

## SYMPOSIUM

“*KOKO GA HEN DA YO NIHON-HÔ*” –  
“IS JAPANESE LAW A STRANGE LAW ?”

**Reports and Summarized Contributions  
of the Symposium  
held in Tokyo on 28 and 29 November 2008**

### I. Introduction to the Symposium

*Toshiyuki Kono* \*

The articles in this volume represent a selection from a symposium convened under the framework of a research project to enhance the transparency of Japanese law for the benefit of global users (hereinafter the “Transparency Project”).<sup>1</sup> Such a goal has been considered as important for Japan and thus this project was selected by peer review, and has been supported by KAKENHI (Grant-in-Aid for Scientific Research on Priority Areas) from the Ministry of Education, Culture, Sports, Science and Technology in Japan for six years. The “Transparency Project” consists of 11 research groups in the following fields of law, namely corporate law, goods and service law; finance law; intellectual property law; insolvency law; arbitration law; international civil litigation law; and public and private international law.

In this project, translating Japanese legislation and important judgments into English has been adopted as the principal means not only to create a data base of Japanese law, but also to identify issues, which might otherwise remain unarticulated or unclear for Japanese eyes. These issues include, *inter alia*, clarification of the specificities of Japanese law from the viewpoint of comparative law. In doing so, obtaining new perspectives for analyzing Japanese law has been an important aim.

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\* The author is a professor at Kyushu University. The reports were originally published in Japanese in NBL (New Business Law) No. 900 (March 2009).

1 See <http://www.tomeika.jur.kyushu-u.ac.jp/>. See also the report by C. LAWSON, in: ZJapanR/J.Japan.L. 24 (2007) 187 ff.

Within the framework of “Transparency project”, many symposia were organized in each field. In addition to these symposia on specific themes, several more general symposia were held under the “Transparency project” as a whole. The symposium, which produced these articles, was held on November 28<sup>th</sup> and 29<sup>th</sup> 2008 in Tokyo as the second one of such a type, and aimed at clarifying the distinctive features of Japanese law in five areas. The symposium also involved the participation of several guest speakers, whose names and affiliations can be found in the footnote of each article.

We considered it necessary to hold a symposium to identify specific issues first, which would then be followed by other symposia to deal with cross-cutting issues. Also at this symposium, from the same consideration, we have one contribution by Prof. Kasai to cover general issues followed by articles concerning each of the five fields of law.

## II. General Comments on the Symposium

*Yasunori Kasai*<sup>2</sup>

### 1. *Introduction: Making the Title of the Symposium Transparent*

What will be the result if we make the title of this symposium – “*koko ga hen da yo nippon-hô*” – transparent? Although one can think of various equivalent words when translating the “*hen da yo*” portion of the title into English, the word which first comes to mind is “unique”. While this also gets entangled with the “uniqueness of Japan theory”, this is an expression which is often used in respect to ancient Greek law (in particular Athenian law), which is one of my specialties.<sup>3</sup> There is no familiarity in Japan with Greek law, and indeed I believe it is difficult for Japanese to form an image of it. In fact, speaking from a comparative law textbook definition, Greek law belongs neither to the civil law (Roman law) tradition nor to the common law tradition and has extremely “unique” characteristics.

However, the word “*hen*” is by no means a neutral word, and is an expression which includes a valuation. Of course, in this context this is a negative valuation, and the equivalent English word would be “awkward”. To put it in other words, when you say “*hen*” to the Japanese law system, there is a connotation of “this is strange”. In the modernization of the mid-19<sup>th</sup> century, Japan “received” so-called Western law. Although the method of reception was extremely varied and complex depending on the era and also depending on each aspect of the law (codification, judicial system, legal research and education) and cannot be easily generalized, I believe there is now no one, even among

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<sup>2</sup> The author is a professor at the Otsuma Women’s University.

<sup>3</sup> Y. KASAI, *Kodai girishia ni okeru hô no kaitô ni tsuite* (2008).

jurists in Europe and America, who does not consider Japanese law from the modern era to be a member of Western law nations. However, there are many who feel it to be “*hen* (strange)”. The problem is that there are Japanese who themselves feel this way. As was pointed out in this symposium on numerous occasions as well, perhaps it is this type of self-criticism and indeed self-contempt regarding the law of one’s own country which is the “*hen* (unique)” aspect of Japanese law. Note that it does not mean that university professors and legal researchers are the ones engaging in self-criticism and that practitioners are satisfied and full of self-praise.

We should now stop that kind of self-contempt. Instead, considering law as a standardized product, we should recognize that the time has come to strategically present to the world the whole of Japanese law, including the judicial system and ADR, like selling the best-selling “products” of Japan in the global marketplace. Recently it has been pointed out that the interest in Japanese law is waning, but there is heightened interest in Chinese law in the United States and Europe. Does this mean the “making law transparent” project may be too late? Indeed, the recognition that Japanese law is being exposed to competition with foreign laws is extremely important. This is from my limited experience with foreign practitioners in London, but there is constant competition between law firms (solicitors) and between solicitors and barristers as well as competition with New York (particularly from a cost perspective). Furthermore, there is a growing sense of impending crisis regarding the future of legal services.<sup>4</sup> Recently, in Japan as well there are researchers and practitioners involved in “legal infrastructure support”, but perhaps they are engaged in activities while continuing to think that Japanese law is “strange”.

I do not believe this project is too late. The objective of this project was not something trite like simply aiming to break out of the closed nature of Japan (Japanese law) or to gain the acknowledgement of foreigners. This project is something which likely only Japan (Japanese law) can do in the world, and through that is something which can open new horizons in legal understanding and legal practice generally.

## 2. *Interface: Translation (Conceptual Translation) and Context or Culture*

Within the overall activities of this project, what one can likely see more than anything else is translation – especially English translations of principal legal texts and judicial precedents. This translation work involves removing barriers – in other words, making those barriers transparent – that distance Japanese law from foreigners. However, this translation is simultaneously something which up to now has impeded the creation of transparency. Translation is an interface between two languages and has ambiguity. From among the themes addressed in the symposium, there are two impressive topics relating to this which I would like to address.

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4 R. SUSSKIND, *The End of Lawyers? – Rethinking the Nature of Legal Services* (Oxford 2008).

