

# The Legal Status of Foreign Companies in Japan's New Company Law

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## I. INTRODUCTION

It is an occurrence important not only for Japanese companies but also for Japanese subsidiaries of foreign companies. On July 26, 2005, Book 2 of the Japanese Commercial Code (*Shôhô*)<sup>1</sup> was deleted, and the Company Act (*Kaisha-hô*) was instead enacted.<sup>2</sup> A foreign company that establishes a branch for continuous transaction in Japan needs to pay regards to some important revisions having been made in the new Company Act. This paper clarifies the difference of legal status of a foreign company in the pre-revised Commercial Code and in the new Company Act. Namely, it first explains how a foreign company is defined newly in the Company Act, while the definition rule of the company itself was deleted (II). Second, it reviews how most regulations of a foreign company such as obligations to appoint a representative(s) in Japan, to refrain from continuous transactions before registration of legal matters, to publish the balance sheet, and so on are similar to those of the pre-revised Commercial Code (III). Third, it explains how a pseudo-foreign company is regulated differently before and after revision (IV).

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1 Law No. 48/1899, last amended by Law No. 87/2005.

2 Law No. 86/2005. This Act has entered into force on May 1, 2006. For an introduction to this law in German language, see M. DERNAUER, Die japanische Gesellschaftsrechtsreform 2005/2006, in: ZJapanR / J.Japan.L. 20 (2005) 123-162.

This paper, however, does not generally discuss the conflict of laws, focusing only on the so-called alien law. Although the Japanese government has revised the Conflict of Laws Act, the *Hōrei* (the Act on the Application of Laws),<sup>3</sup> and enacted a new law entitled *Hō no tekiyō ni kan suru tsūsoku-hō* (the Act on the General Rules of the Application of Laws) on June 21, 2006, any provisions concerning the applicable law of a company were not yet in place.<sup>4</sup>

## II. DEFINITION OF FOREIGN COMPANY

The Company Act created a new definition for a “foreign company.” According to the definition, “a foreign company is a juridical person or other organization founded based on a foreign law, which is of the same kind as, or similar to, a [Japanese] Company” (Art. 2 no. 2, translated by the author). This provision is not intended to create a conflict of laws rule by which a company would be governed by the law under which the company was founded. It defines a foreign company only for the purpose of the Company Act, which would be applicable in each case where the legal relationship is governed by Japanese law.<sup>5</sup> Such a definition is necessary for all alien law provisions that are applicable only to a foreign company,<sup>6</sup> and also other provisions that are applicable both to a Japanese and a foreign company.<sup>7</sup> Although such a definition was not in place in the

<sup>3</sup> Law No. 10/1898, last amended by Law No. 151/1999. The English translation is available at <<http://www.hawaii.edu/aplpj/pdfs/v3-08-Okuda.pdf>>. Cf. also *infra* in this volume the introduction by Y. SAKURADA / Y. NISHITANI / E. SCHWITTEK (265 ff.) and the German translation of the Law (269 ff.).

<sup>4</sup> Law No. 78/2006, not in force. The draft of this Act is available at <<http://www.moj.go.jp/HOUAN/TSUSOKU/refer02.pdf>>. See also HÔMU-SHÔ MINJI-KYOKU SANJIKAN-SHITSU [Ministry of Justice, Civil Affairs Bureau, Secretary Division], *Kokusai shihô no gendai-ka ni kan suru yôkô chûkan shian hosoku setsumei* [Supplementary Explanation of the Outline for Modernization of Private International Law], March 29, 2005, 8-12, available at <<http://www.moj.go.jp/PUBLIC/MINJI57/refer02.pdf>>.

<sup>5</sup> H. KANSAKU, *Kaisha-hô sôsoku, giji gaikoku kaisha – tokushû shin-kaisha-hô no seitei* [General Rules of Company Law and Pseudo Foreign Companies —Symposium: Enactment of the New Company Act], in: Jurisuto 1295 (2005) 142; H. KANDA, *Kaisha-hô* [Company Law] (8<sup>th</sup> ed., Tokyo 2006) 330.

<sup>6</sup> These provisions are Book 6 “Foreign Company” (Arts. 817 to 823), Book 7, Chapter 1, Section 2 “Injunction to Prohibit the Transaction or to Close the Office” (Art. 827), Chapter 3, Section 4 “Special Rules of Proceedings for Liquidation of a Foreign Company” (Art. 903), and Chapter 4, Section 3 “Registration of a Foreign Company” (Arts. 933 to 936).

