ABHANDLUNGEN / ARTICLES

Japanese Bar Examination Questions and Student Preferences: Why Do More Students Choose Insolvency Law over Public International Law and Why Does It Matter?

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I. Introduction: Student Approaches to the Japanese Bar Examination

This article analyses the Japanese bar examination and the reasons behind student preferences for certain questions on the examination. It also provides and critiques the first published translation of bar examination questions into English. Research on the examination has traditionally focused on quantitative information and the examination's incredibly low pass-rates pre-reform.[1] The Japanese National Bar Examination is lauded or criticized, depending on your normative perspective, as one of the most difficult examinations in the world. Pre-2004 reform pass-rates of 1–3% were some of the most

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1 See S. Steele/A. Petridis, Japanese Legal Education Reform: A Lost Opportunity to End the Cult(ure) of the National Bar Examination and Internationalise Curricula?, in: van Caenegem/Hiscock (eds.), The Internationalisation of Legal Education: The Future Practice of Law (Edward Elgar Publishing 2014) 92.

well-known statistics about the Japanese legal system. Senior Japanese licensed lawyers (*bengoshi*) emphasize their year of passing to differentiate themselves from more recent legal professionals who passed when pass-rates were at 20 to 50%. The critique and translations in this article provide insights into the examination which take us beyond statistics and enable a review of the examination from a qualitative perspective. The article also reports evidence suggesting potentially dangerous implications of a hyper competitive bar examination for student well-being.[2]

The article begins by analysing the background and overall content of the bar examination based on traditional quantitative approaches. Next, it critiques two elective questions from the 2012 bar examination, which are translated into English and set out in Appendices 1 and 2. The first question is the public international law question from 2012, and the second question is the insolvency law question from the same year. The article argues that the content, style and presentation of the essay-style Japanese bar examination questions are not significantly different from hypothetical questions set in examinations in most law schools globally; it was, and still is, the artificially low pass-rate and tight time constraints which make the Japanese examination notoriously difficult to pass and put immense pressure on students.

Student perspectives about the examination are analysed in the next section of the article. Understandably, students are interested in maximizing their chances of passing the examination, and their choice of elective examination question topics reflects their individual strategies as well as collective perceptions about what is required for success. The article presents their concerns and strategies as expressed in various public forums, including blogs and more traditional publications such as books.[3] Based on these materials, the article argues that students are responding to three key factors: first, the availability of study materials and effective teachers; second, cram school advice and approaches; and third, perceptions of success such as previous pass-rates for individual questions. For these reasons, the article concludes that the reforms to legal education in 2004 have not increased the popularity of international law as intended, including as elective subjects on the bar examination. This result contributes to the failure of the reforms to fulfil a goal for Japanese legal education: internationalization.[4]

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2 Compare recent research from Australia, W. LARCOMBE et al., Does an Improved Experience of Law School Protect Students against Depression, Anxiety and Stress: An Empirical Study of Wellbeing and the Law School Experience of LLB and JD Students, in: Sydney Law Review 35-2 (2014) 407.

3 Steele argued that student voices were absent from the reform process pre-2004. S. STEELE, Legal Education Reform in Japan: Teachers, Leave Us Kids Alone?, in: Asian Law 7 (2005) 264.

4 See STEELE/PETRIDIS, *supra* note 1, 92; S. STEELE/K. FUKUI, Internationalising Legal Education in Japan as Discourse and Practice, in: Stevens/Breaden/Steele (eds.), Internationalising Japan as Discourse and Practice (Routledge 2014) 32. On the meaning of internationalization for legal education, see J. WAINCYMER, Internationalization of Legal Education, in: Steele/Taylor (eds.), Legal Education in Asia. Globalization, change and contexts (Routledge 2010) 68.

II. Background and Overview of Japanese Bar Examination

The Japanese legal education system underwent major change in 2004 with the introduction of post-graduate law schools.[5] Graduation from a law school is a pre-requisite for sitting the National Bar Examination unless a candidate passes the highly competitive preliminary qualifying examination.[6] The 2004 reforms to legal education failed to make a genuine difference to the content or format of the examination, however.[7] The current Japanese bar examination is conducted over four days commencing with short-answer questions, including a multiple choice section. The short-answer questions between 2004 and 2014 related to public law (the Constitution, and administrative law), civil affairs (the Civil Code, the Commercial Code, and the Code of Civil Procedure) and criminal affairs (the Criminal Code and the Code of Criminal Procedure). The compulsory subjects were consolidated by reforms in 2014 which limit the short-answer questions to the following topics: the Constitution, the Civil Code and the Criminal Code.[8] The changes in 2014 reflect government and public perceptions that post-reform graduates lacked a deep understanding of essential law subjects which is needed 'to solidify the fundamental understandings of these three subjects'.[9]

Students who pass the short-answer question section undertake the next section based on essay-type questions providing responses to hypothetical scenarios on subjects related to public law (the Constitution and administrative law), civil affairs (the Civil Code, the Commercial Code and the Code of Civil Procedure), and criminal affairs (the Criminal Code and the Code of Criminal Procedure), as well as one of either labour, insolvency, tax, economics, intellectual property, environmental, public international or private international law which are classified as expert legal fields.[10] The questions translated in this article are from this section of the examination. Students are allowed to undertake

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5 For a summary of the background to the reforms see N. Kashiwagi, Creation and Development of Japanese Law Schools, in: Steele/Taylor (eds.), *supra* note 4, 185, 185–187; S. Matsui, Turbulence Ahead: The Future of Law Schools in Japan, in: Journal of Legal Education 62 (2012) 3.

6 Steele/Petridis, *supra* note 1, 98–99. For a recent analysis of the impact of the preliminary qualifying examination, see S. Steele, Japan's National Bar Examination: Results From 2015 and Impact of the Preliminary Qualifying Examination, in: ZJapanR / J.Japan.L. 41 (2016) 55.

7 Steele/Petridis, *supra* note 1, 106–107.

8 Bill to amend the Bar Examination Act was passed in the No. 186 ordinary session of the Diet effective from 2014, Ministry of Justice, *Shihō shiken-hō no ichibu o kaisei suru hōritsu-an* [Bill to amend the Bar Examination Act] (28 May 2014), *http://www.moj.go.jp/housei/shihouseido/housei10_00065.html*.

9 K. Masanari, *Shihō shiken tantō-shiki shiken ni kansuru shitsumon shūi-sho* [Questions addressed to the Cabinet regarding short-answer questions on the National Bar Examination] (6 June 2014) [author's transl.], *http://www.shugiin.go.jp/internet/itdb_shitsumon.nsf/html/shitsumon/a186202.htm.*

10 *Shihō shiken-hō 1949* [Bar Examination Act 1949], Act No. 140/1949 as amended by Act No. 52/2014.

the exam each year for 5 years after completion of law school or passing the preliminary bar examination.[11] From 2004 to 2014, students were only permitted to take the examination 3 times in the 5 years after graduation. The change introduced in 2014 is designed to ameliorate some of the pressure on students seeking to pass the examination.

Bar examinations are relied on by many jurisdictions globally as a relatively cheap way of sifting through thousands of candidates. Many of the criticisms of the Japanese examination reflect debates in other jurisdictions about bar examinations generally, including whether examinations reflect what a student needs to know to effectively practice law, whether examinations should or can protect consumers, and which subjects should be examined and how.[12] Even debates about the artificially low pass-rate prescribed by the Japanese Ministry of Justice reflect trends in the United States of America to increase the score required to pass bar examinations in certain States based on assumptions that bar examinations provide consumer protection and negative perceptions about increasing lawyer numbers.[13] Despite the recent pass-rates in Japan being lower than expected at the time of the reforms in 2004, the pass-rate situation is still better than historical rates: Japanese candidates now have approximately one in four chances of passing (post-2007), which is better than a one in one hundred chance (pre-1990s).[14] Yet, pass-rates still continue to influence student decisions about which subjects to study for the bar examination, as discussed further below.

III. TRANSLATION AND TEXTUAL ANALYSIS OF TWO QUESTIONS FROM 2012 JAPANESE BAR EXAMINATION

The translated questions set out in Appendices 1 and 2 come from the 2012 elective essay examination. Students and preparatory schools (hereafter 'cram schools') consider that elective subjects fall into two categories: the so-called major elective subjects are labour law, insolvency law and intellectual property law; and the so-called minor sub-

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11 *Ibid.*

12 A. CURCIO, A Better Bar: Why and How the Existing Bar Exam Should Change, in: Nebraska Law Review 81 (2002) 363. California recently completed a review of its bar examination approach: STATE BAR OF CALIFORNIA, Phase 1 Final Report, Task Force on Admissions Regulation Reform, (11 June 2013), *www.calbar.ca.gov/Portals/0/documents/bog/bot_ExecDir/state_bar_task_force_report_(final_as_approved_6_11_13)_062413.pdf.* The report proposed a set of reforms focusing on competency and professionalism. See, also, R. A. FRANKEL, California's Task Force On Admissions Regulation Reform: Recommendations for Pre and Post Admission Practical Skills Requirements, in: The Bar Examiner 82-3 (2013) 25.