The first topic is “conceptual translation” commented on by Professor Tomotaka Fujita. As is generally known, Japan, when establishing modern Western studies, adopted translationism.<sup>5</sup> Jurisprudence is the field for which this holds most true. Entering the 20<sup>th</sup> century, legal education by Japanese in the Japanese language was also established and the legal environment was completely nationalized. Here translation, as an interface, worked to prevent mutual infiltration. When one recollects the original meaning of translation – namely, the Latin word “translation” derives from “(transfere) to carry over boundaries” – this can be nothing but extremely ironic.

In this way Japanese jurisprudence and legal practice grew itself within a Japanese language environment. So, Japanese law systems could evolve in this closed environment by receiving stimulation from overseas (foreign documents) without assuming interference by censors from outside, thanks to interface coming on the scene. In a sense, readers of translated documents had no option but to trust the translation (translators).<sup>6</sup> Professor Fujita’s report in this symposium gave the name of “conceptual translation” to the translation work in which a “well-established” Japanese jurisprudence (concept) provides a ground for jurisprudential, non-literal translation of English language documents (treaties), and he also vividly describes the phenomenon of how this strays from the meaning of the original text. Herein lie two pitfalls. One of these pitfalls is the problem of the “reconciliation” of what heretofore has been called the French law, German law, etc. – in other words, the concept of the civil law tradition (Roman law) and the concept of the common law tradition. In Japan virtually no “reconciliation” training has been carried out due to the strength of the attachment to one nation (Germany, France, the United States, etc.) which researchers make as their comparative law specialties.

One more pitfall is the existence of foreign researchers on Japan (law). Undoubtedly, the number of researchers on Japan (law) is increasing, principally in the United States. However, are they really able to follow, for example, the detailed Japanese language construction techniques and construction theory that Professor Fujita presented in this symposium? Doubtlessly, modern Japanese law had a later start than their native Western nations. On the contrary, however, just looking at codification, one cannot definitely state that Japan necessarily had a later start. Moreover, in the subsequent 100 years there has been a vast accumulation of work, and this work is not readily approachable to Westerners who have no legal education or experience in Japan. For foreigners, Japanese law is a massive “black hole”. On the other hand, as stated by Professor Hiroto Dogauchi, in normal circumstances we Japanese must persuade the other party in a legal argument in Japanese. Theories such as the Karaoke theory<sup>7</sup> rapidly diffused without inspection from overseas.

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5 M. MARUYAMA / S. KATO, *Honyaku to nihon no kindai* (Tokyo 1998).

6 Those who would like to view the drama around this issue should refer to A. EBIHARA, *Doitsu hōgaku keiju-shi yoteki*, in; *Jurisuto* No. 927 (1989) – No. 999 (1992).

7 ‘Cat’s Eye Incident’, Supreme Court Decision, *Minshū* Vol. 42, No. 3, 199; see also *infra*

Based on the above, as a kind of reverse engineering, even though Japanese laws and precedents are “translated” into “English”, these laws and precedents will not become transparent, though perhaps a little light will be shown in the black hole. Far from it. In an example pointed out in the symposium, we on the contrary invite misunderstanding, as in the “Korean Airlines Incident”.<sup>8</sup> The situation would not be fundamentally changed if we were to replace English with French or German. Why? What should be done?

At the symposium, an emphasis was placed, particularly by Professor Sôichirô Kozuka and Professor Hiroto Dogauchi, on the importance not of “text” but of “context”. It is of great importance to speak a little more concretely rather than in individual regulations and precedents in international transactions, explanations of the civil code, which is general law, or explanations of the chief causes other than law and precedents. Then, when considering the issue further, we return to the problem of explaining “culture (cultural backdrop)”. This point appeared most acutely in the third session on “Cross Border M&A”. This was clearly manifested in the differing understandings between Japan and the United States, which have clashing historical perceptions concerning the public nature and social responsibilities of companies.

### 3. *Surfactant: Diffusion and Mixed Legal System (Jurisdiction)*

So, what is the method by which the context is made clear or, in other words, what is the method by which explanations in English are to be carried out? Presenting this will become the most important issue of this project. Here I will just suggest matters which have been of recent interest.

The first matter is the concept of diffusion. This means to gain an understanding of the phenomenon of the movement, crossing over languages of literature, religion, law and a certain culture as movement from the source to the destination and the perspective of the analysis of the transformations that arise in this movement. Speaking of law, we had not had this perspective; we looked at the relation of Japanese law and foreign law only from the heretofore reception vector. Japan was not a colony of Europe or the United States and, therefore, Japan was able to “pick and choose” the Western laws which it adopted from an independent and equal position. Furthermore, there was a belief that diffusion was initiated from a Western perspective. The concept of diffusion was, thus, something from which the Japanese were estranged. However, because the diffusion perspective was absent, we have no choice but to say that something significant was lost. In particular, because the above-noted attachment to one country (for example, “I research only German civil law”) and the reception perspective was combined with translationism as the interface, a troika system ended up being established in Japan and Japanese law became a complete black hole.

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report of KOJIMA / UENO.

8 Tokyo District Court, 16 July 1997, Hanrei Taimuzu No. 949, 255.

The diffusion perspective is undoubtedly the perspective of those who generated it. However, with respect to Japan, thanks to the interface of the Japanese language it is utterly impossible to attempt to analyze the diffusion mode from the point of view of the generator. Persons from (diffused) colonies have a certain transparency compared with the generator, since the latter directs their interest exclusively to the degree of diffusion from the generator's point of view and this makes their sensitivity to the mode and transformation blunted. Only Japan, by utilizing its linguistic abilities, can stand in the position to speak in the generator's language about the mode of diffusion from the generator's point of view. Although this intellectual activity is one kind of thought experiment, it is an experiment that has value and I believe no other country can be found which could conduct this experiment to the extent that Japan is able to do so.

The advantage of an analysis from the perspective of diffusion is to release Japan from an attachment to one country. The reason why is because it makes possible, for example, a comparison of Japan and modern Greece in terms of the diffusion of German law. Furthermore, from the perspective of the recent diffusion of Japanese law, research is also increasing which gives consideration to relations with South Korea and Taiwan. There may well be too many examples in Japan, such as the previously noted Karaoke theory, that are useful to analyze the diffusion. In this way, it is possible to flesh out the above-noted context,<sup>9</sup> as an adventure tour in order to experience the diffusion.

