BERICHTE / REPORTS

"Germany and Japan: A Legal Dialogue between Two Economies"

German-Japanese conference commemorating 150 years of diplomatic exchange between Japan and Germany, 20-22 October, 2011 at the Max Planck Institute for Comparative and International Private Law, Hamburg

On October 20–21, 2011, the German–Japanese Association of Jurists, the Max Planck Institute for Comparative and International Private Law, and the Bucerius Law School, Hamburg, in cooperation with the Waseda University (COE), Tokyo, held a conference at the Max Planck Institute in Hamburg. It was another contribution to the 150th anniversary of diplomatic exchange between Japan and Germany. On that occasion a group of top-class scientists, both from Germany and Japan, lectured on several topics regarding business and corporate law as well as national and international criminal law issues accompanied by some lively round-table and auditory discussions.

After a welcome in the name of the three organizers of the conference from Professor *Harald Baum* of the Max Planck Institute for Comparative and International Private Law and greetings from the Japanese Consul General in Hamburg, Mr. *Setsuo Kosaka*, Professor *Knut Wolfgang Nörr* of Tübingen University started the conference with a general overview of the Japanese and German economic systems between 1860 and 1914.

Nörr pointed out that the development of Germany's economy in that time can be divided into two periods. The first period from 1860 to 1878/79 was characterised by the attempt to establish a free economy by implementing free-market rules and free trade. The Japanese reception of foreign economic systems in that time, however, was characterised by the idea of the autonomous and self-dependent individual who concurrently was a member of the Japanese society with its own characteristics and a government playing an almost mercantilistic role. In the second period, which started in 1878/79, freedom of competition and free trade in Germany suffered a remarkable decline. In contrast, the influence of the public administration became more and more prevalent. Freedom of contract and of capital movement led to huge enterprises, and a decline of freedom of competition set the stage for the big syndicates. Governmental and economic interdependencies became more and more important, and the first economic associations emerged (e.g. the *Centralverband Deutscher Industrieller*). Nörr made clear, on the other hand, that in Japan interdependencies between companies and administration did not

break any general principles. Quite different from Germany, in Japan it was not associations or lobby groups that tried to influence the administration but the huge companies themselves (esp. the so-called *zaibatsu* conglomerates). Finally, Nörr stressed the importance of syndicates in Germany and the importance of syndicate-like practices (e.g. *dōgyō kumiai*) in Japan in the time after 1878/79. As an appendix, he also described the role of the *Verein für Socialpolitik* and its pendant in Japan, the *Shakai Seisaku Gakkai*, with regard to social topics. In conclusion, Nörr emphasised the fact that Japan, in its adoption of foreign systems and ideas, always tried to fit them into its own culture and tradition.

Professor *Yoshiaki Kurumisawa* of Waseda University followed with his lecture "Economic System and Legal Development in the *Meiji* and *Taisho* Period". He pointed out that until the beginning of the *Meiji* period, there was no society-based demand for law codification. It was the government that forced codification as this was the necessary condition for revision of the unequal treaty system implemented after the "opening" of Japan to trade and exchange with foreign countries. In the *Meiji* period, capitalism could get its funds and labour force only from the agricultural sector. Landlords exploited rent from tenant farmers. The combination of capitalism and feudalism influenced the political and the legal system and was an instrument of control for absolute monarchy. In the *Taisho* period, tenant farmers started to complain about their situation, but constitutional law and civil law protected the traditional feudal system so that it was easy for landlords to always win legal disputes with their tenants. To overcome this unequal system, *Izutaro Suehiro* claimed the *Freie Rechtswissenschaft* and introduced the sociology of law from European countries. Suehiro pointed out a general difference between "living law" or autonomous law-making in society and state law. In his view, this might have been a result of a general law-unawareness in Japanese society, and one reason for the very few lawsuits in the country. According to Kurumisawa, this (state) law-unawareness is also due to the fact that Japan is a "corporate society" (*Unternehmensgesellschaft*). Every individual is part of and organised in the internal system of a company. Only this gives the individual its identity. That is why legal rules beyond the respective company are estimated to be less relevant. In Kurumisawa's opinion, only by overcoming this principle of a "corporate society" will a state of mature civil society be reached. According to Kurumisawa, Germany could serve as an example for coping with this task.