13 CURCIO, *supra* note 12, 363; for a comparison of the United States and Japan, see M. J. WILSON, U.S. Legal Education Methods and Ideals: Application to the Japanese and Korean Systems, in: Cardozo Journal of International & Competitive Law 18-2 (2010) 314, 314.

14 See M. D. WEST/C. J. MILHAUPT, Is the Japanese Bureaucracy Hollowing Out? Evidence from the Market for Legal Talent, in: ZJapanR/J.Japan.L. 15 (2003) 5, 10–31 on student career choices based on examination pass-rates.

jects are environmental law, tax law, economics law, private international law and public international law.[15] We chose to translate the minor subject question relating to public international law from the 2012 National Bar Examination precisely because so few students elect to answer that question: only 28 of the 2,102 candidates who passed the bar examination in 2012 elected to answer the public international law question on the examination. Public international law has consistently been the least popular elective subject on the new bar examination. In 2012, 566 students chose the insolvency law question.[16] Insolvency law has consistently been the second most popular topic – only labour law ranks ahead of insolvency law in popularity amongst candidates. Further, labour law and insolvency law are clear favourites. Intellectual property law and economic law are the next most popular subjects, but are far less popular than labour law and insolvency law, as shown in Table 1 below. We chose the insolvency law question from the 'major' subjects to provide a comparison with the public international law question to see if there are any obvious textual differences which might explain student preferences. Although the majority of students take the labour law question, the pass-rate for the insolvency law question in 2012 was the highest pass-rate of all the elective questions, which led us to query whether there was something special or easy about the insolvency law question. We also chose to translate the insolvency law question over the labour law question based on the authors' research interest in Japanese insolvency law and after deciding that there was nothing inherently special about the labour law question itself. The translations provide an opportunity for English-language audiences to consider the style and complexity of the questions when compared to other jurisdictions.

As the bar graph in Table 1 shows, the majority of students who pass the bar examination elected to answer the labour law or insolvency law question, whereas less than 5% of examination passers elected to answer the public international law question.

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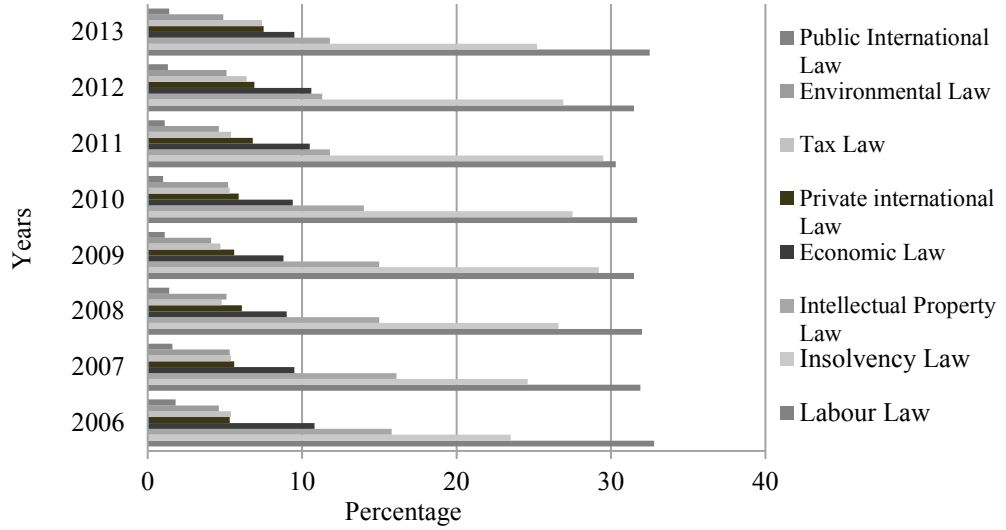
15 For the role of preparatory school in passing the bar examination in Japan, see KASHIWAGI, *supra* note 5, 186; LEC TŌKYŌ LEGAL MIND, *Shin shihō shiken sentaku kamoku no erabikata* [How to choose elective subjects of the New Bar Examination], *http://www.lec-jp.com/yobi_shiken/pdf/resume/ll11981.pdf*.

16 MINISTRY OF JUSTICE, *Heisei 24-nen shihō shiken no kekka* [Results of the 2012 National Bar Examination] (11 September 2012), *http://www.moj.go.jp/content/000102108.pdf*.

Table 1: Elective Subjects Chosen by Passers of National Bar Examination[17]



A glance at the translated questions confirms that both questions are complex and long. Both questions are written in complex Japanese, which the translation into English is designed to capture. At first glance, however, most law school students from jurisdictions such as Australia, for example, would recognise the format of the essay questions. In other words, the Japanese questions are typically no lengthier and/or complex than typical examination questions for an Australian law subject. Further, on its face, the public international law question is no more complicated or challenging than the insolvency law question on the examination.

The responses to the examination questions suggest, however, that students did find the public international law question more challenging in terms of understanding what

17 This bar graph is a composite of data from the following sources. MINISTRY OF JUSTICE, *Heisei 18-nen shihō shiken no kekka* [The Bar Examination Results of 2006] (21 September 2006), *http://www.moj.go.jp/content/000006357.pdf*; MINISTRY OF JUSTICE, *Heisei 19-nen shihō shiken no kekka* [The Bar Examination Results of 2007] (13 September 2007), *http://www.moj.go.jp/content/000006382.pdf*; MINISTRY OF JUSTICE, *Heisei 20-nen shihō shiken no kekka* [The Bar Examination Results of 2008] (11 September 2008), *http://www.moj.go.jp/content/000006423.pdf*; MINISTRY OF JUSTICE, *Heisei 21-nen shihō shiken no kekka* [The Bar Examination Results of 2009] (10 September 2009), *http://www.moj.go.jp/content/000006465.pdf*; MINISTRY OF JUSTICE, *Heisei 22-nen shihō shiken no kekka* [The Bar Examination Results of 2010] (9 September 2010), *http://www.moj.go.jp/content/000103952.pdf*; MINISTRY OF JUSTICE, *Heisei 23-nen shihō shiken no kekka* [The Bar Examination Results of 2011] (8 September 2011), *http://www.moj.go.jp/content/000103954.pdf*; MINISTRY OF JUSTICE, *Heisei 24-nen shihō shiken no kekka* [The Bar Examination Results of 2012] (11 September 2012), *http://www.moj.go.jp/content/000102108.pdf*; MINISTRY OF JUSTICE, *Heisei 25-nen shihō shiken no kekka* [The Bar Examination Results of 2013] (10 September 2013), *http://www.moj.go.jp/content/000114385.pdf*.

was being asked of them and identifying the relevant law. The stand-alone pass-rate for the public international law question was 21.7% in 2012 (refer to Table 2 below), which was not significantly different from the pass-rate of other major optional subjects (labour law 25.5%, insolvency law 28.8%, and intellectual property law 23.3%).[18] However, the highest score obtained in public international law was lower than the score for other subjects. The highest score achieved for public international law was 68 (out of a possible 100) compared to 82 for insolvency law.[19] This change between pass scores and pass rate is explained by the standardization process implemented to equalize the difficulty of questions by examiners, which suggests that even the examiners understand or perceive that certain questions in any given year may be more difficult for candidates than others. In order to maintain consistency across the different elective subjects and their perceived relative difficulties, a special formula is applied to the test scores obtained by the examinee. If the average mark for the question is lower than average, then the examinee will obtain a higher score for that question which is favourable to pass the overall exam.[20]

$$\text{Score} = \frac{\text{Examinee's Score marked by Examiner A (Original Score)} - \text{Average Scores marked by Examiner A}}{\text{Standard Deviation marked by Examiner A}} \times \text{allocated mark} + \text{average score of all subjects}$$

Our analysis also assumes that the skill level and preparedness of all students taking the examination are equal. It may be, for example, that well-prepared students do not select the public international law question. The public international law question may have been more challenging, therefore, because of the relatively lower quality of the students answering the question. We did not find any evidence in the literature or our review of primary materials to suggest, however, that less skilled or prepared students select the public international law question, although it is possible. It would be difficult to test this hypothesis, including because we would need to know more information about the individual students and their capacities, which is data that is not available. A selection bias may also occur the other way in the sense that less able or prepared students choose the most popular questions for the reasons discussed in the next section.