The second matter is the perspective of a mixed legal system (jurisdiction).<sup>10</sup> There is a wide variety of mixed legal systems, the general term for the legal system of countries and regions which have both civil law (Roman law) traditions and common law traditions, for example, Scotland, South Africa, Sri Lanka – the so-called Roman-Dutch law countries. On the other hand, there are cases of common law overlapping on codification, such as Louisiana and Quebec. Well, what about Japan? Who would be satisfied with the textbook explanation that Japan was in the civil law tradition up to 1945 and was subjected to the influence of the common law after the war? Or who would be satisfied with the textbook explanation that, in source of law theory, the institutional source of law is statutory law (law) but case law as a *de facto* source of law is also important? In this context, this problem was made clear in the symposium by the theme of conceptual translation noted above.

I am not arguing that Japan is a mixed legal country. I would only like to suggest, as we reflect on attachment to one country, cases of finding other subjects for comparison. Then, for example, one cannot say the attempt is wholly useless to discover sites for the previously noted “reconciliation” training in such countries.

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9 See KASAI/MATSUMOTO, *Kita, mita, katta – san hōka daigaku-in yōroppa kenshū ryokō*, in: *Hōgaku Kyoshitsu*, No. 321 (2007); ID, *Veni, vidi, vici – san hōka daigaku-in yōroppa kenshū ryokō (tsuzuki)*, in: *Hōgaku Kyoshitsu* No. 322 (2007).

10 See J. DU PLESSIS, *Comparative Law and the Study of Mixed Legal Systems*, in: Reimann/Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford 2006) 477-512, for a summary.

Incidentally, the affirmation of a mixed legal system is, in fact, pregnant with extremely radical elements. For example, with respect to England, the chief representative of the common law tradition, one is implicitly confronted with the fundamental question of whether it is truly a case law legal system. This point, I believe, will be linked to the problem of “law making in Japan” as often raised in the symposium by Professor Yoshihisa Hayakawa, or to put it in other words, to the problem of “what is law in Japan?”.

#### *4. In Place of a Conclusion: Once Again Not Preventing Mistranslation*

The work of making the law transparent by this project is, I believe, something which probably everyone has thought about but only very few have put into practice. In my case, for example, I have taught introductory Japanese law courses in English to foreign students and have given lectures overseas (at universities, etc.) on Japanese law. Attorneys who specialize in international matters can also be said to practice a “making the law transparent” project. Putting it bluntly, going back and forth from everyday language to legal terminology, they are “making Japanese law transparent” daily to their Japanese clients using the Japanese language.

As a final word, language as an interface has ambiguity, and there are both positive and negative aspects to this. Walls are barriers to passage, but they do afford protection. However, if passage becomes impossible, there are fewer things to protect. “Once again not preventing mistranslation ...”

### III. Report on the First Session on Intellectual Property Law

#### Keynote Report: “Indirect Infringement and Provisions Restricting Rights in Copyright Law”

*Tatsuhiko Ueno / Ryû Kojima*<sup>11</sup>

The keynote report addresses two issues, the so-called “indirect infringement” and provisions restricting rights in copyright law.

#### 1. Concerning Indirect Infringement

Japan’s Copyright Law does not have clear provisions relating to so-called “indirect infringement”. However heretofore in case law, even though viewed physically it is not possible to make a straight assessment of utilization falling within the scope of the rights of a copyright, various legal constructs have been pointed to as interpretive theories to affirm seeking an injunction against a person who has some form of involvement in the infringing acts of a third party.

The “Karaoke theory” is that archetype. The Karaoke theory is a concept which normatively assesses the subject of the utilization focusing on two elements “management (control) and profit” of a person whom it would be difficult to call the subject of the physical utilization. This had its inception in the 15 March 1988 Supreme Court decision in re “Club Cat’s Eye Incident”<sup>12</sup> and following this, exceeding initial expectations, there has been a tendency to expansively apply this in a variety of cases.<sup>13</sup>

As a result, we have seen opinions being expressed that this trend may be inhibiting new technological developments and the evolution of new businesses on the Internet in

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11 The authors – *Tatsuhiko Ueno* is associate professor at Rikkyo University and *Ryû Kojima* is associate professor at Kyushu University – provided the keynote report; the other panelists were *Shigeki Chaen*, Professor, Osaka University (moderator) and as guests *Hideo Ogura* (attorney) and *Naoyoa Bessho* (CCO & General Manager, Legal Affairs Division, Yahoo! Japan).

12 *Minshû*, Vol. 42, No. 3, 199.

13 For example, refer to the following cases: P2P file exchange service (Tokyo High Court, March 31, 2005 [File Rogue Case: Appeal decision]), storage service (Tokyo District Court, May 25, 2007, Hanrei Jihô 1979, 100 [Myuta Case]), TV program viewing service (Intellectual Property High Court decision, November 15, 2005 [Internet Video Recording Case: appeal for a temporary injunction decision]), the June 14, 2008 Osaka High Court Hanrei Jihô 1991, 122 [Yoridori-midori Case: appeal decision], the May 28, 2008 Tokyo District Court [Rokuraku II case]. As an example of a case where infringement was rejected, refer to the Intellectual High Court decision, December 15, 2008 (Maneki TV case: appeal decision).



Japan. So, whether “indirect infringement” is valid under Japan’s Copyright Law becomes an issue from the perspective of interpretive and legislative theories.<sup>14</sup>

With respect to identifying the issues as noted above, the reporter (Ueno) made the following observations. First, the Karaoke theory does not provide proof to support why the elements indicated in the decision lay the foundation for agency; furthermore, in the decision there is no indication of the grounds for justification other than “from the perspective of rules under the Copyright Law”. Thus, there are questions about those grounds for justification. Additionally, in the approximately 20 years prior to the introduction of the Karaoke theory, extremely complex and unique circumstances (the existence of Article 14 of the Supplementary Provisions of the Copyright Law, etc.) existed revolving around Karaoke and, although we can understand why there was no option but to introduce this theory, we also need to investigate whether this is appropriate at the present point in time when those circumstances have been cleared up due to changes in the situation (1999 revisions, etc.).

