An Analysis on Court Practices around Tort Rules of Current Japanese Private International Law: So Far and From Now On (summary)

Yasuto KOMADA
Professor, Faculty of Law, Sophia University

In 2006, *Hôrei*, the old Japanese private international law, was totally revised and superseded by *Hô no tekiyô ni kansuru tsûsoku-hô* (hereinafter referred to as *Tsûsoku-hô*). Then, 10 years have passed since *Tsûsoku-hô* came into effect. This paper examines the court practices for these 10 years around the tort rules in *Tsûsoku-hô* by focusing on the applications of the provisions which had never existed in *Hôrei*.

This paper reveals that article 21 has brought a kind of "homeward trend" (a favor of *lex fori*): in some cases, courts applied *lex fori* relying on this provision when the parties demonstrated under the law but seemed to be innocent of the applicability of other country's law. This paper points out that such a homeward trend may have come from a shortage of explanation of the provision, hence more doctrinal support is needed in order to lead the courts to apply the provision properly.

This paper clarifies that there are some cases which applied article 19 to the damages to the plaintiffs' credits caused by the distributions of false information among their clients. Such an act is a kind of unfair competition that could relate closely to the market in which the defendant should compete with the plaintiff under the same rule. This paper argues that it is better to apply the "market law" as the law of the country in which the result of the wrongful act occurred (article 17) than to apply the law of the victim's habitual residence (article 19). The latter should be considered as the law for the infringement of personality right.

A little less than half of the cases applying the tort rules of *Tsûsoku-hô* are related to the infringement of intellectual property. In terms of a patent infringement, the following case law formed under *Hôrei* seems to be still effective under *Tsûsoku-hô*. Supreme Court once said that the injunction claim was a matter of the effect of a patent right and the law of the country in which the patent was registered should apply to the claim by virtue of *ratio*

legis. The court added that the infringement occurring in Japan was an exceptional case where only Japanese law should apply mandatorily in order to keep its public order. This would mean that the law of the country of registration shall apply irrespective of the place of infringement as long as the law wishes its application, except when the infringement occurs in Japan and its public order is invoked. The idea of this rule is based on "unilateralism". This paper argues that the unilateralism harms the foreseeability of the law applicable to the effect of a patent right, hence the reform of *Tsûsoku-hô* is necessary in order to remove the case law. It is favorable that the rule under which the effect of an intellectual property shall be governed by the law of the country in which its exploitation takes place be put in *Tsûsoku-hô*, and the word "exploitation" be interpreted exclusively from conflict of laws perspective. In cases where the act of the infringer and the demands of end-users can be found in different countries, the country of the latter should be considered as the connecting point (the country of exploitation) no matter what the relevant substantive law regulate as the act subject to the right. The famous "*lex loci protectionis*" rule should not be adopted, for the word "protecting country" in the Berne Convention does not mean the country for whose territory the protection is sought but simply mean each member-state of the Union.

Some authors fear that the above-mentioned country of exploitation rule could result in the complex applications of multiple laws in cases of so-called ubiquitous infringement (e. g. internet transmission), hence they proposed to have a special rule for such an infringement under which a certain single law should apply. But this paper argues that the single law approach could bring problems which are bigger than those of the applications of multiple laws, and geo-blocking technology which has been widely utilized these days will reduce the complexity if it is recognized as a tool for territorially partitioning injunction.