After the exams are marked every year, the Ministry of Justice publishes a report that collates opinions of the exam markers documenting how the exam questions were marked, categorized by subjects, and the markers collate the strength and weaknesses of answers for each question on the exam. The analysis published by the Ministry of Jus-

18 MINISTRY OF JUSTICE, *Heisei 24-nen shihō shiken juken jōkyō* [Current state of examinees 2012] (11 September 2012), *http://www.moj.go.jp/content/000098851.pdf.*

19 *Ibid.*

20 MINISTRY OF JUSTICE, *Shin-shihō shiken ni okeru saiten oyobi seiseki hyōka tō no jisshi hōhō, kijun ni tsuite* [On the methods of the execution and the standards of the markers and the assessment of the results etc. of the new National Bar Examination] (17 March 2005), *http://www.moj.go.jp/content/000002099.pdf.*

tice in 2012 outlines difficulties faced by students in relation to both the insolvency law and public international law questions.[21] According to the Ministry of Justice, most students who answered the insolvency law question were able to identify the relevant section of the law that applied to the case, however, higher grades were awarded to those individuals who were able to convincingly explain their rationale for their answer after exploring all possible options and by drawing on the facts provided in the problem.[22] The Ministry of Justice noted, however, that the public international law question proved challenging for a large number of students.[23] Many could not identify all of the relevant international treaties and applicable precedents to justify their answer.[24]

It is clear even from the translated text of the questions that the public international law question requires a broad and deep degree of knowledge of a range of subject matter when compared to other elective subjects such as insolvency law.[25] Insolvency law requires students to apply a small number of specialized acts and precedents, and does not even require knowledge of the Corporate Reorganization Act (Act No. 154/2002). The question still requires a considerable amount of content to be rote learned and thus a large time commitment to do exceptionally well, but the confined nature of the topic when compared to topics such as public international law is a perceived advantage which seems to be borne out by the text and the examiner's feedback. Further, the content of insolvency law questions typically relates back to Civil Code and Civil Procedure which students already have to study for the bar examination.[26] In contrast, as the translation of the 2012 public international law question shows, this subject area may require knowledge about anything from a United Nations agreement and maritime law to bilateral treaties and specialized cross-border regulations. The breadth of knowledge suggested by the translated question discourages many students from taking the public international law question on the bar examination.

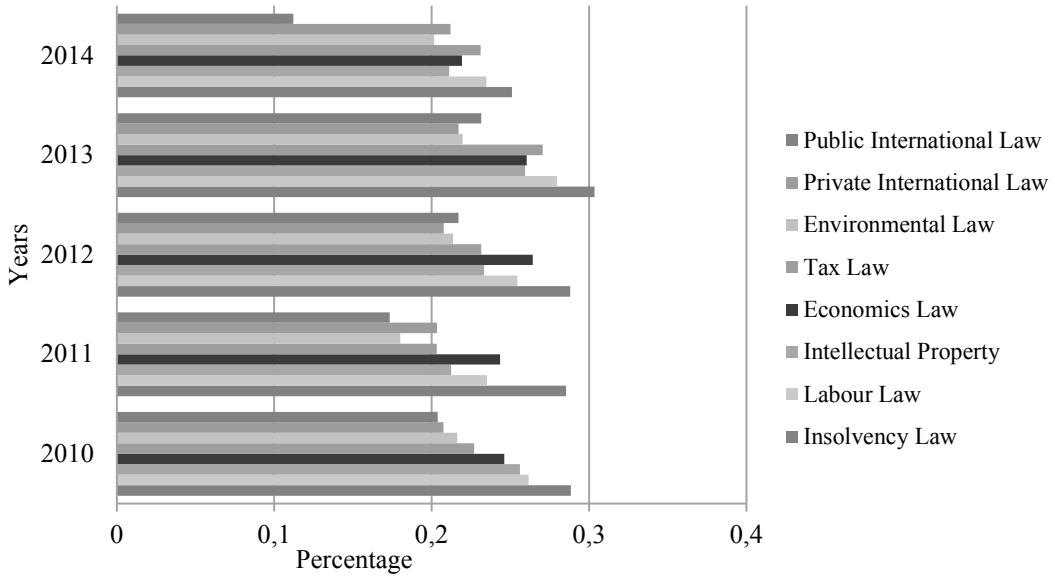
IV. STUDENT PERCEPTIONS AND DRIVERS FOR EXAMINATION QUESTION CHOICES

There are a number of other factors driving choices about examination questions, which are external to the content of the examination question itself and are reflected in student

21 MINISTRY OF JUSTICE, *Heisei 24-nen shihō shiken no saiten jikkan tō ni kansuru iken* [Opinions of the markers of the 2012 National Bar Examination], *http://www.moj.go.jp/content/000105102.pdf*.
22 *Ibid.*, 32.
23 *Ibid.*, 59.
24 *Ibid.*, 61.
25 MINISTRY OF JUSTICE, *Heisei 22 shin-shihō shiken kōsai-in (kokusai kankei-hō (kōhō-kei)) ni taisuru hiaringu no gaiyō* [Outline for the hearing of the investigation committee for the new National Bar Examination (public international law) 2010], 2, *http://www.moj.go.jp/content/000052954.pdf*.
26 See LEC TŌKYŌ LEGAL MIND, *supra* note 15, 3.

perceptions about the examination. Those external factors and student perceptions are analysed in this section. In addition to student concerns about the breadth of content, there are three key drivers behind student choices according to our analysis of publicly available materials: first, the availability of study materials and effective teachers; second, cram school advice and approaches which emphasise the need to memorise large amounts of material; and third, perceptions of success such as previous pass-rates for individual questions and employability in a tight labour market. Recent statistical trends show a decline in the pass-rate for students who choose to take the public international law question, plus a decline in the number of students choosing the question in the first place (see Table 2).

Table 2: Percentage of Examination Passers by Elective Subject [27]



Student perceptions can be found in a number of published materials. Many students write blogs about their law school and examination experience. They believe that they can assist other students to pass the exam and want to make the process easier for

27 This bar graph is a composite of data from the following sources: MINISTRY OF JUSTICE, *Heisei 22-nen shihō shiken no kekka* [The Bar Examination Results of 2010] (9 September 2010), *http://www.moj.go.jp/content/000103952.pdf*; MINISTRY OF JUSTICE, *Heisei 23-nen shihō shiken no kekka* [The Bar Examination Results of 2011] (8 September 2011), *http://www.moj.go.jp/content/000103954.pdf*; MINISTRY OF JUSTICE, *Heisei 24-nen shihō shiken no kekka* [The Bar Examination Results of 2012] (11 September 2012), *http://www.moj.go.jp/content/000102108.pdf*; MINISTRY OF JUSTICE, *Heisei 25-nen shihō shiken no kekka* [The Bar Examination Results of 2013] (10 September 2013), *http://www.moj.go.jp/content/000114385.pdf*; MINISTRY OF JUSTICE, *Heisei 26-nen shihō shiken no kekka* [The Bar Examination Results of 2014] (9 September 2014), *http://www.moj.go.jp/content/000126773.pdf.*

them.[28] Most blogs cover the blogger's study style, tips on how to succeed in the exam and a comparison of different cram school notes and textbooks.[29] These blog resources provide a valuable starting point for many students and assist in figuring out the most effective study style for individual students.[30] Further, some students may perceive blogging as an avenue to release stress. Past and current students undertaking the bar exam voice concerns of stress and immense pressure to pass the exam.[31] The general societal and exam-based pressure to pass is coupled with personal factors. A student at Waseda Law School, for example, felt pressure to succeed because he received both moral and financial support from family members as well as law school teachers and fellow students.[32] There are also more traditional sources of information about student perceptions of the examination. Eru Publishing Company (*Eru Shuppan-sha*), for example, collated the experience of passers of the 2013 bar examination into a book aimed at students currently preparing to undertake the bar examination in 2014.[33] The analysis below is drawn from such student blogs and books and anecdotal evidence from the authors' observation of law students.

1. Availability of Study Materials and Effective Teachers

The number of specialized textbooks available to students for the major elective subjects is much higher than for a subject such as public international law. A contributor to the book *Watashi no shihō shiken gōkaku sakusen '14-nenban* [My plan to pass the National Bar Examination 2014 version], who skipped law school by passing the preliminary qualifying examination and straight afterwards passed the bar examination at the age of 23, comments on the reason for his choice of labour law: 'especially as a person not enrolled in the law school system, labour law had the most number of reference books

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28 NIHON BLOG MURA, *Shihō shiken ninki rankingu* [Bar Exam Popularity Ranking] (25 May 2015), *http://qualification.blogmura.com/shihou_shiken/ranking.html*.

29 E.g. S. HOSHINO, *'Hajimemashite'* on *Hoshino no shihō shiken burogu* [Hoshino's Bar Exam Blog] (6 July 2012), *http://ameblo.jp/kandai-ta/entry-11295854139.html.*

30 K. NATORI, *Jimichina tō'an no kanren shūga gōkaku e no saitan kōsu* [Short course for passing: continuously practicing drafting answers to problems], in: Eru Publishing (ed.), *Watashi no shihō shiken gōkaku sakusen 14-nenban* [My plan to pass the National Bar Examination 2014 version] (Eru Publishing 2014) 63, 81.