After those two general overviews, Professor *Hiroshi Oda* of London University gave an introduction to a more technical topic: "Long-Term Continuous Contracts in Japan". Oda pointed out that in contrast to the German system, where contract period and termination possibilities are mainly determined either by statue or by party agreement, in Japan courts do not feel bound by those explicit provisions. Thus whether and how a contract can be terminated – even despite explicit provisions – is subject to a number of court decisions. To determine whether a contract can be terminated, one has to take into account the background to the conclusion of the contract, the nature of the contract, the benefit and loss on the part of the parties by the termination of the contract

and other special circumstances. Oda took several examples of court decisions to illustrate the Japanese legal development and its parallelism to the German notion of *Treu und Glauben*. He emphasised that Japanese courts tend to implement a far more intense application of good faith principles than German courts. With regard to that, Oda pointed out that although there can be a need for termination against explicit provisions, the party's freedom of business/contract should be basically respected. On the other hand, the doctrine of good faith and fair dealing can and should be used as an instrument to accommodate an equitable solution of disputes where the application of commercial/ business rules results in unfairness. Thus the Japanese courts are quite flexible to cope with this task.

The first part of the conference was concluded with a lecture by Professor *Karsten Schmidt* of the Bucerius Law School asking "Does Commercial Law Have a Future?". Referring to the coincidence of the 150 years of diplomatic exchange between Germany and Japan and the 150th anniversary of the German Uniform Commercial Code (*Allgemeines Deutsches Handelsgesetzbuch*, the predecessor of the actual Commercial Code, the *HGB*), Schmidt described the different scientific approaches to commercial law as either a part of civil law or an independent legal system. He outlined the attempts to define commercial law as either instrumental – focussing on providing liability rules for production and commercial transaction – or entrepreneurial – identifying the relevant individuals, as for instance the merchant (Kaufmann). Schmidt pointed out that the latter approach is preferred by German legislation, while in reality and also in the Japanese legal system both theories are mixed. For the relation between commercial and civil law, Schmidt referred to *Levin Goldschmidt* and his famous metaphor of the commercial law as a glacier that nourishes the river of civil law. In his opinion, however, commercial law derives directly from civil law and will therefore never be as consistent as the latter. After giving some aspects of the interplay of commercial and consumer protection law, Schmidt closed his lecture with a remark on the famous Professor *Claus Wilhelm Canaris*, who denies commercial law as a concept and favours the incorporation of the German Commercial Code (HGB) into the Civil Code (BGB). According to Schmidt, commercial law as a concept would not end through such a reintegration, as its independent existence is not a question of whether a special code exists. Nonetheless, in his eyes there should be a development from the stereotype of the merchant to notions such as business, corporate finance and governance and from commercial law to business law. Hence Schmidt's answer to the title question of his lecture was that commercial law does have a future if it is open to adjustment.

After this first part, the lecturers as well as the audience had an interesting discussion on these topics. The discussion mainly dealt with why there are so few court actions in Japan, and the interaction between administration-ruled law making ("law from top to bottom") and law deriving from practises and customs in society ("law from bottom to top"). The advantages and disadvantages of both attempts led to an especially lively debate.

The second part of the first conference day dealt with liability and corporate governance issues. Professor *Etsuro Kuronuma* from Waseda University started with the topic "Liability of Directors under Japanese Company Law". Kuronuma assessed to whom directors should owe fiduciary duties and to whom they should be liable, either to their company or to the shareholders or even to third parties. He also discussed the amount and structure of directors' duties. As a conclusion, Kuronuma pointed out that managers should perform their duties to increase and maintain the shareholders' value. No one can perform fiduciary duties to two or more persons. The interest of creditors, employees and other constituencies should be protected by binding the company itself. In Kuronuma's eyes, it is effective to deal with the problem of the liability of directors towards third parties in a functional approach that limits direct lawsuits against directors to special circumstances.