In this way, although we also feel that the Karaoke theory has been carried on as a convenient tool for judges in circumstances in which the theory has not necessarily been sufficiently justified, we think that we have now reached the time for the reinvestigation of the theory.<sup>15</sup>

## 2. *Concerning Provisions Restricting Rights*

The reporter (Kojima) pointed out the following. Japan’s Copyright Law has limited enumerated provisions from Article 30 to Article 50 restricting rights. The court took a negative view of the application of fair use as a general provision (and the court has shown reserve as well in making interpretations in the direction toward expanding limitations on rights).<sup>16</sup> With respect to Article 30 of the Copyright Law’s prescriptions on private reproduction of work subject to copyright, the persons in charge of enacting the legislation took into consideration the intent of the “three-step test” prescribed in international treaties and argued about the possibility that international treaties should be considered in the direction of more narrow interpretation of existing restrictive provisions.<sup>17</sup> Heretofore, it was thought that provisions restricting rights are “exception

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14 T. UENO, “Indirect Infringement” in the Copyright Law, in: *Jurisuto* 1326 (2007) 75 (in Japanese).

15 T. UENO, A Reconsideration of the so-called ‘Karaoke Theory’, in: *Modern Evolution of Intellectual Property Laws and Competition Laws, Nobuo Monya 70<sup>th</sup> Birthday Commemoration* (Hatsumei Kyōkai, 2006) 781 (in Japanese).

16 Tokyo District Court, December 18 1995, *Chiteki Saishu* Vol. 27, No. 4, 787 [Last Message in the Final Issue Case].

17 M. KATO, *Copyright Law Article by Article Lectures* (5<sup>th</sup> Revised Edition, Copyright Research and Information Center, 2006) 225 (in Japanese). For a detailed review, refer to R. KOJIMA, *Limitations on Rights in Treaties*, in: *Copyright Research* 35 (2008) 72 (in Japanese).

provisions” and should be strictly interpreted and, inferring from the intent of international treaties, there is a potential for a further restricted interpretation.<sup>18</sup>

Nevertheless, what is deeply interesting is the fact that the court has made an effort to draw an appropriate conclusion by a normative manipulation of reproduction (Art. 21 Copyright Law) concepts under limited enumerated provisions restricting rights.<sup>19</sup> The reasons behind the strict interpretation of provisions restricting rights and why the difficulty of application by analogy generally prevailed must be reconsidered.

Recently we have seen the intensification in the debate over the “Japanese version of fair use”.<sup>20</sup> With respect to fair use as a general provision, on the one hand it abounds with flexibility but it is also criticized for damaging predictability. It is easy for a bias to develop in the direction of bolstering rights in circumstances in which on the one hand it is easy for the opinions of rights holders to be expressed in the legislative process, while on the other it is difficult to integrate the opinions of average users. There is also an aspect in which it is difficult to specify the general provisions as the subject of lobbying.<sup>21</sup> Attention is also being given to the deepening debate on the relation between the so-called “Rule and Standard” with respect to the issue of which should be selected in all situations, either detailed provisions restricting rights or general provisions.<sup>22</sup>

Overseas as well opinions continue to be expressed pressing for a reconsideration of the “Three-Step Test”. The Max Planck Institute for Intellectual Property, Competition and Tax Law issued a “declaration” concerning the “Three-Step Test” and stated that the test should be interpreted in a manner which ensures a proper and balanced application of the test with respect to restrictions and exceptions to rights.<sup>23</sup>

As noted above, we can see an intensification of the debate both inside and outside of Japan concerning the restrictions of rights, and close attention should be paid to future trends.

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18 T. UENO, Reconsideration of Provisions Restricting Rights in the Copyright Law: A Potential Japanese Version of Fair Use, in: *Copyright* 560 (2007) 2 (in Japanese).

19 Tokyo District Court, October 27, 1999, Hanrei Jihô 1701, 157 [Light Fixtures Catalog Case]; T. IIMURA, Issues in the Interpretation of Provisions Restricting Rights, in: *Copyright Research* 35 (2008) 109 (in Japanese).

20 Strategic Council on Intellectual Properties, Committee on Intellectual Property Policy for the Digital Network Age, “The Functioning of the Intellectual Property System in a Digital Network Age (Report)” [<http://www.kantei.go.jp/jp/singi/titeki2/houkoku/081127digital.pdf>].

21 Y. TAMURA, A Study on Intellectual Property Law and Policy, in: *Intellectual Property Law and Policy Journal* 20 (2008) 5 (in Japanese).

22 R. SHIMANAMI, Legislative Forms of Restricting Rights, in: *Copyright Research* 35 (2008) 90 (in Japanese).

23 Max Planck Institute for Intellectual Property, Competition and Tax Law, Declaration: A Balanced Interpretation of the “Three-Step Test” in Copyright Law, available at [http://www.ip.mpg.de/shared/data/pdf/extranet/declaration\\_three\\_step\\_test\\_final\\_english.pdf](http://www.ip.mpg.de/shared/data/pdf/extranet/declaration_three_step_test_final_english.pdf)

#### IV. Report on the Second Session on Financial Law:

##### Keynote Report:

##### “Regulatory Impact Assessments of Japan’s Financial Laws”

*Yoshiaki Nomura*<sup>24</sup>

The second session attempted to clarify what sort of problems there were until recently with financial-related regulations due to the failure to undertake regulatory ex-ante assessments as requested by the Government Policy Evaluation Act<sup>25</sup> as well as the partial revisions of the Government Policy Evaluation Enforcement Ordinance.<sup>26</sup> The Depositors Protection Act was used as an example.<sup>27</sup>

##### 1. *Depositors Protection Act and Regulatory Impact Assessments*

According to Professor Yanaga, regulatory impact assessments (also referred to as “RIA”) include the following details. When creating laws which incorporate regulations, regulatory impact assessments are not general abstract debates about what potential impact the regulations will have on the national economy as a whole or on business, trading, customers and consumers individually; instead, they are concrete quantitative and qualitative assessments which analyze respective merits and demerits, setting forth a number of options.

With respect to the Depositors Protection Act, an increasing number of cases recognized the negligence of financial institutions revolving around the interpretation of repayments to persons holding quasi-possession of claims under Article 478 of the Civil Code. The question is whether one can say that the regulations pursuant to the Depositors Protection Act which responded to this increase were appropriate and whether there were adverse effects due to there not having been regulatory impact assessments.