31 Concerns about student stress and well-being are not unique to Japan. For recent empirical work on this issue see the writing of Associate Professor Wendy Larcombe and her colleagues, including: W. LARCOMBE, et al., *supra* note 2, 407–432; W. LARCOMBE/K. FETHERS, Schooling the Blues? An Investigation of Factors Associated with Psychological Distress Among Law Students, in: University of New South Wales Law Journal 36-2 (2013) 390.

32 M. KONDŌ, *Kankyō ga onaji demo, gōhi ga wakareru riyū wa nanika? Kankyō to dōgu o tsukai tsukusu tameni* [What are the reasons for success and failures even when in the same environment? How to fully utilize the environment and tools given], in: Eru Publishing (ed.), *supra* note 30, 82.

33 ERU PUBLISHING (ed.), *supra* note 30.

and practice questions published for students'.[34] Passers of the preliminary qualifying examination are entitled to sit the bar examination without incurring the time and expense involved in the post-graduate law school system.[35] Lecturers also argue that the breadth of potential content makes it difficult for them to quantify and focus their teaching for subjects like public international law.[36] Publishers also struggle to create specialized textbooks for public international law, which adds to the complexity of study for students.

Further, many lecturers from renowned law schools are also markers of the specialized minor topics for elective questions.[37] On one view, students from these law schools are able to undertake elective questions which the lecturers from their university mark, as the lecturers will be able to teach techniques to appropriately structure and answer the question.[38] Arguably, only the most prestigious law schools in Japan can afford to support faculty specializing in areas outside of the major elective subjects, which further diminishes the pool of potential candidates sitting the public international law question. Access to lecturers specializing in international fields can also be a factor in determining the destinations of graduates, because their students are traditionally more likely to become attorneys at large law firms with international practices.[39]

2. Cram School Advice and Approaches

Other stakeholders also support choosing so-called major subjects. A lecture delivered by one of the top legal preparatory schools, LEC Tōkyō Legal Mind, emphasised the importance and convenience of undertaking the major elective subjects, namely, labour, insolvency and intellectual property law, especially for those undertaking the exam without attending law school.[40] The lecturer also noted the sizable number of reference books for these subjects.[41] As the comments from LEC Tōkyō Legal Mind noted in the preceding section suggest, cram school advice and approaches also matter. Materials published by the cram schools argue that public international law questions require an understanding of many international conventions and precedents such as the Internation-

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34 K. ISHIHARA, *Yobi shiken kara shihō shiken ni ippatsu gōkaku suru hōhō* [How to pass the Bar Examination on your first try after passing the preliminary exam], in: Eru Publishing (ed.), *supra* note 30, 12, 19.

35 On the preliminary qualifying examination generally, see STEELE, *supra* note 6.

36 MINISTRY OF JUSTICE, *supra* note 25.

37 *Ibid.*

38 We are not suggesting that students and lecturers are cheating, although there was a case where a Keiō Law School professor was disciplined for providing questions to students which were very close to the bar examination question for which he was responsible.

39 JAPANESE SOCIETY OF INTERNATIONAL LAW, *Ankēto shūkei kekka* [Collated results from Survey], *http://www.jsil.jp/infomation_page/kako_info/results.pdf.*

40 See LEC TŌKYŌ LEGAL MIND, *supra* note 15, video (24 January 2014) available at *https://www.youtube.com/watch?v=W-ywlzwJcmM*.

41 *Ibid.*

al Court of Justice Judicial Precedents, Advisory Opinions and International Arbitration precedents.[42] In addition, examination questions could ask about a wide variety of possible topics such as the source and actor of law, national responsibility, jurisdictions of the sea, sky and space and environment, economic, human rights, and dispute resolution. Aiming to increase the number of students undertaking public international law, the Ministry of Justice stated that the focus of the potential question was international human rights law and international economic law, centering on International Law in 2010. As shown in Table 1 however, this stipulation does not appear to have significantly impacted the number of students taking of the questions.[43]

3. Perceptions of Success: Passing and Employability

Success for students in the short-term means passing the bar examination and finding employment. It initially begins with entrance into a prestigious law school as the number of passers from these law schools is greater than the average pass-rate.[44] Previous success relating to elective questions may have a halo effect. It makes sense that students will want to take subjects that have also been taken by most of the students passing the examination to date. Students may infer that to have the best chance of passing the bar examination, they need to take the major elective subjects. To some extent, this seems misguided. Although the number of students undertaking public international law is low, it may be a favourable option if the examinee obtains a high mark in the subject as the standardization process may increase the student's average, as explained earlier.

A final concern for students is the applicability of knowledge to their future careers and its marketability in the context of the competitive Japanese job market. Anecdotally, there is an increasing demand from students wanting to take at least private international law classes based on urban myths that it will assist them in obtaining a position at law firms focusing on international business law *(shōgai hōritsu jimu-sho)*.[45] Since the 2004 reforms, companies and businesses are employing a greater number of lawyers (that is, *bengoshi* or people with practicing certificates), such that the career options for young *bengoshi* are increasingly outside of the traditional trajectory of private practice lawyer,

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42 LEC TŌKYŌ LEGAL MIND, *supra* note 15.

43 MINISTRY OF JUSTICE, *Heisei 22-nen shin-shihō shiken ni okeru kokusai kankei-hō (kōhō-kei) nitsuite* [On Public International Law in the new National Bar Examination of 2010] (14 July 2010), *http://www.moj.go.jp/content/000126379.pdf.*

44 MINISTRY OF JUSTICE, *Heisei 24-nen shihō shiken hōka daigaku-in tōbetsu gōkaku-sha tō* [Statistics of the 2012 Japanese Bar Examination separated by Law Schools], *http://www.moj.go.jp/content/000101962.pdf.*

45 LEC TŌKYŌ LEGAL MIND, *supra* note 40; MINISTRY OF JUSTICE, *Shin-shihō shiken kōsai-in (sentaku kamoku) ni taisuru hiaringu no gaiyō* [Outline for the hearing of the investigation committee for the new National Bar Examination (Elective Subject)], *http://www.moj.go.jp/content/000006834.pdf.*

judge or prosecutor.[46] Even in the in-house context, however, research suggests that it is knowledge of subjects such as labour and environmental law that is considered useful by employers.[47] Students with an interest in practicing in commercial law are also more likely to choose a subject such as insolvency law as an elective subject on the bar examination rather than international law.

V. Implications for Japanese Legal Profession and National Policy of Internationalization: Why Does it Matter if Students Avoid International Law?

The failure to encourage more students to attempt the public international law question on the bar examination is important because it reflects a wider lack of interest in international projects amongst Japanese students. A key reform recommendation outlined by the seminal Justice System Reform Council at the opening of the 21st century was to find ways to facilitate the 'internationalization of lawyers'.[48] The low participation in both public and private international law subjects on the bar examination (see Table 1) suggests that this goal is not being realised. At both the law faculty and law school levels, many incentives and opportunities are offered to students so that they can explore specialized fields of law, including externships and exchanges.[49] Yet, undergraduate law faculty students are focused on getting into law school, and law school students are focusing more of their time on passing the examination than ever before.[50] The new legal education system in Japan was established to nurture future 'lawyers capable of operating effectively in an international legal environment'.[51] To the extent that the low number of students choosing either public and private international law as an elective on the bar examination compared to other fields may be used as a proxy for internationalizing the Japanese legal profession, this goal of internationalization has not been realised. As suggested in the *Melbourne Journal of International Law* by Lynch almost a decade ago in the context of Australia,

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46 Itoh Juku, *Hōsō ikusei seido kaikaku o shiru* [To learn about the Legal Education Reforms] (26 August 2013), *http://www.itojuku.co.jp/shiken/yobi/feature/DOC_033905.html.*

47 *Ibid.*; See also K. Fukui/Y. Fukui, Empirical Support for Redefining the Legal Profession and New Roles for Lawyers in Japanese Corporations, in: Asian Law 12-2 (2010) 273 (ed. by S. Steele).

48 Justice System Reform Council, For a Justice System to Support Japan in the 21st Century (12 June 2001), *http://japan.kantei.go.jp/policy/sihou/singikai/990612_e.html.*

49 Steele/Fukui, *supra* note 4, 32.

50 Ministry of Education, Culture, Sports, Science and Technology, *Shihō shiken yobi shiken ni kansuru hōka daigaku-in ni taisuru ankēto chōsa kaitō kekka (gaiyō)* [Summary report of questionnaire to Law Schools about preliminary bar examination] (24 February 2014), *http://www.mext.go.jp/b_menu/shingi/chukyo/chukyo4/012/siryo/icsFiles/afieldfile/2014/02/26/1344585_02.pdf.*

51 See D. Rosen, Butaman for breakfast and other morsels of legal reasoning, in: Steele/Taylor (eds.), *supra* note 4, 200.

this lack of interest and knowledge also has potential implications for the use of international law canon such as human rights law in domestic advocacy.[52]

The competitive bar examination forces most students to work backwards in Japan: they want to take subjects, which will help them pass, and those subjects are perceived to be domestically focused. Employer feedback also seems to confirm their interest in subjects traditionally seen as domestically based.[53] The Prime Minister of Japan and his Cabinet argued that the elective subjects on the National Bar Examination should reflect societal needs and expectations, which may include public international law, depending on the time and context. Internationalisation of legal education will foster alternative ways of approaching legal problems and developing the ability to formulate legal responses to problems in different jurisdictions.[54] As international trade and commercial activity increases complexity, there is a need for lawyers competent in dealing with international legal issues.[55] Whether an exam on its own would ever be able to filter capable internationalized legal professionals is questionable, but the current situation is not even fostering a greater interest in studying or obtaining expertise in international law.