Professor *Holger Fleischer* of the Max Planck Institute, Hamburg, followed with his lecture describing the German point of view under the German Stock Corporation Act. He referred to the increasing number of court cases dealing with the liability of managing directors in Germany, (e.g. Siemens, MAN, IKB and Arcandor). Fleischer described the legal framework in Germany and emphasised that in the German system, managing directors, members of the managing board and of the supervisory board are only liable to the company itself (cf. e.g. § 93 Stock Corporation Act). This always channels liability through the company, and external liability occurs only in rare exceptions. Fleischer then pointed out that a system of managing directors' duties – such as duty of care and duty of loyalty – defined their content as well as the conditions for a cause of action and described the enforcement competence. He also referred to the possibility for shareholders to enforce the company's claim for damages according to § 148 Stock Corporation Act, which has been, so far, actually dead law in Germany.

Fleischer's lecture was followed by a lecture from Professor *Tatsuo Uemura* of Waseda University with the title "Corporate Governance and the Capital Market (Especially Takeovers)". Uemura first criticised that the Japanese – though they have a complete joint-stock company system – still lack deep understanding of the attendant benefits and risks. In his eyes, the Japanese also lack operating know-how on managing the joint-stock company system as an integral element of the capital market. Uemura also warned that a too-optimistic view of the self-correcting mechanisms of the market can lead to big problems. In the following, he compared the European legal system's avoidance of excessive dependence on market mechanisms on the one hand, and the US legal system, which emphasises freedom of the market, on the other. He then described the development and characteristics of the Japanese economic system, with its strong rise after World War II, its bubbles and crises as well as the adjustment of its legal system. Uemura critically analysed the basic concept of the publicly traded company and the worth and meaning of maximizing shareholders' value in contrast to the purpose mentioned in the articles of incorporation. Uemura then moved on to the role of corporate governance, which in his eyes is to regain "humanity in its true form" within the

framework of a joint-stock company. Finally, Uemura ended with a statement "half in jest and half serious" as regards corporate mergers and acquisitions. On the one hand, he pointed out the huge number of Japanese companies that have existed over the centuries; on the other, he indicated that the United States, with a much younger history then these Japanese companies, have a corporate valuation method that does not distinguish between century-old businesses and young companies. Uemura claimed that those old Japanese companies should not be bought up according to this standard; instead, they should be rendered impervious to all takeover bids by being declared "important cultural treasures".

For the German point of view, Professor *Christian Kirchner* from Humboldt University, Berlin, gave an introduction to German takeover regulations and corporate governance. First he pointed out the problems occurring when a takeover bid is made, such as defence strategies of the target company's management, discrimination of shareholders and collective action problems. But he also explained that assumed problems such as information asymmetries can be necessary to make a takeover possible. Kirchner showed then the regulatory approaches to solving problems that occur with regard to takeovers, for instance, the Williams Act in the US or the Financial Instruments and Exchange Act in Japan. Kirchner also focussed on influences on takeover strategies, such as formal and informal rules and the expected strategies of the target/bidding company with regard to the Suzuki takeover by Volkswagen. Kirchner showed that Japanese takeover law lacks statutory law and is dominated by informal rules. As a conclusion, Kirchner stated that the takeover of a shareholder-ruled company is easily done by changing the shareholders. In the case of a stakeholder-ruled company, one is wise to refrain from takeover because in those cases a bundle of problems will occur. Thus Kirchner would have counselled against Volkswagen taking over Suzuki.

The first day of the conference ended again with a lively discussion, especially surrounding Uemura's provocative thesis that old traditional companies should be defended against takeovers, and about the importance of anti-takeover strategies of target companies.