<sup>7</sup> In this case, the words “a company (a foreign company included)” are used. These provisions are Art. 2 no. 33, Art. 5 (which is applicable *mutatis mutandis* in Art. 6 para. 1, Art. 8, and Art. 9), Arts. 10 to 24, Art. 135 para. 2 no. 1, and Art. 155 no. 10. In addition, the definition of a subsidiary and a parent company is in place in Art. 2 no. 3 and no. 4, whose details are defined in Art. 3 of *Kaisha-hô shikô kisoku* [Enforcement Order of the Company Act], Ordinance of the Ministry of Justice No. 12/2006, last amended by Ordinance 28/2006. This applies also to a foreign company (Art. 2 para. 3 no. 2, Enforcement Order).

pre-revised Commercial Code, a foreign company was considered a company that was founded based on a foreign law.<sup>8</sup> This is because to register a branch of a foreign company, it was required to prescribe the law under which the company was founded (Art. 479 para. 3 first sentence).<sup>9</sup> Therefore, the definition of a foreign company is, in effect, the same under both the Company Act and the pre-revised Commercial Code.

Further, since a foreign company is defined as “a juridical person or other organization” in the Company Act, an organization without juridical personality is not always excluded, though it must be “of the same kind as, or similar to, a company” of Japan. No definition of “company” exists in the Company Act, however. To be sure, Art. 2 no. 1 provides that a company means a “*kabushiki kaisha* [stock company], *gōmei kaisha* [general partnership company], *gōshi kaisha* [limited partnership company], or *gōdō kaisha* [limited liability company]”, but this enumerates the kinds of company and it is not a definition rule.<sup>10</sup> Contrary to this, Art. 52 of the pre-revised Commercial Code defined a company as a corporation aiming at profit.<sup>11</sup> Since this provision has not been brought over to the new Company Act, the definition of a company is now based on *jōri* (rule of reason).<sup>12</sup> As a result, also in the context of a foreign company, questions concerning what is a “company” for the purpose of the Company Act, and which organization is “of the same kind as, or similar to, a company” of Japan will likely be disputed before a tribunal in the future.<sup>13</sup>

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8 KANSAKU, *supra* note 5, 142; K. EGASHIRA, *Kabushiki kaisha, yūgen kaisha-hō* [Stock Company and Limited Liability Company Law] (4<sup>th</sup> ed., Tokyo 2005) 799.

9 A similar provision is found in Art. 933 para. 2 no. 1 of the Company Act.

10 See KANSAKU, *supra* note 5, 137. Accordingly, this rule should have been put somewhere else than in Art. 2 of the general definition rules. In addition, while a provision similar to Art. 2 no. 1 of the Company Act was found in Art. 53 of the pre-revised Commercial Code, a definition rule of a company was in place in Art. 52 of the same Code, as mentioned below.

11 Exactly said, Art. 52 para. 1 of the pre-revised Commercial Code defined a company as “a corporation founded for a purpose of doing commercial transactions”, and para. 2 regarded “a corporation aiming at profit and founded according to this Book” to be a company, even if it was not for doing commercial transactions. Therefore, even if it did not correspond to the commercial transactions stated in Artt. 501 to 503, all the corporations aiming at profit in the broader sense were able to be founded as a company.

12 See KANSAKU, *supra* note 5, 137.

13 For example, there is a question whether a German partnership company (*offene Handelsgesellschaft*) or an Anglo-American partnership both of which are not juridical persons can be registered as a foreign company similar to a Japanese general partnership company according to Art. 912 of the Company Act. It seems that a German partnership company should be categorized as a foreign company, but an Anglo-American partnership should be excluded.

### III. REGULATION ON FOREIGN COMPANIES

Art. 36 para. 1 *Minpō* (Civil Code) recognizes the juridical personality of a foreign company in general.<sup>14</sup> However, when establishing the necessary continuous transactions in Japan, a foreign company must appoint and register representative(s) in Japan, one of whom has to reside in Japan (Art. 817 para. 1 and Art. 933 para. 2 no. 2 Company Act). Moreover, before registering the legal matters, a foreign company shall not maintain continuous transactions in Japan. Any person who does such transactions before registration is responsible jointly with the company for any debts arising from the transactions concerned (Art. 818, the same).<sup>15</sup> Although the pre-revised Commercial Code had similar provisions (Art. 479 para. 1 and Art. 481), there was no provision concerning the residence of representative(s). In registration practice, like the new Company Act, the registration of representative(s) who had residence in a foreign country was admissible if at least one of the representatives had residence in Japan.<sup>16</sup> Later, a Civil Affairs' Bureau Notification in 2002 changed the practice to exclude those who did not have residence in Japan.<sup>17</sup> On the other hand, for the registration practice of a Japanese company, it was sufficient if one of its representatives had residence in Japan.<sup>18</sup> It was felt that such a difference between a foreign and a Japanese company was unfair. Thus, the opinion calling for equal treatment was accepted in the preparatory works of the act.<sup>19</sup>