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24 The author – professor at Osaka University – was the moderator of the second session; he prepared this summary in cooperation with the panelists focusing on points in controversy in the keynote reports by *Masao Yanaga* (Professor, Tsukuba University) and *Koji Kinoshita* (Professor, Doshisha University) of the international financial law team of the designated field of research project, the comments by *Takashi Asada* (Legal Affairs Department, Mitsui Sumitomo Banking Corporation) and *Toshiro Ueyanagi* (Attorney, Tokyo Surugadai Law Office).

25 Act No. 86 / 2001.

26 Cabinet Order No. 323 / 2001.

27 Act on Protection, etc. of Depositors and Postal Saving Holders from Unauthorized Automated Withdrawal, etc. Using of Counterfeit Cards, etc. and of Stolen Cards, etc.; Act No. 94 / 2005.

As a general argument, it is a good thing to protect depositors from suffering unforeseen losses caused by the theft or forgery of an ATM card. This is also in accord with the rational intent of depositors. However, the perspective of preventing dishonesty is lacking in the concept (set forth in the Act) that depositors should bear 25% of the loss in the case of slight negligence and should bear the full loss in the case of gross negligence. There is a possibility that a financial institution will be unable to prove negligence or gross negligence, and there is a possibility that the incentives for the depositor to prevent dishonest use will not work.

From the perspective of the protection of depositors, there is also the possible option of putting the responsibility for proof on the depositors while reducing the rate of the burden of the depositor. However, there is no evidence that this option was raised and analyzed. If proper analysis of the regulatory impact had been undertaken, it should have been possible to anticipate the adverse reaction that not knowing even that the depositor assists dishonest use encourages dishonest use.

The Depositor Protection Acts' elimination of freedom of contract is another issue. People who like high risk/high return do not like the lower effective returns when the risk level has been forcibly held down. If this is the case, a good option is to mandatorily protect depositors – for example, up to 5,000,000 yen – and entrust amounts over that to freedom of contract.

The risk of financial institutions responding excessively is an even bigger issue. In order to avoid risk, financial institutions will, perhaps, act to only allow the use of ATM cards with biometric verification. While in this event the potential for dishonest use will be reduced, it will become impossible for the depositor to ask another person to withdraw his/her savings and convenience will be reduced. With respect to the above as well, there was no evidence that these issues were sufficiently studied.

As a result of not making a regulatory impact assessment, not only has there been an increase in the burden on the national economy as a whole due to excessive regulation, but this failure has caused depositors to be inconvenienced as well.

## 2. *Regulatory Impact Assessments and the Previous Legislative and Judicial Process*

Next, Mr. Kinoshita reported as follows questioning whether it appears as though consideration was not given to regulatory impact assessments in previous legislation and court cases.

Following the reform of the financial system, it cannot be said that, with respect to financial law, Japanese law was strange because it seemed as though every year revisions of laws and ordinances and the preparation of supervisory guidelines were being undertaken. It is too soon to judge whether Japan's financial laws have been powerless in the current financial crisis. It is necessary to understand the interconnection of matters promoted in legislation with the objective of resolving urgent social problems with trends in case law which address changes in society.

From 2002 to around 2003 case law appeared which was more severe than previous judgments in respect to businesses. A prime example of this is the series of Supreme Court cases in lawsuits for the return of overpayments in the money lending business. Additionally, in respect to dishonest withdrawals of funds using stolen or forged ATM cards and stolen bankbooks, severe judgments for banks appeared one after another. The above trend is backed up as well by the comprehensive study for the translation of judicial precedents by the international financial law team.

Mr. Kinoshita additionally investigated the predictability of financial law judicial decisions using a Supreme Court precedent concerning the withdrawal of bank deposits using an ATM by persons other than the depositor.<sup>28</sup> In this case, in respect to a demand for repayment, a defense was made of performance to a holder of a quasi-possession of a claim (Civil Code Article 478) and there was no dispute concerning the concrete fact situation at the time of the withdrawal of the deposit or the background circumstances. The primary point at dispute was, in relation to the bank's exemption clause, whether there had been negligence in the sense of maintaining the security of the system, including ATM card records. If this case is viewed as a precedent-setting judgment based on the technology of the time, this also explains later lower court decisions which appear to contradict this decision.

Next, Mr. Kinoshita discussed the relation between regulatory impact assessments concerning the Depositors Protection Act. Although this act was lawmaker-initiated legislation, a study group of the Financial Services Agency, in essence, undertook short-term, concentrated deliberations of the legislation. The deliberations began with hearings with related parties and reports of foreign legal systems and, until a consensus was formed on the foundation of a draft proposal, it can be said that a process was engaged in internally under which various options were presented and their merits and demerits were studied. Mr. Kinoshita, while agreeing with Mr. Yanaga's report concerning the issues with internal investigations, pointed out that, as a goal had been set of passing legislation in a short period of time, the infrastructure was not put in place to undertake regulatory impact assessments within that period.

Second, based on his experience of being involved in the legislative process on the Insurance Act, Mr. Kinoshita noted that consideration was given, as required, similar to a regulatory impact assessment. At the public comment stage of the interim draft bill of the revised Insurance Act, with respect to policies to ensure that an injured party definitely receives liability insurance monies without the commingling of the wrongdoer's general assets, discussions narrowed in on two methods: (1) the method of granting the injured party a right to make a direct claim against the insurer and (2) the method of granting a prior lien to the injured party's right to claim compensation from the wrongdoer. From the minutes, we understand that the merits and demerits of these two proposals were minutely studied and that, in the end, proposal (2) was adopted.

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28 Supreme Court Decision, July 19, 1993, Hanrei Jihô 1489, 111.

## V. Report on the Third Session on Corporate Law:

### Keynote Report: “Cross-Border M&A”

*Ken'ichi Ôsugi / Yoshihisa Hayakawa*<sup>29</sup>

The third session concentrated on issues revolving around M&A transactions. Of specific interest was the Supreme Court decision of 7 August 2007, concerning the adoption of a poison pill as defensive strategy against hostile takeovers (“Bull-Dog Sauce”).<sup>30</sup> The keynote report provided by Professor Ôsugi first focused on that decision.