The second day of the conference started with Professor *Katsunori Kai* from the Waseda University and his lecture on corporate compliance in Japan and Germany. Kai pointed out that the development and diversification of economic activities in recent years has also led to a diversification of economic offences. As there are certain common roots in Germany and Japan, both legal systems can be compared, leading to good cooperation between Waseda Univesity and the Max Planck Institute for Foreign and International Criminal Law in Freiburg i. Br. The main focus of Kai's lecture was the importance of compliance programmes. Although compliance rules are largely obeyed, the number of economic offences is increasing (e.g. the cases of *Enron, Parmalat, Mannesmann* and *Siemens*). In 2010 Kai's Waseda University research group carried out an empirical study by questioning about 3,100 companies on compliance topics using a specially pre-

pared questionnaire. 30 percent of those companies gave an answer to this questionnaire. Amongst these companies there is a tendency to implement compliance measures, such as Corporate Social Responsibility (CSR) systems or measures according to the US Whistleblower Protection Act. Kai sees the problem in the fact that Japanese criminal law does not know the accusation of companies, which would be a *lege ferenda* to enhance efficiency of compliance rules. As regards the dogmatic basis of compliance, Japan – like Germany – considers compliance either as a cause of justification, a cause of exculpation or as a question of sentencing. For the latter, the US Sentencing Programme would be a good example. Kai also emphasised compliance's connection to legislation as an implementation of compliance in an extra-criminal code (*Nebenstrafrecht*). As a conclusion, Kai sums up his recommendation for an effective compliance system: first, a common compliance programme for all companies; second, specially adjusted compliance programmes for certain business sectors; and third, more detailed programmes for every single company adjusted to its individuality. This would result in economic criminal law more fluidly becoming company criminal law and a combination of soft and hard law.

Professor *Thomas Rönnau* of the Bucerius Law School, Hamburg, followed with his lecture on corporate compliance and criminal law in Germany. Rönnau emphasised the dialectic of discharging and charging effects of compliance on the application of criminal law. On the one hand, compliance systems should serve to minimise the risk of criminal liability; on the other hand, it also increases the risk of criminal charges with regard to the pursuit of "best practise". If standards of ethical behaviour are raised by ambitious and copious self-obliging codes of conduct, everyone will be measured by these criteria. Thereby, corporate reality is implemented into criminal law by influencing the definition of negligence as well as specific statutory definitions of crimes incorporating "fair practise". According to Rönnau, this development should be examined carefully. In the second part of his lecture, Rönnau dealt with internal investigation as a kind of "privatisation of criminal prosecution". Rönnau described the fundamental problem of using the results of private internal investigation in official criminal procedures. He claimed a general prohibition of the usage of such evidence deriving directly from the constitution, or more precisely, from general personal rights. On the other hand, Rönnau warned that in combination with immunity provisions in civil law, this must not lead to a complete absence of legal sanctions. The legal authority is requested to find a remedy as in § 97 I 3 of the German Insolvency Code (InsO).

The resulting discussion led to questioning why companies can be victims of fraudulent behaviour even if they have an elaborated compliance system. When asked how compliance systems work in practice, Professor Rönnau pointed out that the dogmatic specification of compliance systems is not of great importance as compliance-relevant matters are mostly subject to deals. Another subject of the discussion was whether it is sufficient if courts rule out disproportionate compliance systems when judging criminal

cases and the effectiveness of Rönnau's postulated prohibition of the usage of evidence deriving from internal investigations.