Next, a duty to establish an office of a foreign company had already been abolished in 2002. Instead, a foreign company of the same or similar kind as a Japanese stock company was obliged to publish its balance sheet either in the official gazette, a daily newspaper, or a website (Art. 483-2 pre-revised Commercial Code). The abolition of the duty to establish an office was justified by the development of e-commerce. On the

14 Law No. 89/1896, last amended by Law No. 87/2005. The English translation of Art. 36 is available at <[http://www.cas.go.jp/jp/seisaku/hourei/data/CC\\_2.pdf](http://www.cas.go.jp/jp/seisaku/hourei/data/CC_2.pdf)>.

15 Further, this person is responsible for an administrative fine equivalent to the amount of the registration license tax for founding a company (Art. 979).

16 See Reply of 4<sup>th</sup> Section Chief of Civil Affairs' Bureau, No. 4109, August 9, 1984, in: Tōki Kenkyū 442 (1984) 80. For example, registration of one person who had residence in Japan and two persons who had residence abroad both as representatives in Japan was admissible.

17 See Notification of the Director General of Civil Affairs' Bureau, No. 3239, December 27, 2002, in: Tōki Jōhō 496 (2003) 133. For example, even if it was going to carry out Registration of one person who had residence in Japan and two persons who had residence in a foreign country both as representatives in Japan, only the former was admissible.

18 See Reply of 4<sup>th</sup> Section Chief of Civil Affairs' Bureau, No. 4974, September 26, 1984, in: Tōki Kenkyū 442 (1984) 81.

19 See HÔMU-SHÔ MINJI-KYOKU SANJIKAN-SHITSU [Ministry of Justice, Civil Affairs' Bureau, Secretary Division], *Kaisha hôsei no gendai-ka ni kan suru yôkô shian hosoku setsumei* [Supplementary Explanation on Outline for Modernization of Company Law System, cited hereafter as Supplementary Explanation], October 22, 2003, 97, available at <<http://www.moj.go.jp/PUBLIC/MINJI39/refer02.pdf>>. See also S. AIZAWA (ed.), *Ichimon ittô shin-kai-sha-hô* [Questions and Answers on the New Company Act] (Tokyo 2005) 239.

other hand, because there was a possibility of injuring the interests of domestic creditors when a company did not have an office in Japan, the duty of publication of the balance sheet was imposed for the purpose of informing the creditors about the financial conditions of the company.<sup>20</sup> The same provision is replicated in Art. 819 of the Company Act. However, determining what kind of foreign company is the same or similar kind as a Japanese stock company can pose a problem in the application of this provision. For example, the German *Aktiengesellschaft (AG)* will most likely be included in this category, while whether the *Gesellschaft mit beschränkter Haftung (GmbH)* should be regarded as similar to a Japanese stock company is an open question.

Similarly, there is no substantial divergence concerning legal matters to be registered by a foreign company. Under the pre-revised Commercial Code a foreign company had to register the same matters as a Japanese company of the same or similar kind, as well as additional matters including the law applied to the founding of the company, the representative's name and residence, and in the case of a company of the same or similar kind as a Japanese stock company, the method of publication of the balance sheet (Art. 479 paras. 2 and 3). The Company Act now requires every foreign company to register its method of publication according to Japanese law, and in the case of a company of the same or similar kind as a Japanese stock company, also the method of publication according to the law applied to the founding of the company (Art. 933 para. 2). The Company Act also designates the registration office at the place of the company office, or if this is not available, at the residence of the representative in Japan as competent (Art. 933 para. 1 Company Act; Artt. 9, 10, and 479 para. 2 pre-revised Commercial Code).

Further, a representative's authority in Japan is the same under the Company Act and the pre-revised Commercial Code. That is, the representative in Japan is authorized to do all judicial and extra-judicial acts related to the company's business in Japan. Any restriction of his authority by the articles of company shall not be asserted against a bona fide third party (Art. 817 paras. 2 and 3 Company Act; Art. 479 para. 8, Art. 78 pre-revised Commercial Code, and Art. 54 Civil Code). A foreign company is liable for damages caused by any representative's act related to its business in Japan (Art. 817 para. 4 Company Act; Art. 479 para. 8, Art. 78 para. 2 pre-revised Commercial Code, and Art. 44 para. 1 Civil Code). On the other hand, under the pre-revised Commercial Code, when all representatives in Japan resigned, any creditors of the company could raise an objection, and in this case the company had to offer security for the creditors (Art. 483-3, Art. 100 paras. 2 and 3).<sup>21</sup> Under the new Company Act, this objection is

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20 See KANDA, *supra* note 5, 330.