Discussions around the recommendation by the Cabinet's Legal Professional Development Committee to abolish elective subjects in the bar exam may help to provide an answer to the selection challenges faced by students, but they have also created much controversy.[56] Opposition to the proposal focused on the original aim of the judicial reform; that is, to nurture legal professionals capable of operating in a dynamic, international environment.[57] The abolition of elective subjects, however, may encourage students to focus on compulsory subjects for the bar examination and explore other fields of interest offered at the law school level on a voluntary basis, which may include international law and other specialist programmes such as internships and study abroad. As it is impossible to test all subject matters on a bar examination, the examination could also place greater emphasis on skills-based testing and ethics as suggested in reform proposals for other jurisdictions with bar examinations.[58] There is a danger that students will continue to avoid international law subjects at law school even with these reforms,

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52 P. LYNCH, Harmonising International Human Rights Law and Domestic Law and Policy: The Establishment and Role of the Human Rights Law Resource Centre, in: Melbourne Journal of International Law 7-1 (2006) 225.

53 FUKUI/FUKUI, *supra* note 47.

54 STEELE/FUKUI, *supra* note 4, 32.

55 WAINCYMER, *supra* note 4, 71.

56 MINISTRY OF JUSTICE, *Hōsō yōsei seido kentō kaigi torimatome* [Summary of minutes from discussions on education of legal professionals] (26 June 2011), *http://www.moj.go.jp/content/000112068.pdf* .

57 CABINET SECRETARIAT, *Shihō shiken sentaku kamoku haishi ni kansuru dantai tō kara no iken-sho* [Collated opinions from groups etc. on matters concerning the abolishment of elective questions], *http://www.cas.go.jp/jp/seisaku/hoso_kaikaku/dai4/siryou1.pdf.*

58 CURCIO, *supra* note 12.

but the level of interest amongst students cannot get much worse than that suggested by current statistical evidence from the post-2004 bar examination.

VI. Conclusion

The legal education reform in Japan aimed to internationalise the curriculum and lawyers, but the bar examination has and will continue to pose a challenge to education providers and reformers. At the law school level, there is an already crowded curriculum which makes it difficult to incorporate different specialisations of law as students are highly focused on passing the bar examination instead of learning different fields of practice. In the 21st century, however, even subjects traditionally considered domestically based can often include international elements such as immigration issues in labour law or cross-border corporate collapse in insolvency law. Even for this reason, as Waincymer argued five years ago, international law and teaching about other jurisdictions should be an important focus of any contemporary legal education – even in Japan. The statistics and analysis in this article suggest, however, that this view is subsumed for students who are desperate to pass the examination and obtain work in Japan.

APPENDICES

1. Translation: Public International Law from 2012 Japanese Bar Examination

論文式試験問題集　（国際関係法（公法系））

Essay-Type Examination Questions (International Relations Law (Relating to Public Law))

［国際関係法（公法系）］

[International Relations Law (relating to public law)]

〔第1問〕（配点：50）

Question 1 (50 points):

X 国は、国内法で基線から 12 海里までを領海、24 海里までを接続水域、200 海里までを排他的経済水域（以下「EEZ」という。）と定め、各海域に対して適用される国内法令を制定し、施行した。

Under the domestic law of Country X, 'Territorial Waters' are defined as the region that lies between the baseline and 12 nautical miles; the 'Contiguous Water Area'[59] is the band of water extending from the outer edge of the Territorial Waters up to 24 nautical miles from the base line; and the 'Exclusive Economic Zone' (hereafter referred to as "EEZ") is the area from the edge of the Contiguous Water Area up to 200 nautical miles from the base line and established and enforced by domestic legislation that applies to each costal zone.

X 国は、同国 EEZ 内での漁業活動を許可に基づき外国人にも認めている。

Country X recognises that foreign nationals may also conduct fishing activities within its domestic EEZ after receiving permission.

他方、X 国は、関税に関する限り、領海及び接続水域だけでなく EEZ の海域をも同国関税法の適用区域と定め、漁船燃料用の軽油の無許可での持ち込み及び販売を禁止し、違反者に重い罰則を科すことを定めていた。

On the other hand, Country X, to the extent that customs law applies, not just the Territorial Waters and the Contiguous Water Area, has established domestic customs duties laws for relevant jurisdictions including the EEZ coastal zone and has prohibited carrying or selling diesel fuel to

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59 The translation of the Japanese legal term '水域' is 'Water Area' in the Standard Legal Terms Dictionary (March 2009 ed.). The United Nations Convention uses the English term 'Contiguous Zone' as the term which appears to correspond to '接続水域'. For the purpose of the translation of this examination paper, '接続水域' will be translated as 'Contiguous Water Area'.

fishing vessels in these regions without permission, and established heavy penalties for anyone who violates [these provisions].

批准時に「国連海洋法条約 56 条に定める沿岸国の主権的権利及び管轄権には、排他的経済水域における海外船舶の商業活動に対する関税法の適用が含まれる。」という宣言を付した。

At the time of ratification, [Country X] declared that “the sovereign rights and jurisdiction of the coastal State in the exclusive economic zone provided for in Article 56 of the United Nations Convention on the Law of Sea, include the application of Customs Act applicable to commercial activity conducted by foreign fishing vessels in the EEZ”.

Y 国の登録船舶 A 号、B 号及び C 号は、X 国の EEZ 内で操業する漁船に対して漁船燃料用軽油を販売することを目的とした船舶であり、A 号は、X 国基線から 11 海里の海域で漁業活動中でない漁船に漁船燃料用軽油を販売しているところを X 国沿岸警備当局の巡視艇に発見され、関税法違反で拿捕された。

Country Y’s registered vessels A, B and C are vessels with the purpose of selling diesel fuel used in fishing activities to fishing vessels operating within Country X's EEZ and Vessel A was discovered selling diesel fuel used in fishing activities to a fishing vessel which was not operating fishing activities within the coastal zone between 11 nautical miles from Country X's baseline by Country X coastal guard’s patrol boat, and detained for breaching Country X's Customs Act.

また、B 号は、基線から 20 海里の海域で、C 号は、基線から 100 海里の海域で同様の販売行為により拿捕された。

In addition, vessel B and vessel C were also detained in the coastal zones at 20 and 100 nautical miles away from the baseline respectively for conducting the same sales activities.

これらの船舶及び乗組員は、X 国の港に連行された後、関税法違反で起訴され、司法手続においてそれぞれ有罪を宣告され、漁船燃料用軽油は没収された。

After the vessels and crew were taken to Country X's port, they were charged with violating the Customs Act, and each found guilty based on the judicial process, and the diesel fuel used in fishing activities was confiscated.

以上の事実を踏まえて、以下の問題に答えなさい。なを、X 国と Y 国は、共に国連海洋法条約の当事国である。また、国連海洋法条約第 292 条に定める迅速な釈放の問題には触れなくてよい。

Taking into consideration the above facts, answer the following questions. Note that Country X and Y are both signatories to the United Nations Convention on the Law of Sea. Further, there is no need to consider issues regarding the prompt release of vessels and crews as provided for in Article 292 of the United Nations Convention on the Law of Sea.

設問

Questions

1. X 国が国連海洋法条約批准時に付した宣言の国際法上の効力について説明しなさい。

   Explain the validity of Country X'S declaration at the time of ratification of the United Nations Convention on the Law of Sea from the perspective of international law.

2. X 国による Y 国の登録船舶ア号、B 号及び C 号に対する各措置について、国際法上どのように評価できるか、沿岸国が領海、接続水域及び EEZ のそれぞれにおいて有する管轄権の違いを踏まえて、説明しなさい。

   Taking into consideration the different jurisdictional rights that apply to the Territorial Waters, Contiguous Water Area and EEZ, explain the effectiveness of the measures taken by Country X against Country Y's registered vessels A, B and C, from the perspective of international law.