It has been pointed out that, triggered by the Bull-Dog Incident, foreign investment funds and institutional investors have been withdrawing from the Japanese market since the fall of 2007. While there are also other reasons for the outflow of investment capital at this time, it is impossible to deny the impact of this incident. Foreign investors weighed heavily the fact that shareholders and the courts could have stopped the adoption of the takeover defensive measures in this incident and yet failed to do so, and the fact that takeover defensive measures in Japan transformed into something different from their original form. They also questioned whether the conduct of players in the Japanese stock market was based on principles that are different from Anglo-American conventional wisdom. It seems as though they believed that if this were the case that they could not, with assurance, invest in the Japanese market. The Ministry of Economy, Trade and Industry, which sensed a crisis in this state of affairs, announced a new recommendation in June 2008 at the Corporate Value Study Group indicating that it would work to put a stop to the transmutation of takeover defensive measures.<sup>31</sup>

The judicial rulings on the Bull-Dog Incident (Tokyo District Court, Tokyo High Court, Supreme Court) were translated into English, reported in the European and American business media and were very negatively received. Here the question I have is whether the judges who wrote these decisions had an awareness of global standards. (There is a possibility that the Supreme Court decision was written with this awareness based on its careful wording). More generally, until now it is questionable whether this awareness of “seen from overseas” existed among persons involved in the formation of the “law”, including case law, but the Bull-Dog Incident has forced us to be conscious of the issue.

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29 The panelists were *Yoshihisa Hayakawa*, Professor, Rikkyo University (moderator), *Ken'ichi Ôsugi*, Professor, Chuo University, *Hideyuki Matsui*, Associate Professor, Rikkyo University, and, as guests, *Hiroshi Mitoma*, attorney, *Kentarô Uryû*, attorney and *Nicholas Benesh* who are all legal practitioners involved with global M&A in their daily work.

30 *Minshû*, Vol. 61, No. 5, 2215.

31 *Shôji Hômu* 1838, 53.

One locus of the problem is the sectionalism of the bureaucracy. Regardless of the country, the authority of government ministries and agencies has restrictions placed on them by administrative laws and rules. But in Japan ministries and agencies have a high degree of independence and the “village consciousness” of each ministry and agency is very strong. In other words, there are questions about whether, as a whole, policy is systematically understood and executed. In these circumstances, when a policy issue (for example, the M&A legal system) arises, an assessment is made as to which ministry or agency has authority for the issue and, after this, high-quality work is undertaken in a short period of time internally within the ministry. However, with respect to problems which straddle different spheres, integrated efforts are made to cross over the thresholds of government offices; but Japan is, perhaps, not as adept at this as compared to other countries. In relation to the M&A legal system, the demarcation of authority between the Financial Services Agency and the Ministry of Justice is unnatural. In other words, the aspect of the buying and selling of stocks is regulated by the Financial Services Agency and the aspect of the transfer of the right to control a company is regulated by the Ministry of Justice (Companies Act). As a result, in the TOB rules of Japan there is the perspective of the transparency of the market, but the perspective of the propriety of the transfer of the right of control does not (on the surface) exist. Also compounding this situation, without the leadership to unify the whole we believe that the policies of Japan, as a state, concerning M&A and capital markets remain unclear.

The locus of the second problem is the lack of specialization in the judiciary. In the United States, numerous disputes relating to company law are decided by the courts in the state of Delaware. The judges of this state possess an economic sense (an understanding of finance theory and an interest in the “opinions of the market”), and they use this economic sense when writing decisions, making an effort not to give the parties a mistaken message. This kind of ability is very different from the abilities required in general civil and criminal cases. However, looking at the career path of Japan’s professional judges, judges assigned to the commercial division of the Tokyo District Court and the Osaka District Court are not, over an extended period of time, able to specialize on commercial cases.

In order to improve on the current situation, first more sweeping personnel exchanges than exist at present must be promoted. For example, the temporary transfer of personnel from government agencies (Financial Services Agency / Ministry of Justice) and private firms (financial institutions) to the courts, and from private firms to the government (Ministry of Justice / Financial Services Agency / Ministry of Economy, Trade and Industry) should be promoted. Second, coordination beyond personnel exchanges between government agencies should be facilitated. While there is a “Consumer Agency” concept in consumer affairs administration, it is desirable with respect to company takeovers as well to seek policy coordination between government agencies, including from the perspective of taxation and anti-trust policy and not just between the Ministry of Justice and the Financial Services Agency.

In addition to the issues discussed above, with respect to the point of “making Japanese laws transparent”, there are issues of, for example, whether the voices of overseas users were sufficiently reflected in the legislative process of Japan. Additionally, with regard to the role of the M&A legal system, there is a point at issue which, while basically accepting the appropriateness of the slogan “an open market with no discrimination between domestic and foreign”, does not completely dismiss factors for consideration such as so-called “national interest” and “industrial policy”, and this point as well needs further discussion.

## VI. Report on the Fourth Session on Transactional Law:

### Keynote Report: “Characteristics and Issues of Japanese Law in the Transactional Law Area”

*Shin'ichirô Hayakawa*<sup>32</sup>

The fourth session had two reports. Professor *Tomotaka Fujita* of the University of Tokyo provided the first report on the reception of uniform law in transport law and Japanese modifications. Professor *John P. Stern* of Nihon University provided the second report dealing with the question of how to make Japanese law, including Japanese transactional law, a tool to opening to the world.

#### 1. *The Reception of Uniform Law in Transport Law and Japanese Modifications*

Professor Fujita's report looked at the Carriage of Goods by Sea Act. In addition, he examined the issues in incorporating treaties into domestic law as seen in this Act. By doing so, Professor Fujita's objective was to provide a clear concrete example of Japanese-type modifications when introducing a uniform law, and to enable an examination surrounding the “strange” aspects of Japanese law, which is the common theme of this symposium.