21 The enactment of this provision in 2002 led to the change of the registration practice mentioned in note 17. See Supplementary Explanation, *supra* note 19, 97; AIZAWA, *supra* note 19, 239.

limited to the case when all the representatives who have residence in Japan resign (Art. 820).

Finally, the provisions authorizing a tribunal to restrain a foreign company from doing business or to order its liquidation are similar under the Company Act and the pre-revised Commercial Code. That is, in the case of an illegal act of the company, a de facto stop of business, or a similar event, a judge may order a stop on all the transactions, or close the office at the request of the Minister of Justice or an interested person such as a stockholder or creditor (Art. 827 Company Act; Art. 484 pre-revised Commercial Code). In this case, the judge can also order, *sua sponte* or at the request of an interested person, the liquidation of all the company's property located in Japan (Art. 822 Company Act; Art. 485 pre-revised Commercial Code).

#### IV. PSEUDO-FOREIGN COMPANIES

##### 1. *Doctrine and Case Law on the Pre-revised Commercial Code*

As mentioned in II, although the pre-revised Commercial Code did not define a foreign company, the distinction between a foreign company and a domestic company was, as in the new Company Act, based on which law was applied to the founding of the company. Such a rule, however, could lead to an undesirable result where a company was founded in a foreign country to evade the stricter regulation of Japanese law.<sup>22</sup> Art. 482 of the pre-revised Commercial Code tried to prevent such an evasion of law by providing that the "same provisions" as for a Japanese company should apply to a company that had its head office in Japan or if its main purpose was doing business in Japan, even though it was founded in a foreign country.<sup>23</sup> This approach covered the regulation of the so-called pseudo-foreign company. The words of "same provisions" in Art. 482, however, were interpreted in two different ways.

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22 See HÔTEN CHÔSA-KAI [Code Investigation Commission], *Shôhô shûsei-an riyû-sho* [Reasons for Amendment Proposals of the Commercial Code] (Tokyo 1898) 220.

23 A similar provision was in place in Art. 258 of the Commercial Code before the 1938 revision. It was modeled from Art. 230 para. 4 of the Italian Commercial Code of 1882, which was taken over in Art. 2505 of the Civil Code of 1942. See R. YAMADA, *Kokusai shihô* [Private International Law] (3<sup>rd</sup> ed., Tokyo 2004) 259. Further, it is followed by the Italian Act on Private International Law of 1995, which provides that "the companies, the associations, the foundations, and any other corporate bodies, whether public or private, even if lacking legal personality, are governed by the law of the State in whose territory the procedure of founding has been completed. Nevertheless, Italian law is applicable when the center of administration is situated in Italy, or when the principal object of such corporate bodies exists in Italy" (Art. 25 para. 1, translated by the author). The Italian text is available at <<http://www.altalex.com/index.php?idstr=32&idnot=1178>>.

Some professors argued that all provisions including those of founding were included in the “same provisions” of Art. 482, and that the juridical personality of a pseudo-foreign company should be denied since the company was not founded under Japanese law.<sup>24</sup> Japanese judges agreed with this approach: on December 16, 1918 they ordered a Japanese branch’s founding registration to be deleted, because the company was founded in Delaware, U.S.A., and considered a pseudo-foreign company. They refused to recognize its establishment unless it reincorporated under Japanese law.<sup>25</sup> Further, on June 4, 1954, based on the same ground, a judge granted a provisional order ordering the Japanese representative of a Delaware company to refrain from business.<sup>26</sup>

On the other hand, other academics found that the “same provisions” of Art. 482 did not include the provisions of establishment, and only other provisions should be applied to a pseudo-foreign company whose juridical personality was recognized in Japan.<sup>27</sup> Their rationale was as follows:<sup>28</sup> First, since the juridical personality of a foreign company is generally recognized and the exception is not defined in Art. 36 para. 1 of the Civil Code, it would go too far to deny the juridical personality of a pseudo-foreign company. Second, a pseudo-foreign company certainly might lack sufficient capital under the Japanese legal standard, but a Japanese authority can demand a pseudo-foreign company to remedy this defect ex post and does not need to deny its juridical personality. Third, if juridical personality should be denied, the pseudo-foreign company would be treated as a corporation without legal capacity under Japanese law. This would result in prejudice to the interests of domestic creditors, since in this case all the provisions for regulation of a company are not applicable to the pseudo-foreign company.