3. Y 国の登録船舶 C 号に関する事件を X＊Y 両国は、合意により国連海洋法裁判所に付託した。Y 国の請求は、海洋の使用に対する Y 国の自由及び X 国の関税法服さない Y 国の権利が侵害されたことの宣言と、これらの侵害から生じた Y 国の損害の賠償を求めるものであった。本件が、国連海洋法条約第 292 条に定める、「国内的な救済措置を尽くすことが国際法によって要求されている場合」に当たらないとすれば、それはどのような理由によるものかを Y 国の請求内容から説明しなさい。

   Countries X and Y agreed to take registered vessel C's case to the United Nations Convention of the Law of Sea's court. Country Y claimed compensation for damages which Country Y claims arising from the violation of Country Y's freedom to access the sea and of Country Y's right to disregard Country X's customs law. Explain based on the content of Country Y's claim the reasons why the international laws requirement of domestic remedial action provided for in article 292 of the United Nations Convention on the Law of Sea does not apply to this case.

〔第 2 問〕（配点：50）

Question 2 (50 Points)

A 国にある B 国大使館が，同大使館の敷地内に通常大使館にはあり得ないような遊戯施設を建設して，A 国に在留する B 国民に開放した。A 国は，そのような遊戯施設は，外交機能に関わるものではなく，大使館の敷地内の建造物であるとはいえ，不可侵は認められないと主張している。

Country B's embassy is located in country A however, Country B's embassy has, within its property, built an entertainment facility that is unusual for an embassy, and opened the facility to citizens of Country B residing in Country A. Although it is a building within the premises of the embassy, Country A claims that the facility is not inviolable because it has nothing to do with diplomatic functions.

ところで，B 国は，当該遊戯施設を建設するに当たり，A 国法人である甲建設会社（以下「甲」という。）と契約して建設を委ねた。建設が終了して建造物が B 国に引き渡されても，B 国は，契約にあるとおりの建設代金を甲に支払わないでいる。

In order to build this entertainment facility, Country B entered into a contract with a corporation of country A, C construction company (hereafter referred to as “C”). After the construction was completed and the building handed over to Country B, Country B did not pay C the construction fee in accordance with the contract.

そこで甲は，B 国を相手として A 国の国内裁判所（以下「A 国裁判所」という。）に，建設代金の支払を求める訴えを提起した。B 国は，主権免除を理由として，A 国の裁判管轄権は及ばないと主張した。A 国裁判所は，B 国の主権免除の主張を認めず，B 国に対して不履行となっている代金債務の支払を命じ，判決は確定した。しかし，B 国は，代金を支払わないでいる。

Accordingly, in a domestic court in Country A, C argues that Country B should be ordered to pay the construction fee. Country B argues that the courts of Country A do not have jurisdiction, because of sovereign immunity. Country A’s court rejects Country B's claim for sovereign immunity, and entered a judgment ordering Country B to pay the amount not paid. However, Country B still refused to pay the construction fees.

さらに，この遊戯施設で，小規模な火災が発生した。そこで，A 国警察は，火災現場の実況見分を求めた。

In addition, there was a small fire at the entertainment facility. Therefore, Country A’s police department requested an on-the-spot inspection of the fire site.

その後，B 国大使館のある地域で大規模な災害が発生した。このため B 国は，当該遊戯施設を B 国民だけでなく，全ての者に開放して避難所としての利用に供した。また，人命救助や復旧の目的で，A 国の同意を得て B 国から軍隊を派遣し，B 国大使館の敷地内での人命救助や損壊している建物などの復旧に従事させた。

Thereafter, there was a large scale disaster in the area where Country B's embassy is located. As a result, Country B opened its entertainment facility as an evacuation site to everyone, not only citizens of Country B. Also, for the purpose of rescuing people and recovery, after obtaining Country A's consent, Country B dispatched military forces for the rescue of people and the recovery of damaged buildings etc. within the premises of Country B ’s embassy.

ところが，B 国軍隊による人命救助や復旧活動が行われている際に，B 国軍隊が操作していたクレーンが倒れるという事故があり，この事故により遊戯施設に避難していた A 国民である乙が傷害を負った。乙は，B 国を相手として，A 国裁判所に損害賠償を請求する訴えを提起した。

However, while the military forces of Country B were engaged in the rescue and rebuilding activities, there was an accident whereby a crane that was operated by Country B's military force fell over and, as a result, a citizen from Country A that had been evacuated to the entertainment facility was injured. The citizen of Country A filed a lawsuit claiming compensation for damages against Country B in a court of Country A.

以上の事実を踏まえて，以下の設問に答えなさい。

Taking these facts into consideration, answer the following questions.

設問

Questions

1. 遊戯施設を建設した甲がB国を代金債務の支払を求めて訴えた裁判で，A国裁判所は，B国の主張する主権免除を認めなかったことについて，あなたの評価を述べなさい。

   In the case where C, who constructed the entertainment facility, claimed payment of the financial obligation against B, evaluate the decision of Country A's Court to reject B's claim of sovereign immunity.

2. A国裁判所は，B国に対して代金の支払を命じた判決に基づき，B国大使館がA国内の銀行に開設している銀行口座を差し押さえることができるか論じなさい。

   Given Country A's Court decision to order Country B to pay the construction fee, discuss whether Country B's embassy bank accounts held within Country A could be seized.

3. A国警察から火災現場の実況見分を求められたことに対して，B国は不可侵を理由にこれを拒否できるか論じなさい。

   Discuss whether Country B is able to reject the request for an on-the-spot investigation of the fire site by Country A's police department, based on the reason of inviolability.

4. B国軍隊の行為により傷害を負った乙が，A国裁判所に，B国を相手として損害賠償を請求する訴えを提起しているが，裁判管轄権について，A国裁判所は，どのような判断を下すと考えるか論じなさい。

   Country A's citizen, who was injured by the act of Country B's military forces, filed a suit claiming compensation for damages against Country B in Country A's Court. Taking into consideration Country A's judicial jurisdiction, discuss how the Country A Court will determine the case.

2. Translation: Insolvency Law from 2012 Japanese Bar Examination

論文式試験問題集 （倒産法）

Essay-Type Examination Questions (Insolvency Law)

［倒産法］

[Insolvency Law]

〔第 1 問〕（配点：50）

Question 1 (50 points):

次の事例について，以下の設問に答えなさい。

Answer the following questions based on the facts provided.

【事例】

(Facts)

A 株式会社（以下「A 社」という。）は，コンピュータ・ソフトウェアの製造及び販売を業とする会社であり，平成 20 年頃には，年間で 50 億円を超える売上げを計上するなど，順調な業績を維持していたが，平成 22 年末頃以降は，徐々にその経営が悪化し，平成 23 年 9 月 5 日には，破産手続開始の申立てをするに至り，同月 15 日，破産手続開始の決定を受け，弁護士Xが破産管財人に選任された。

Stock Company A (hereafter referred to as 'Company A') is a company which develops and sells computer software as its business, and maintained steady results including annual sales of over 5,000,000,000 JPY in 2008. However, from about the end of 2010, business performance gradually deteriorated, and on 5 September 2011, it filed a petition for the commencement of bankruptcy proceedings, and soon thereafter on the 15th of that same month, the company received an order of commencement of bankruptcy proceedings, and Lawyer X was appointed as the bankruptcy trustee.

〔設問〕以下の 1 及び 2 については，それぞれ独立したものとして解答しなさい。

(Questions) Provide separate answers to the following questions 1 and 2.

1. A 社は，平成 22 年 12 月頃，売上げの半分以上を占めていた取引先が破綻し，当該取引先からの支払が突然途絶えたため，以後は，その資金繰りが悪化した。

1. Around December 2010, Company A's client, which accounted for more than half of the sales of Company A, went bankrupt, and the payment from this client suddenly stopped. As a result those cash flows of Company A deteriorated.1.

そこで，A 社は，メインバンクを含む金融機関に新規の融資を求めたものの，十分な額の融資を得ることができそうになかったため，取引先からの紹介を受け，いわゆる事業再生ファンドである B アセット株式会社（以下「B 社」という。）と交渉した結果，将来の他社とのM&A を念頭に置いて B 社から最大で 20 億円をめどに融資を受けられることとなり，まず，平成 23 年 2 月 1 日に 5 億円の融資を受ける旨の契約を B 社との間で締結し，その融資は，同日，実行された（以下においては，利息については考慮せず，当該契約に基づく A 社の債務額は，5 億円とする。）。

Thereupon, company A requested new loans from financial institutions including its main bank, however it was apparent that it would not be able to obtain loans of a sufficient amount. As a result, Company A received an introduction from a client, and as a result of negotiations with the so-called business rehabilitation fund called B Asset Stock Company (hereafter referred to as 'Company B') and was able to receive loans of up to 2,000,000,000 JPY from Company B taking into consideration the potential for a future merger and acquisition with another company; and first of all, on 1 February 2011, it signed a contract with Company B for a loan of 500,000,000 JPY, and this loan was made available the same day (in relation to below, ignore any interest on principal, such that Company A's debt obligation based on this contract is 500,000,000 JPY).