When comparing the Carriage of Goods by Sea Act with the treaty (the Hague-Visby Rules) which served as the foundation of the Act, there are various differences. But in the report, from amongst those differences, three areas were noted and explained in detail as examples: the obligations and liabilities of carriers, the limitation of the liabilities of carriers, and the “documentary nature” of bills of lading. Concretely, in

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<sup>32</sup> Commentators were Professor *Sôichirô Kozuka* of Sophia University, who commented the first report, and Professor *Hiroto Dôgauchi* of the University of Tokyo, who commented on the second.



respect to the obligations and liabilities of carriers, comparisons were undertaken in (1) Paragraph 1, Article 4 of the Carriage of Goods by Sea Act and Item (q), Paragraph 1, Article 4 of the treaty; (2) Item 11, Paragraph 2, Article 4 of the Carriage of Goods by Sea Act and Item (p), Paragraph 1, Article 4 of the treaty; and (3) the immunities of liability for high value goods pursuant to Article 20 of the Carriage of Goods by Sea Act and Article 578 of the Commercial Code and transactions under the treaty. With respect to the limitations on the liabilities of carriers, a comparison of Article 13 of the Carriage of Goods by Sea Act and Paragraph 5, Article 4 of the treaty was undertaken covering three points (Paragraph 1, Article 13 of the Act and Item (a), Paragraph 5, Article 4 of the treaty, Paragraph 3, Article 13 of the Act and Item (c), Paragraph 5, Article 4 of the treaty, and Paragraph 6, Article 13 of the Act and Item (h), Paragraph 5, Article 4 of the treaty). Additionally, concerning the “documentary nature” of bills of lading, a comparison of Articles 7 and 9 of the Carriage of Goods by Sea Act and Paragraphs 3 and 4, Article 3 of the treaty was undertaken. Regardless of the concrete example, there were points where surprisingly significant modifications had been made in the process of incorporating the treaty into domestic law, and the conference hall listened with deep interest to Professor Fujita’s lucid explanation interspersed with subtle humor.

Next, on the basis of these concrete examples, an analysis was made as to why these modifications occurred. These modifications can, for the moment, be classified into four categories. The first are simple mistakes, the second are those that were consciously passed in the legislation with different wording premised on a particular interpretation relating to the treaty, the third are those that were consciously put in place as unique stipulations in domestic law based on an understanding that there were matters which were not covered by the treaty, and the fourth are those that (likely unconsciously) were passed in legislation incorporating conceptual translation work to suit Japan’s legal structure. Setting aside the question of the first category, it is possible to subject the second through fourth categories to an extremely interesting analysis.

There is a two-step problem with respect to the second and third categories. First, there is the issue of whether the interpretation and understanding shown at the stage of incorporation into domestic law did not exceed the permissible range of treaty interpretation. If the permissible range of interpretation was exceeded, that would be a breach of the treaty and there is a strong suspicion that some of the concrete examples noted may constitute such a breach. Next, even when it is determined that the modifications were within the permissible range of treaty interpretation, the issue is whether to pass legislation as domestic law with that kind of understanding and interpretation or whether to translate the exact wording of the treaty and have the courts make the interpretation.

The fourth category of modification is similar to a problem which has been repeatedly pointed to in regard to the adoption and enactment of foreign law in Japan – the problem is basically of a nature similar to the example where a text originating in French law was forcibly interpreted to fit into the structure of German law. Although this

is a problem which to a greater or lesser extent cannot be avoided when encountering foreign laws and treaties, recently this type of problem has been given a great deal of attention due to a large amount of criticism. However, when the Carriage of Goods by Sea Act was enacted (1957), we believe that there were not yet a significant number of papers written from such a perspective and, in that sense, this Act is legislation which allows one to sense its age.

In the report, in relation to the above-noted comparative study, comments were made on general issues revolving around the incorporation of uniform treaties into domestic law. For example, even though it is clear that there are problematic points in the Carriage of Goods by Sea Act, the issues are not as simple as saying that Japan should limit itself to ratifying the treaty and not incorporate it into domestic law when participating in a uniform treaty, such as the Warsaw Convention. In other words, in cases such as the Hague-Visby Rules where the treaty unifies limited matters on a piecemeal basis only, there is a great need to prepare coherent and comprehensive domestic law which incorporates the regulatory content of the treaty because of the need for significant supplementation through domestic law. Additionally, if domestic legislation is not passed, courts will interpret the treaty when hearing individual cases, but there is no guarantee that that interpretation will be a more accurate interpretation of the treaty undertaken when passing domestic legislation.

## 2. *To Make Japanese Law, Including Japanese Transaction Law, a Tool to Open Up to the World*

In Professor Stern's report, a number of issues were commented on from a broad perspective that need to be overcome in order to make Japanese law transparent and to make it a tool to open up to the world.

First, there is the language barrier. With respect to just how difficult the Japanese language is, Professor Stern related certain deeply interesting anecdotes in fluent and charming Japanese, such as the number of hours occupied by the Japanese language curriculum in American training for diplomats (much more time is required for Japanese language acquisition compared to other principal languages) and the notorious mistakes in the speech by a certain Prime Minister. Following this, having confirmed that diffusion in English is effective, Professor Stern proposed that the translation of laws and ordinances be undertaken on a Wikipedia-style basis.

Next, Japanese laws themselves have problems. For example, Professor Stern noted the provisions of Article 821 of the Company Act pertaining to pseudo-foreign companies, provisions relating to the effect of registration in the Act on Special Provisions of the Civil Code pertaining to the Perfection Requirement for the Assignment of Movables and Claims, the provisions of Article 8 of the Arbitration Act prescribing the intervention of the courts when the place of arbitration has not been designated, etc. In the passage of this legislation, one has a sense that this was undertaken without sufficiently

grasping the issues and current state of the activities of foreign firms, the work of processing excess inventory, and the actual practice of arbitration, etc., and it would be difficult to say that this legislation appropriately addresses the needs of transactions and the realities of business. In this relation, being a signatory to private law unified treaties such as the Vienna Convention of the International Sale of Goods is a forceful method, in the sense of introducing the common rules of foreign nations, of opening Japanese law to the world.

Additionally, Professor Stern commented that under Japanese law an impression is given of a weak guarantee of human rights vis-à-vis foreigners as, for example, revealed by the 2008 Supreme Court decision on the unconstitutionality of the international law which stated that “Japanese nationality has meaning as an extremely important legal position in receiving [...] a guarantee of basic human rights in Japan.” If it appears as though Japanese law is only for the Japanese, perhaps it will be difficult to make Japanese law into something which is opened to the world. In regard to this point, Professor Stern noted that attention should be given to recent trends (such as the abolishment of the family register system) in South Korean law.