While the interpretation of the Commercial Code differs as noted above, it seems that all the experts found unanimously that the revision of Art. 482 was necessary. For example, one professor who argued against the juridical personality of a pseudo-foreign company nevertheless suggested that Art. 482 should be revised so as to recognize each

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- 24 See M. DOGAUCHI, *Pointo kokusai shihô kakuron* [Points of Private International Law, Particular Parts] (Tokyo 2000) 199; H. SANO, *Kokusai kigyô katsudô to hô* [International Corporate Activity and the Law], in: KOKUSAI-HÔ GAKKAI (ed.), *Nihon to kokusai-hô no 100-nen, dai-7-kan, kokusai torihiki* [100<sup>th</sup> Year Anniversary of Japan and International Law, Volume 7, International Transactions] (Tokyo 2001) 184. See also books and articles cited in: K. UEYANAGI / T. ÔTORI / A. TAKEUCHI (ed.), *Shinpan chûshaku kaisha-hô 13* [New Edition of the Commentary of Company Law 13] (Tokyo 1990) 534, written by Z. OKAMOTO.
- 25 Imperial Court, December 16, 1918, in: *Minji Hanketsu-roku* 24, 2326.
- 26 Tokyo District Court, June 4, 1954, in: *Hanrei Taimuzu* 40, 73.
- 27 See YAMADA, *supra* note 23, 260-262; Y. NOMURA, *Gaikoku kaisha no kiritsu: kyoryû-chi kara gurôbaru shakai e* [Regulation of Foreign Company: From Settlement to Global Society], in: *Jurisuto* 1175 (2000) 25-26; EGASHIRA, *supra* note 8, 805. See also books and articles cited in: UEYANAGI / ÔTORI / TAKEUCHI, *supra* note 24, 534.
- 28 See above all YAMADA, *supra* note 23, 261-262.

company.<sup>29</sup> Other professors who accepted the juridical personality demanded revision of Art. 482 so as to clarify which provisions should be applied to a pseudo-foreign company.<sup>30</sup>

## 2. *Preparatory Work for Article 821 of the Company Act*

Art. 821 of the Company Act provides in para. 1 that “a foreign company that has its head office in Japan or whose main purpose is doing business in Japan shall not undertake continuous transactions in Japan,” and in para. 2 that “a person who breaches the preceding paragraph shall join with the foreign company to take responsibility of the other party for the debt produced by the transactions concerned” (translated by the author). The status of a pseudo-foreign company is not particularly ambiguous under this Article. A pseudo-foreign company now has the same status as a foreign company before registration under Art. 818 of the Company Act which prohibits continuous transactions and the joint liability of the individual person and of the company.<sup>31</sup> To understand the purpose and object of this rule, it is necessary to look back to the preparatory work for the revision.

The Outline for Revision presented two proposals in 2003 concerning a pseudo-foreign company.<sup>32</sup> Namely, Proposal A clarified that the “same provisions” in Art. 482 of the pre-revised Commercial Code should cover all provisions, including those on founding, and as a result the juridical personality of a pseudo-foreign company should be denied. Proposal B deleted Art. 482 so to not distinguish in the treatment of a pseudo-foreign company and other foreign companies. According to the supplementary explanation,<sup>33</sup> the proposals both aimed to resolve the controversy on the interpretation of the “same provisions” in Art. 482, which was an obstacle to the founding of a foreign company that was adequate for modern financial techniques such as capital mobilization. The proposals, however, were criticized during the proceedings: Proposal A might prejudice legal security, and Proposal B would permit the evasion of law.

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29 SANO, *supra* note 24, 184.

30 YAMADA, *supra* note 23, 267 n. 11; EGASHIRA, *supra* note 8, 805 n. 8.

31 A person who has breached either Art. 818 or 821 further is responsible for an administrative fine equivalent to the amount of the registration license tax for founding a company (Art. 979 para. 2).

32 HÔSEI SHINGI-KAI KAISHA-HÔ (GENDAI-KA KANKEI) BUKAI [Legal System Investigation Commission, Working Group on the Modernization of Company Law], *Kaisha hôsei no gendai-ka ni kan suru yôkô shian* [Outline for Modernization of the Company Law System], October 22, 2003, 48, available at <<http://www.moj.go.jp/PUBLIC/MINJI39/refer01.pdf>>.

33 Supplementary Explanation, *supra* note 19, 97. Further, the opinion that the “same provisions” in Art. 482 should be other than those of founding was examined. However, a proposal in this sense was not adopted, because it was found difficult to define concretely which provisions should apply and which should not.