Professor *Mariko Kawano* of Waseda University then lectured about legal problems of fighting piracy from the Japanese perspective, mainly dealing with the enactment of Japan's Anti-Piracy Act 2009. She pointed out that this Act was made to enable a contribution of Japanese officers to international cooperative operations against piracy, in particular in the waters off the coast of Somalia and in the Gulf of Aden. Kawano gave a quite detailed insight into the different measures of the Anti-Piracy Act and its main purposes, which are cooperation with anti-piracy operations under international law, protection of vessels regardless of the flag, criminalization of acts of piracy, instigation of an effective response to such acts and finally maintenance of public safety and order at sea. Kawano also compared the Act with the UN Convention on the Law of the Sea (UNCLOS). One difference between those two legal systems is that the Act has a more detailed and concrete specification of acts of piracy. In contrast to the UNCLOS, the Act not only applies on the high seas but also in Japanese territorial and internal waters. Kawano also described one of the main features of the Act, which has opened the way for Japanese officers to take measures abroad. Whether those officers should be members of the Self-Defence Forces (SDF) or of the Japanese Coast Guard (JCG) was a main discussion point during the law-making. This was especially with regard to the experiences of World War II and the famous Article 9 of the Japanese Constitution. Thus the Anti-Piracy Act opts for a primary competence of the JCG, as only JCG officers are permitted to perform measures of a judicial police officer under the Code of Criminal Procedure. The SDF Act does not contain an equivalent provision. Therefore, when SDF participate in operations under the Anti-Piracy Act, JCG officers must be on board to apprehend, arrest or detain the suspects. Kawano then described more detailed regulations, such as the use of arms by JCG and SDF officers and apprehension and transfer of suspects. As a conclusion, Kawano stressed that the actual cause of piracy is poverty of the people on the land, and that a real solution to the problem of piracy cannot be found without addressing poverty.

The German perspective of fighting piracy was illustrated by Bucerius Law School's Professor *Doris König*. Beginning with a statistical overview of acts of piracy and contributions of the different countries to fighting piracy (e.g. the ATALANTA Programme), König then described Germany's constitutional difficulties to send armed forces (*Bundeswehr*) abroad by giving a brief introduction to the historical background. The actual constitutional concept bears a lot of uncertainties as regards the usage of the *Bundeswehr* in and outside German borders. König pointed out that in the latter case, an international mandate such as ATALANTA is always required. She also described the underlying principle of the use of military forces as the separation between police powers and military action (*Trennungsgebot*), which is quite similar to the Japanese legal system. The dilemma with this principle is that the German Federal Police, which would legally have the competence to execute police powers, is currently not adequately equipped. Another

question would be whether the *Trennungsgebot* applies for out-of-area operations. According to König, better arguments can be made for not applying this principle in those cases to enable the better-equipped *Bundeswehr* to participate in multilateral military operations. Due to those specific constitutional barriers, the German Navy is allowed to operate against Somali pirates only within a system of mutual collective security, namely within the EU Operation ATALANA. Unilateral action is generally not permitted. This led to the problem that in the case of the German Vessel *Taipan*, which was seized by pirates outside of the ATALANA area, Germany was not allowed by its own constitution to free the vessel. This had to be done by the Netherlands. To solve these problems, König suggested a constitutional amendment to clarify the tasks of the *Bundeswehr*, which have changed significantly in recent years, and to give legal certainty to political decision-makers, military personnel and alliance partners. The competencies of the Federal Police and the German Armed Forces need to be clarified and adjusted to meet the realities of today's multilateral missions. In König's eyes, Japan's Anti-Piracy Act might serve as a model for that purpose.

The conference's last lecture was again followed by a lively discussion. First, Kawano and König talked about the practical difficulties of maintaining the German *Trennungsprinzip*, as even in bare military operations apprehension and/or other police measures can be necessary. Then the President of the International Tribunal for the Law of the Sea, Professor *Shunji Yanai*, who attended the conference by special invitation, pointed out that there is unfortunately no international judicial body to deal with piracy. In his opinion, the International Criminal Court in The Hague might be the right body, but as yet it has no statutory power. This led to a lively discussion on if, where and how such an international judicial body should be established.

Summing up, the conference was a great enrichment for all participants, with very interesting and diverse lectures and discussions of both high academic quality and practical relevance. Professor Baum thanked all participants, especially the Japanese guests for travelling the long way to Germany. He announced that conference volume will be published.

Axel Kuhlmann