the case of employment contracts, because of the unpredictability of the weight to be attached to the general presumption, uncertainty inherent in the closest connection test remains.

For consumer contracts and employment contracts, the principle of party autonomy is preserved but subject to the mandatory rules of the habitual residence of the consumer or the place with which the employment contract is most closely connected. One of the major concerns regarding special provisions for the weaker party is a condition set out for a consumer and an employee to rely on the protection of the mandatory rules; asking them to identify a specific mandatory provision and manifest his/her intention to the other party that the provision should be applied. In most cases, however, a consumer and an employee had no trouble meeting this condition, so such concern appears to be unfounded. It is true that at first there were some cases in which the courts failed to apply Article 11 to consumer contracts and Article 12 to employment contracts, but the situation has improved since around 2016. So it would be safe to say that the courts now successfully provide consumers and employees with the protection of their own legal system.