When public opinion was invited on this Outline, Proposal B was preferred. This stand was justified for the following reasons.<sup>34</sup> First, the denial of juridical personality would prejudice legal security. Second, the fact that a considerable number of the companies were conducting business in Japan as pseudo-foreign companies had to be respected. Third, the evasion of law was best prevented on a case-by-case basis through the general principles of law on juridical personality. Finally, the denial of juridical personality in all cases would be rather prejudicial to the interests of domestic creditors. One member in the Working Group, however, objected that a person who was going to establish a company could choose freely between the company law of Japan and the law of Delaware.<sup>35</sup> This objection resulted in a compromise between Proposals A and B. As mentioned above: Art. 821 of the Company Act now defines the prohibition of continuous transactions and the joint liability of an individual person and of a company. The pseudo-foreign company has been put on the same status as the foreign company before registration, while its juridical personality is still respected.

To be sure, the ambiguity of the “same provisions” in Art. 482 of the pre-revised Commercial Code has been lost. However, the solution produced a question regarding which companies will be viewed as a pseudo-foreign company. The wording of the definition is the same in Art. 482 of the pre-revised Commercial Code and Art. 821 of the Company Act: both regard a pseudo-foreign company as one which has its head office in Japan or whose main purpose is doing business in Japan. The doctrine before and after revision recognizes that the “head office” in these provisions means a factual one that is the company’s center of business.<sup>36</sup> The crucial question, however, is under which circumstances is a company considered to have its head office in Japan or its main purpose as doing business in Japan.

This question was discussed many times in the parliamentary debates on the draft of the Company Act.<sup>37</sup> This is because it was thought that more than 30 foreign securities companies doing business in Japan might be considered pseudo-foreign companies

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34 See S. AIZAWA et al., “*Kaisha hôsei no gendai-ka ni kan suru yôkô shian*” ni tai suru kakukai iken no gaiyô [Summary of Public Opinions to the Outline for Modernization of Company Law System], in: *Jurisuto* 1267 (2004) 129.

35 HÔSEI SHINGIKAI KAISHA-HÔ (GENDAI-KA KANKEI) BUKAI [Legal System Investigation Commission, Working Group on the Modernization of Company Law], *Dai-20-kai kaigi giji-roku* [Minutes of the 20<sup>th</sup> Meeting], March 17, 2004, available at <<http://www.moj.go.jp/SHINGI/040317-1.html>>; *Dai-25-kai kaigi giji-roku* [Minutes of the 25<sup>th</sup> Meeting], June 16, 2004, available at <<http://www.moj.go.jp/SHINGI/040616-1.html>>. See also KANSAKU, *supra* note 5, 143.

36 See UEYANAGI / ÔTORI / TAKEUCHI, *supra* note 24, 533; KANDA, *supra* note 5, 331. See also Imperial Court, December 16, 1918, in: *Minji Hanketsu-roku* 24, 2326.

37 See also KANSAKU, *supra* note 5, 144-145.

if Art. 821 of the Company Act were to be applied literally.<sup>38</sup> According to a press report, these companies, the U.S. government, and others demanded a postponement of the enforcement of Art. 821 or to exclude securities companies from its application.<sup>39</sup> On the other hand, in the parliamentary debates the Minister of Justice expressly rejected such a demand,<sup>40</sup> while she gave a narrower interpretation of the definition of a pseudo-foreign company.<sup>41</sup> That is, since Art. 821 aims at prevention of the evasion of law, it is applicable only when the business in Japan is indispensable to the existence of a company; thus, most companies that are undertaking an enterprise not only in Japan but also abroad should not be considered as pseudo-foreign companies. Moreover, the supplementary resolution of the Upper House on the draft of the Company Act notes particularly:<sup>42</sup> (i) Art. 821 of the Company Act which exclusively prevents the evasion of Japanese law will not disturb in any way the existing and future investment by foreign companies; (ii) the Japanese government should make known more broadly that it has no intent with this Article to restrict or enforce a specific form of investment by foreign companies; (iii) the Japanese government should examine after the coming into effect of the Company Act whether this Article can prejudice the interests of foreign companies, and revise it if necessary.

Similar to the statement of the Minister of Justice in the parliamentary debates, a book written by the staff of the Ministry of Justice says that Art. 821 of the Company Act is applicable only when the business in Japan is indispensable to the existence of a company, since it aims to prevent the evasion of law; further, it suggests cases that do not fall under Art. 821 as follows.<sup>43</sup>

First, neither an office nor an employee's location determines the place of a "business" in Art. 821, but it is determined by considering all circumstances such as the location of customers or suppliers, the place or manner of transactions, the financing place, and so on. Therefore, Art. 821 is not applicable: (i) even if a foreign company

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38 See the statement of the government witness, K. SUZUKI, in: Minutes of the Committee of Justice, Upper House, the 162<sup>nd</sup> Period of Parliament, No. 20-1, May 19, 2005, 16. On the other hand, no foreign bank or insurance company seems to fall under the definition of a pseudo-foreign company.