この契約においては，A 社は，同年 8 月 1 日をもって，借入金を返済する旨の条項が含まれていた。

This contract contained provisions for Company A to repay the loan before 1 August 2011.

A 社によるスポンサー企業等の開拓は，その後も精力的に続けられたが，業界の景気の更なる悪化などのため，適当なスポンサー企業等を獲得するには至らなかった。

Company A's search for a sponsor enterprise etc. continued vigorously even after then; however, because of further deterioration of the market conditions in the industry etc., Company A was unable to find a suitable sponsor enterprise etc.

その結果，A 社の経営状況は，同年 6 月頃から深刻さを増したものの，B 社からの上記の 5 億円の融資金の残りを利用することができたため，一部の金融機関に対する債務の返済計画を相手方の同意を得て変更した以外は，全ての債務を約定どおり弁済していた。

As a result, the business operations of Company A increased in seriousness from about June of the same year, but because it was able to use the remainder of the 50,000,000 JPY loan referred to above from Company B, it paid all of its debt in accordance with its terms, except for a portion owed to financial institutions which changed the terms of the debt repayment plan with the consent of the other party.

一方，B 社は，同年 6 月頃には，A 社への上記の融資は失敗であり，その回収に向けた準備が必要であるとの判断に至ったことから，当該融資の段階でその担保のために抵当権の設定を受けていた A 社所有の不動産の評価を進めたところ，2 億円しか満足を受けられる見込みがないことが明らかになった。

On the other hand, around June 2011, Company B realised that the loan referred to above to Company A was a failure, and decided it was necessary to begin preparations to recover the loan,

such that it hastened to obtain valuations on the collateral held by Company A which was provided for the taking of the mortgage as security for the loan at the time of the loan, but it became apparent that it was unlikely that it would even satisfy 200,000,000 JPY.

そこで，同年 7 月 25 日，B 社の代表取締役らが A 社を訪れ，5 億円の融資の返済期日を同年 9 月 1 日に変更するとともに，その見返りとして，A 社の有する複数の売掛金債権（全てが優良債権であり，その評価額は，2 億円であった。）を追加担保（譲渡担保）として B 社に差し入れることを求めた。

Therefore, on 25 July of that same year, the representative directors of Company B visited Company A, and in addition to changing the date of repayment of the loan to 1 September of that same year, in return, Company B requested additional security (security by way of transfer) to be deposited with it in the form of accounts receivables that company A currently holds (all of which were superior grade claims with a valuation of 200,000,000 JPY).

A 社の代表取締役である C は，同年 7 月 25 日，やむを得ず，これに応じて，当該売掛金債権について債権譲渡担保を設定し（以下「本件債権譲渡担保設定行為」という。），A 社と B 社は，同月 28 日に債権譲渡登記を経由した。

On 25 July of the same year, Person C, Company A's representative director, reluctantly agreed to this and established the security by way of transfer of claims in relation to the accounts receivables (hereafter referred to as 'the act of establishing security by way of transfer of claims'). On the 28th of the same month, Company A and Company B registered the transfer of claims.

A 社は，この当時，同年 8 月中旬までに弁済期が到来する債務を幾つか負担し（この他には，同年 8 月中に弁済期が到来する債務はなかった。），その総額は，1 億円に達していたが，B 社に対する債務の支払の猶予を受けたことで余裕ができたため，何とか，これらの債務を全額決済することができた。

At this point of time, Company A had a number of maturing debt obligations due for payment by the middle of August that year (otherwise it had no other maturing debt obligations in August that year), and the total amount was of 100,000,000 JPY; however, as it had some flexibility due to receiving an extension for payment of debt obligations from Company B, it was somehow possible to meet all its outstanding debt obligations.

ただし，C ら A 社の経営陣は，同年 7 月末時点で，A 社の余裕資金はぎりぎり 1 億円であり，他方で，同年 8 月中に新たな弁済資金の調達の見込みがなかったため，同年 8 月中旬には弁済資金が枯渇するものと予想していた。

However, the Management of Company A, including C, at the end of July of that same year, forecasted that there would be insufficient funds for repayment by the middle of August of that same year, because although Company A had some flexibility of almost 100,000,000 JPY, on the other hand, there was no likelihood of raising any new funds for repayment by the middle of August of that same year.

そして，実際にも，その予想どおりに資金状況は推移し，返済期日が同年 9 月 1 日に変更された B 社に対する上記の債務の支払をすることができなかった。

Moreover, in reality, the funding situation transitioned in accordance with that forecast, and it could not repay the debt obligation referred to above to Company B by the revised due date of 1 September of that same year.

以上の場合において，A 社の破産手続開始後，A 社が B 社のためにした本件債権譲渡担保設定行為をXが否認することができるかどうかについて，予想されるX及び B 社の主張を踏まえて，論じなさい。

In accordance with the facts stated above, discuss whether X, after the commencement of Company A's bankruptcy proceeding, can avoid the act of establishing security by way of transfer of claims by Company A in favour of Company B, including taking into consideration any arguments which may be anticipated from X or Company B.

2. A 社は，平成 23 年 5 月 27 日，株主総会を開催し，①取締役として D らを選任すること，② 定款を変更して，本店を移転すること，③1 株当たり 5000 円の配当をすることをそれぞれ決議した。ところが，A 社の株主Eは，同年 7 月 29 日，当該株主総会の決議の取消しの訴えを提起した。
   なお，この訴訟においては，D が A 社を代表して訴訟追行をしていた。

2. Company A held its general meeting of shareholders on 27 May 2011, and resolved the following matters: election of D and others as company directors; change the articles of incorporation and move the head office; pay a dividend of 5000 JPY per one share. However, on 29 July of that same year, shareholder E of Company A filed a lawsuit calling for the revocation of that general meeting of shareholder's resolutions. Further, in this lawsuit, D represented Company A in the conduct of the litigation.

以上の場合において，当該訴訟は，A 社に対する破産手続開始の決定によってどのような影響を受けるかについて，論じなさい。

In accordance with the facts stated above, discuss what impact, if any, the order of commencement of bankruptcy proceeding by Company A may have on this litigation.

〔第 2 問〕（配点：50）

(Question 2) (50 Points)

次の事例について，以下の設問に答えなさい。

Answer the following questions based on the facts provided below.

【事例】

(Facts)

金属製品のリサイクル業等を営む A 株式会社（以下「A 社」という。）は，債権者 50 社に対して総額約 10 億円の負債を負っていたことから，破産手続開始の原因となる事実の生ずるおそれがあるとして，平成 23 年 5 月 30 日に再生手続開始の申立てを行ったところ，同日に監督委員として弁護士Xが選任された上，同年 6 月 3 日に再生手続開始の決定を受けた。

Stock Company A (hereafter referred to as 'Company A'), which operates a metalware recycling business etc., owed 50 creditor companies liabilities totalling about 1,000,000,000 JPY and as a consequence, had facts to support the commencement of bankruptcy proceedings and because of this ,filed a petition for the commencement of a rehabilitation proceeding on 30 May 2011, and Lawyer X was appointed as supervisor on the same day, after which Company A received an order of the commencement of rehabilitation proceedings on 3 June of the same year.

〔設問〕以下の 1 及び 2 については，それぞれ独立したものとして解答しなさい。

(Question) Provide separate answers to the following questions 1 and 2.

1 A 社は，平成 23 年 1 月 21 日，その主要な取引銀行である B 銀行から 1 億円の融資を受けるに当たり，その担保として，B 銀行に対し，取引先の C 株式会社（以下「C 社」という。）外 10 社に対する金属製品の販売に係る売掛金債権をそれぞれ譲渡した。

1. Company A, on 21 January 2011, in order to receive an additional loan of 100,000,000 JPY from Bank B, which is its main bank that it transacts with, variously transferred, as collateral for that loan, the accounts receivables in respect of sales of metalware to its counterparties Stock Company C (hereafter referred to as 'Company C') and another 10 companies to Bank B.

その際，対抗要件の具備については留保し，B 銀行が A 社を代理して譲渡通知を行うことができる旨の委任が A 社から B 銀行にされた。

At that time, they postponed perfection requirements, but delegated from Company A to Bank B the ability for Bank B to give the notice of transfer on behalf of Company A.

B 銀行は,A 社が再生手続開始の申立てを行ったことを受け，同年 6 月 1 日，上記の売掛金債権の譲渡担保について確定日付のある証書による債務者らに対する譲渡通知をしたものの,C 社に対する売掛金債権については，この譲渡通知を行うことを失念していた。

Bank B, upon discovery of Company A having filed the petition for commencement of a rehabilitation proceeding, on 1 June 2011, issued transfer notices to the debtors by using an instrument bearing a fixed date in relation to the aforementioned securitised accounts receivable, but failed to issue that notice of transfer in relation to the accounts receivables to Company C.

