「国際金融と国際私法」
国際私法年報第2号　96－116頁　2000年10月

"International Finance and Conflict of Laws"

Japanese Yearbook of Private International Law, No.2, pp.90-116, October 2000.

Law and practice of international finance have undergone historical change. Events such as the birth of the so called "euro market," the rise of international asset securitization and financial markets liberalization characterized the development of international markets for the past forty years. The Asian financial crisis and the introduction of the Euro marked the financial scene in the last few years of the 20th. Century.

These events were intertwined with the development of law of finance in many countries. In fact securitization and liberalization were the moving forces that initiated and prompted the reform of Japanese financial system. The new system required the so-called private law to change. For example, many new legislations were introduced to provide the infrastructure of securitization. However the reform has not touched upon the century old private international law. The rules and theories of conflict of laws have experienced little change since 1890's when international trade were dominated by merchants in the extraterritorial foreign settlements in Japan.

This article seeks to inquire whether the rules and theories of Japanese conflict of laws should change in response to the developments of law and practice in the changing world. In this regard, three topics are chosen in order to give a perspective to the inquiry: first, the law of the money and money obligations, second, assignment of receivables, and third set-off.

For the first topic, it seems that characterization of the question such as the introduction of the Euro as monetary indicates the solution to the ensuing problems in the system of the law of the money. However the solution is not so obvious when the governing law of the transaction is not those of the EMU participating members. In this regard, New York General Law of Obligations sections 5-1602-1604 should be commended. It is argued that the private initiatives such as the EMU Protocol should be supplemented by the clear governmental guidance like the New York law.

Secondly, Japanese law and practice of receivables finance have changed considerably. For example, the filing system of assignment of receivables was introduced to partly substitute the old notice-to-debtor system of the Civil Code. It is demonstrated that the present conflict-of-law rule, which refers to the law of the debtor, does not adequately cover the legal questions related to securitization. The law of the assigned claim, though supported by dominant views, makes the legal relationship more complex if applied to the bulk assignment of the receivables. Accordingly, a new rule of conflict of laws is proposed: the law of the assignor should determine the effect of assignment with respect to the third party other than the debtor.

Thirdly, it is submitted that the law of the primary claim should determine the question of international set-off. Application of this law, instead of the cumulation of laws, i.e., application of the law governing the primary claim and cross-claim, protects the expectations of the parties as well as the third parties. However the law of the primary claim does not seem an answer to the multi-claims, multi-party set-off. In the funds transfer situation, for example, freedom to choose the governing law should be given to the clearing system to bind all parties. In the absence of such a choice, a clear and objective rule, which looks to the place of business of a dominant bank in the transaction, is necessary.

In conclusion, while the traditional law and theories of conflicts are still viable in many areas of international finance, legislative activism should be adopted in other areas. It is urged that the traditional characteristic of conflict-of-laws as academic law should be changed to realize more predictability and practicability of results. To do so will require codification of more specific conflict-of-law rules in Japan.