39 Nikkei newspaper, morning on June 7, 2005, 7.

40 The statement of the Minister of Justice, C. NÔNO, in: Minutes of the Committee of Justice, Upper House, the 162<sup>nd</sup> Period of Parliament, No. 22, June 9, 2005, 16.

41 The statement of the Minister of Justice, C. NÔNO, in: Minutes of the Committee of Justice, Upper House, the 162<sup>nd</sup> Period of Parliament, No. 26, June 28, 2005, 3.

42 Minutes of the Committee of Justice, Upper House, the 162<sup>nd</sup> Period of Parliament, No. 26, June 28, 2005, 8.

43 AIZAWA, *supra* note 19, 241-242.

sells all its goods in Japan when the goods are mainly supplied from other foreign companies;<sup>44</sup> (ii) even if a foreign company buys all its goods from Japanese suppliers when the goods are also sold abroad or exported to foreign customers;<sup>45</sup> (iii) even if a foreign company sells all its goods in Japan when it has a subsidiary that is doing business abroad; (iv) even if a foreign company buys all its goods from Japanese suppliers and sells them in Japan when it raises its operating funds abroad by borrowing or issuing corporate bonds; (v) if the company's directors reside abroad, or the board of directors meetings are held abroad.

Next, because the "main purposes" in Art. 821 is a subjective requirement, it should not be determined immediately by comparing the scale of business in Japan and abroad. Therefore, Art. 821 is not applicable: (i) when a foreign company which was doing business chiefly abroad at the outset is now doing business mostly in Japan due to its expansion of the scale of business in Japan; (ii) when a foreign company which is doing business now exclusively in Japan plans to do business abroad in the future; (iii) when a foreign company which was founded for the purpose of doing business both in Japan and abroad is now doing business exclusively in Japan due to problems with its business abroad.

In the short term, such interpretations appear convenient for foreign companies. However, it also appears contrary to the wording of Art. 821 of the Company Act. That is, the business of the subsidiary, the raising of the operating funds, and the residence of the directors or the place of the board of directors meetings should not be considered for determining the place of "business" according to a literal interpretation of Art. 821. To be sure, "the main purposes" is a subjective requirement but it needs to be determined considering objective circumstances. Thus, the cases cited above for the interpretation of the "main purpose" are all questionable. Therefore, Art. 821 needs to be revised immediately, since otherwise the literal interpretation will prejudice the interests of the foreign companies that are actually doing business in Japan.

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44 See also the statement of the Minister of Justice, C. NÔNO, in: Minutes of the Unified Board of the Committees of Justice, of Finance, and of Economy and Industry, Upper House, the 162<sup>nd</sup> Period of Parliament, No. 1, June 9, 2005, 4.

45 See also the statement of the Minister of Justice, C. NÔNO, *supra* note 44, 4; the statement of the government witness, I. TERADA, in: Minutes of the Committee of Justice, Upper House, the 162<sup>nd</sup> Period of Parliament, No. 24, June 16, 2005, 6-7.

## V. CONCLUSION

International corporate activity in Japan grows in diversity every year. Several decades ago, the government only needed to consider simple cases of foreign companies establishing Japanese branch offices or founding subsidiaries under Japanese law. However, in drafting the new Company Act, the Japanese government also has to consider cases of foreign companies conducting continuous transactions without establishing offices; for example, as a result of the development of e-commerce. Similarly, there are foreign securities companies that create paper companies in the Cayman Islands exclusively for doing business in Japan.<sup>46</sup>

The Japanese government has attempted to enact a law to regulate these cases, but the result is not satisfactory. The government should reiterate that foreign companies need transparency under Japanese law. It is very likely that the shoddy guidance on application of the Company Act provided by the Ministry of Justice will be reversed by the courts as it is contrary to the wording of the Company Act. The interpretation of Art. 821 concerning a pseudo-foreign company is a good example. Further, additional ambiguous points exist, such as the definition of a company, the obligation to publish a company's balance sheet, and so on. Therefore, it is important that all foreign companies remain vigilant in monitoring Japanese practice under the new Company Act.