B 銀行は，同月 13 日になってこれに気付いたことから，同日，C 社に対し，当該売掛金債権につき確定日付のある証書によって譲渡通知をするとともに，同月 15 日には，C 社から確定日付のある証書による承諾も，取得した。

Bank B realised this [failure] on the 13th of the same month, and that same day issued a transfer notice by using an instrument bearing a fixed date in relation to those securitised accounts receivable to Company C, and on the 15th of the same month, received acceptance from Company C by using an instrument bearing a fixed date.

以上の場合において,A 社が B 銀行に対して C 社に対する売掛金債権が A 社に帰属することを主張することができるかどうかについて,B 銀行の譲渡通知及び C 社の承諾がそれぞれ再生手続上どのように取り扱われるかを踏まえて，論じなさい。

In accordance with the facts stated above, discuss whether Company A may claim against Bank B for the return of the accounts receivables of Company C to Company A, taking into consideration how each of the transfer notification by Bank B and the acceptance from Company C will be considered in the rehabilitation proceedings.

2. A 社は，財産評定を完了し，平成 23 年 7 月 29 日，裁判所に対し，財産目録及び貸借対照表を提出した。

2. Company A, after completion of asset valuations, submitted an inventory of assets and a balance sheet to the court on 29 July 2011.

これらによれば，A 社の再生手続開始の時点における資産総額は，3 億円であり，共益債権，一般優先債権及び破産手続において清算するための費用等を控除して算定した予想破産配当率は，10％とされていた。

According to these [documents], Company A’s total assets at the time of the commencement of the rehabilitation proceedings were 300,000,000 JPY, and after common benefit claims, claims with general priorities and costs of liquidation in the bankruptcy proceedings were deducted, the estimated bankruptcy distribution percentage was calculated at 10%.

Xが調査を進めたところ，A 社について，主要な取引先である D 株式会社（以下「D 社」という。）から再生債権である未払の売掛金を即時に弁済しなければ新規の取引を全て打ち切る旨を告げられたため，やむを得ず，再生手続開始後財産評定前の段階で，D 社に対し，裁判所に無断で，500 万円の弁済をしていたという事実が当該財産評定後に判明した。

As X continued the investigation, Stock Company D (hereafter referred to as ‘Company D’), which is one of Company A’s main counterparties, announced that it would not enter into any

new transactions unless it received payment immediately of the outstanding accounts receivable which were rehabilitation claims and, as a result, Company A reluctantly made a payment of 5,000,000 JPY without the consent of the Court at some stage after the commencement of the rehabilitation proceeding and before the asset valuation, but this fact was discovered after the asset valuation had been completed

なお，当該財産評定においては，上記の 500 万円の弁済後の資産が計上されていた。

Further, in relation to this asset valuation, it was calculated based on the assets after the payment of the above mentioned 5,000,000 JPY.

その後，A 社は，同年 8 月 29 日，裁判所に対し，再生計画案を提出した。当該再生計画案における権利の変更の一般的基準の要旨は，次の①から④までのとおりであった。

Later, Company A, on 29 August of the same year, submitted a rehabilitation plan to the Court. The content of the general standards for modification of rights in the rehabilitation plan are set out below from 1–4.

1. 再生債権の元本並びに再生手続開始の決定の日の前日までの利息及び遅延損害金の合計額のうち，10 万円までの部分は，免除を受けず，10 万円を超える部分は，再生計画の認可の決定が確定した時にその 95%の免除を受ける。

1. Of the total sum of interest and damages for delay accumulated on the principal amount of the rehabilitation claim, up to the day before the decision to commence the rehabilitation proceedings: any portion up to 100,000 JPY will not receive any exemption; and any portion over 100,000 JPY will receive an exemption of 95% [of the amount] at the time an order of confirmation of the rehabilitation plan becomes final and binding.

2. 再生手続開始の決定の日以後の利息及び遅延損害金は，再生計画の認可の決定が確定した時に全額の免除を受ける。

2. The amount of interest and damages for delay from the day of the order of commencement of the rehabilitation proceeding will receive an exemption of the total amount at the time an order of confirmation of the rehabilitation plan becomes final and binding.

3. 権利変更後の債権額のうち，10 万円までの部分は，再生計画の認可の決定が確定した日から 2 か月以内に支払う。

3. Of the amount of claims after modification of rights: any portion up to 100,000 JPY will be paid within 2 months from the day an order of confirmation of the rehabilitation plan becomes final and binding.

4. 権利変更後の債権額のうち，10 万円を超える部分は，均等額で 5 回に分割し，平成 24 年から平成 28 年までの間，毎年 7 月末日限り，支払う。

4. Of the amount of claims after modification of rights: any portion over 100,000 JPY will be divided into 5 equal payments, and will be paid annually by the end of July from 2012 until 2016.

以上の事実関係を踏まえ，裁判所が A 社の提出した再生計画案を決議に付すかどうかを判断するに当たり，どのような法律上の問題点があるかを論じ，あわせて，X が A 社に対してどのような是正措置を採るように勧告すべきかについて，論じなさい。

Taking into consideration the above facts, discuss what problem based on the law arise in relation to the Court determining how to refer in relation to the proposed rehabilitation plan to a resolution by Company A; and, in addition, discuss any kind of corrective measures that X must recommend that Company A adopt.

SUMMARY

This article analyses the Japanese Bar Examination and the reasons behind student preferences for mainstream elective questions on the examination, which do not involve international law. Based on the translation of two elective questions from the 2012 bar examination and a textual analysis of those questions, the article argues that the form and content of the questions examined are not particularly different from hypothetical questions examined in other jurisdictions and aren't key drivers for student choices. Rather, primary resources written by students suggest that they are driven by practical and immediate considerations to choose mainstream subjects such as insolvency law over subjects such as public international law. Those reasons include available materials, advice from stakeholders such as cram schools, pass-rates from previous examinations, and perceptions about future employability. The conclusion confirms the difficulty of incorporating international law and other perspectives into already crowded law curricula, particularly in light of the ultra-competitive bar examination. This conclusion is important, because it reflects a failure for one of the key goals of Japanese legal education reforms in 2004: internationalization (kokusai-ka) and producing lawyers capable of competing in international markets. A lack of interest and knowledge about public international law also has potential implications for the use of international law in domestic advocacy. The Japanese narrative also marries with other commentaries about the declining interest from Japanese society in internationalising despite this policy concept being heavily sponsored by parts of the Japanese government. The failure to reform the bar examination and lower-than-expected pass-rates contributes significantly to this outcome, however, and the article concludes by suggesting a key reform to the content of the examination.

ZUSAMMENFASSUNG

Der Beitrag untersucht das japanische Staatsexamen (National Bar Examination) und die Gründe dafür, dass Kandidaten bestimmte Prüfungsfächer besonders häufig wählen, Völkerrecht aber besonders selten. Basierend auf der Übersetzung und Textanalyse zweier Aufgaben des Staatsexamens 2012 kommen die Autoren zu dem Schluss, dass Form und Inhalt der Aufgaben sich nicht auffällig von möglichen Prüfungsfragen in anderen Ländern unterscheiden. Sie sind daher nicht treibende Kraft hinter der Auswahlentscheidung der Studenten. Vielmehr legen von Studenten verfasste Berichte nahe, dass rein praktische Überlegungen dazu führen, dass Fächer wie Insolvenzrecht dem Völkerrecht vorgezogen werden. Zu den Kriterien für die Wahl gehören das verfügbare Material zur Vorbereitung auf die Prüfung, die Ratschläge von Beteiligten wie etwa den Repetitoren (cram schools), die Erfolgsquoten der vergangenen Jahre sowie mögliche Auswirkungen auf die Chancen auf dem Arbeitsmarkt. Die Schlussfolgerung der Autoren verdeutlicht die Schwierigkeit, internationales Recht in den bereits jetzt überladenen Lehrplan zu integrieren, insbesondere in Anbetracht der höchst kompetitiven Natur des Staatsexamens. Die Ergebnisse verdeutlichen das Versagen der Reform der japanischen Juristenausbildung von 2004 in einem ihrer Kernpunkte: der Internationalisierung (kokusai-ka) und der Ausbildung von Juristen, welche sich im internationalen Wettbewerb behaupten können. Ein Mangel an Interesse und fehlende Kenntnisse auf dem Gebiet des Völkerrechts können sich allerdings auch auf die Einbeziehung internationalen Rechts im innerstaatlichen Kontext auswirken. Die Ergebnisse der Untersuchung passen zur Beobachtung eines schwindenden Interesses der japanischen Gesellschaft insgesamt an einer Internationalisierung, obwohl Teile der japanischen Regierung sie mit Nachdruck fördern. Der erfolglose Versuch, das Staatsexamen zu reformieren, und die hinter den Erwartungen zurückgebliebenen Erfolgsquoten tragen in erheblichem Maße zum derzeitigen Zustand der Juristenausbildung bei. Der Beitrag schließt mit dem Vorschlag, den Inhalt der Prüfung grundlegend zu reformieren.

(Die Redaktion)