

On the Relationship between *lex rei sitae* and the Immutability of Law of Creation

—From the Perspective of Temporal and Factual Division of the Applicable Law (summary)

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The Act on the General Rules of the Application of Laws (“Act”), which establishes general rules for Japan’s private international law, sets out the governing law for real rights in its Article 13. Article 13(1) of the Act connects real rights and other rights requiring registration (“real rights”) to the law of the place where the object is located (*lex rei sitae*). In contrast, Article 13(2) provides that the governing law for the acquisition or loss of real rights is the law of the place where the object was located at the time when the factual cause of the acquisition or loss was completed (law of creation). Since Article 13(2) fixes the governing law to the law of the location of the object at the time the factual cause was completed, it is said that even if the object crosses national borders and its location changes, the governing law does not change (the principle of immutability of governing law).

However, the Supreme Court’s Mercedes-Benz case applied Article 10(2) of *Horei* (predecessor of the Act, which became Article 13(2) of the present Act without substantial changes) and recognized good faith acquisition under Japanese law for a stolen car imported from abroad, while the appellate court had denied this based on German law as the law of the garage. This gives the impression that the governing law had changed due to the change in the object’s location from a foreign country to Japan. How should we understand this?

Based upon the comparative law analysis, this article purports to demonstrate the usefulness of the “temporal and factual division theory of applicable law” for the interpretation of Article 13(1) and Article 13(2) of the Act. This theory interprets the apparent inconsistency between *lex rei sitae* and the immutability of the law of creation of rights in movables to mean that the old location law applies to facts before the change in location, and the new location law applies to facts after the change.

In Part 1, when Article 13 of the Act is applied to issues of acquisition and effectiveness of real rights accompanying the cross-border movement of movable property, we find that there is

a theoretical basis for the principle of immutability of the governing law for acquisition in contrast to the changeability for effectiveness. Second, the “temporal and factual division theory of applicable law” can explain the relationship between Articles 13(1) and 13(2) of the Act.

In Part 2, we question the explanation given during the drafting of *Horei*, that linking real rights to the law of the location of the object at the time of the factual cause’s completion would solve the then controversial issue of governing law for acquisitive prescription. On the basis of comparative analysis of the materials which were referred to in the drafting process, it would be misleading to explain that the phrase “at the time of completion of the factual cause” be mainly intended for the regulation of acquisitive prescription.

In Part 3, we specifically examine the major legal relationships addressed by Article 13(2) of the Act, based on the distinction between completed and incomplete legal requirements, and from this, shed light on the issue of good faith acquisition of stolen movables in their final destination.

First, regarding issues of completed legal requirements, the new location law evaluates facts related to effectiveness that occurred after the change in the object’s location, so it can be said that there was a change in the governing law for effectiveness. However, for matters that occurred before the change in location, the old location law still applies, meaning that the principle of immutability is appropriate for the governing law regarding acquisition and loss.

Next, regarding issues of incomplete legal requirements, the new location law can evaluate facts related to effectiveness that occurred after the change in the object’s location, but for matters that occurred before the change in location, the old location law applies, so the new location law cannot evaluate real rights that were not acquired under the old location law.

In light of this analysis, although it may seem that there is a change in the governing law regarding the issue of good faith acquisition of stolen movables in their final destination, in reality, the change in the governing law cannot be an issue.

In cases like the Mercedes-Benz case, it may appear that the governing law changed due to the change in the location of the object across national borders. However, when good faith acquisition under Japanese law is at issue, ownership is newly and originally acquired under Japanese law, so there is no need to recognize good faith acquisition (if any) under the old location law. The applicable law for good faith acquisition should be Japanese law alone, and there is no need to consider a change in the applicable law for good faith acquisition.

In general, ownership acquired in the old location, including by good faith acquisition, is

recognized as continuing in the new location, but when good faith acquisition is at issue in the new location, continuity is not recognized, and ownership is newly and originally acquired under the new location law.

Above discussions show that the temporal and factual division theory provides a coherent explanation of the relationship between the principle of immutability of the governing law for the acquisition and loss of real rights and the law of the location of the object. This theory will serve as a useful analytical perspective for understanding the relationship between Articles 13(1) and 13(2) of the Act.