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46 See the statement of N. MINEZAKI of the Democratic Party, in: Minutes of the Committee of Justice, Upper House, the 162<sup>nd</sup> Period of Parliament, No. 22, June 9, 2005, 15; Nikkei newspaper, morning on June 7, 2005, 7. See also H. KANDA, *Kigyô no kokusaiteki katsudô to kaisha-hô* [Companies' International Activity and the Company Act], in: Zaimu-shô Zaimu Sôgô Seisaku Kenkyû-sho [Research Institute of Ministry of Finance on Comprehensive Financial Policy], "Jittai keizai no henka to hô-seido no taiô ni kan suru kenkyû-kai" hôkoku-sho [Report of Study Group on Change of Economy and Legal Strategy] (Tokyo, May, 2006) 118. Professor Kanda gives an example: a German bank founded a securities company as a subsidiary in Hong Kong which in turn established a Japanese branch and is working chiefly in Japan. He explains why the German bank could not directly establish a Japanese branch for securities business. This is because the Japanese government had once adopted a policy of separation of banking and securities business. That is, a bank should not found a securities company as subsidiary, and a bank of a foreign country which adopts the universal banking system like Germany should not directly establish a Japanese branch, either. Thus, such a foreign bank could do nothing other than founding a securities company in a third country such as Hong Kong, which aims at business chiefly in Japan and then establishes a Japanese branch. According to Professor Kanda, such a manner of investment was suggested with the agreement of the Banking Bureau, the Securities Bureau, and the International Finance Bureau of the Ministry of Finance which adopted the policy of separation of banking and securities business. This means that the Japanese government recommended foreign banks to establish pseudo-foreign companies.

## ZUSAMMENFASSUNG

*Internationale Unternehmenstätigkeit in Japan wird von Jahr zu Jahr vielfältiger. Vor wenigen Jahrzehnten mußte sich die japanische Regierung nur mit einfachen Fällen der Eröffnung von Filialen oder der Gründung von Tochtergesellschaften durch ausländische Unternehmen nach japanischem Recht beschäftigen. Bei der Ausarbeitung des neuen Gesellschaftsgesetzes mußte die Regierung nun jedoch auch Fälle berücksichtigen, in denen ausländische Unternehmen kontinuierlich Geschäfte tätigen, ohne jedoch eine Niederlassung zu gründen, wie etwa im Bereich des E-Commerce. Am 26. Juli 2005 wurde das Zweite Buch des japanischen Handelsgesetzbuchs (Shôhô) außer Kraft gesetzt; an seine Stelle tritt das Gesellschaftsgesetz (Kaisha-hô). Ein ausländisches Unternehmen, das eine Niederlassung für ständige Geschäftstätigkeit in Japan gründet, muß nun einige wichtige Änderungen im neuen Gesellschaftsgesetz berücksichtigen. Der Beitrag geht auf die Unterschiede in der Rechtsstellung einer ausländischen Gesellschaft nach dem alten Handelsgesetz und dem neuen Gesellschaftsgesetz ein.*

*Zunächst wird die neue Definition eines „ausländischen Unternehmens“ im Gesellschaftsgesetz vorgestellt, die im Ergebnis jedoch der des alten Gesetzes gleicht. Im zweiten Abschnitt wird auf die Vorschriften, denen ausländische Unternehmen unterliegen, eingegangen, wie etwa die Verpflichtung, einen Vertreter in Japan zu bestellen, das Verbot, vor der rechtlichen Registrierung eine ständige Geschäftstätigkeit aufzunehmen oder die Pflicht, die Bilanz zu veröffentlichen. Auch hier zeigen sich wiederum große Ähnlichkeiten zur früheren Rechtslage. In einem dritten Abschnitt werden die Vorschriften bezüglich nur zum Schein nach ausländischem Recht gegründeter Unternehmen vor und nach der Gesetzesänderung verglichen. Im Handelsgesetz fand sich zwar keine Definition eines ausländischen Unternehmens, die Unterscheidung zwischen ausländischen und inländischen Unternehmen wurde jedoch, wie dies auch unter dem neuen Gesellschaftsgesetz der Fall ist, aufgrund des auf die Gründung des Unternehmens angewandten Rechts getroffen. Diese Regel führte jedoch in Fällen, in denen ein Unternehmen zum Zweck der Umgehung strengerer japanischer Vorschriften im Ausland gegründet wurde, unter Umständen zu unerwünschten Ergebnissen. Im neuen Gesellschaftsgesetz erhalten derartige nur zum Schein im Ausland gegründete Unternehmen die gleiche Stellung wie ausländische Unternehmen vor der Registrierung, ihre Rechtspersönlichkeit wird anerkannt.*

*Der Versuch der japanischen Regierung, ein Gesetz zu schaffen, das internationale Unternehmenstätigkeit in Japan reguliert, hat kein befriedigendes Ergebnis hervorgebracht. Es ist sehr wahrscheinlich, daß die Gerichte die nicht ausreichenden Leitlinien zur Anwendung des Gesellschaftsgesetzes, die das Justizministerium herausgegeben hat, für unwirksam erklären werden, da diese häufig dem Wortlaut des Gesetzes widersprechen. Für ausländische Unternehmen in Japan ist es daher erforderlich, aufmerksam die japanische Praxis nach dem neuen Gesellschaftsgesetz zu beobachten.*

*(Zusammenfassung durch d. Red.)*