Furthermore, Professor Stern indicated there are also problems with the infrastructure of the judicial system. First, in Japan the number of attorneys is totally insufficient and, even looking at quality, there are still too few attorneys equipped with sufficient ability to resolve disputes that arise in transactions and business. Thus, Professor Stern first noted that it is necessary to increase the number of attorneys by increasing, rather than decreasing, the pass rate to over 50% of the successful candidates to the new bar examination. Additionally, as can be understood from the saying that “Japan is a 20% judicial society”, in Japan the percentage and importance occupied by the judiciary in the means to resolve disputes arising in relation to transactions, etc., is low and this as well is an obstacle to using Japanese law as a tool to open to the world.

## VII. Report on the Fifth Session on Civil Procedure Law:

### Keynote Report:

#### “Issues in the Internationalization of Japanese Civil Procedure Law”

*Jun'ichi Matsushita*<sup>33</sup>

The fifth session dealt with recent reforms in the area of civil procedure law where legislation has been enacted based on UNCITRAL (United Nations Commission on International Trade Law) model laws relating to international insolvency law and arbitration law and, additionally, legislative work is presently being advanced which is conscious of international standards relating to international jurisdiction.

#### 1. *Internationalization of the International Insolvency Legal System*

Formerly, with respect to the international insolvency legal system, Japan adopted the principle of territorial jurisdiction; under this the effect of Japanese insolvency proceedings did not extend overseas and the effect of foreign insolvency proceedings did not extend to Japan. Internationally, Japan was criticized for adopting this position. As a result, an interpretative theory was developed in academic theory to overcome the principle of territorial jurisdiction. When UNCITRAL prepared an international insolvency model law in 1997, Japan, which was at that time advancing work on a complete revision of its insolvency system, was the first among advanced nations to put into place an international insolvency legal system based on this model law. There are points where Japan's Law on Recognition and Assistance differs from the model law, such as where it does not automatically recognize foreign main proceedings, and the individual processing of assistance is done on the basis of the court's recognition determination. Additionally, there are systems which are more advanced than the model law, such as cross filing under which a Japanese bankruptcy trustee can, representing Japanese creditors, file a claim in foreign proceedings and, conversely, under which a foreign trustee can also file a claim in Japanese insolvency proceedings representing foreign creditors. Understandably, there are also provisions which could not be adopted in the Japanese law even though they were present in the model law, such as contact between courts.

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33 The author – professor at the University of Tokyo – was a member of the panel. Professor *Kazuhiko Yamamoto* of Hitotsubashi University provided keynote report; the other panelists were Professor *Tadashi Kanzaki* of Gakushuin University (moderator), attorney *Hideyuki Sakai*, Professor *Tatsuya Nakamura* of Kokushikan University, and attorney *Yoshimasa Furuta*.

## 2. *Internationalization of the International Arbitration Legal System*

Part 8 of the 1890 Code of Civil Procedure prescribes matters relating to arbitration, and this was applied for over 100 years. Japan's current Arbitration Act, which is based on the Model Law on International Commercial Arbitration prepared by UNCITRAL in 1985, was enacted in 2003. The motive for the Arbitration Act's enactment was the emphasis given to the importance of arbitration in the debates in the Justice System Reform Council and in the report of this Council. On its enactment, a policy was taken to adopt the model law, which had already been adopted by many nations and had become the international standard. Furthermore, consideration was given to selecting terminology so that even through the wording of the text it would be understood that the model law had been adopted. Naturally, rules differing from the model law also exist; for example, in order to make it easily understandable, the application of the law (substantive law) of the nation with the closest relation to the matter is prescribed by the arbitration panel when there is no agreement on the governing law; in addition, in order to ensure the transparency of the settlement proceedings, the arbitration panel can only mediate a settlement when there is written agreement of both parties. Note that the adoption of UNCITRAL's 2002 Model Law on International Commercial Conciliation is an issue for the future.

## 3. *Internationalization of the International Civil Procedure Legal System*

Whereas the Code of Civil Procedure and the Civil Execution Act already have provisions regarding the recognition and execution of foreign judgments, provisions have not been established from amongst the areas of international civil procedure law regarding international jurisdiction. This is because Japan is watching the trend taken in the enactment of the convention on international jurisdiction at the Hague Conference on International Private Law – although Japan did establish clear provisions when enacting the current 1996 Code of Civil Procedure. However, because the 2005 Hague Convention stopped at small-scale measures prescribing only agreed jurisdiction, in 2008 Japan set up the International Jurisdiction Section in the Legislative Council of the Ministry of Justice in order to establish its own provisions. Deliberations have advanced that aim to present a draft to the Diet in the 2010. In the deliberations, reference was made to the legislation of various foreign countries, the Brussels Convention and Regulation, the Lugano Convention, and the Hague Convention preliminary draft, among others. With respect to waiving jurisdiction over foreign states, the Sovereign Immunity Section was set up in the Legislative Council of the Ministry of Justice in order to incorporate into domestic law the United Nations Convention on Jurisdictional Immunities of States and Their Property, and the Section is advancing deliberations that aim to present a draft to the Diet in the 2009.

#### 4. Conclusion

Over these past 10 years, movements have rapidly evolved to have Japan's international civil procedure legal system conform to international standards. Understandably, there are cases where that kind of movement has not yet been sufficiently communicated overseas. Additionally, the problem of management remains even though legislation has been passed. Lastly, it is necessary in future operations to consider the next legislative issue.

#### ZUSAMMENFASSUNG

*Der Beitrag fasst Berichte über ein Symposium zusammen, das im November 2008 in Tokyo als Teil des sog. „Transparency of Japanese Law Project“<sup>34</sup> ausgerichtet wurde. Die Berichtersteller wirken an dem Projekt mit, dessen Ziel die Erstellung qualitativ hochwertiger englischer Übersetzungen von japanischen Gesetzen und wichtigen Gerichtsurteilen ist. Hinzu kommen englische Einführungen in ausgewählte Rechtsmaterien. Auf diese Weise soll das japanische Recht für ausländische Juristen zugänglich gemacht werden. Thema des Symposiums war der Charakteristika des Rechts in Japan und Fragestellungen, die sich bei der vergleichenden Arbeit mit diesem Recht ergeben.*

*(Die Red.)*

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34 Siehe dazu den Bericht von C. LAWSON, in: ZJapanR/J.Japan.L. 24 (2007) 187 ff.