Reform of Transport Law in Japan

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I. INTRODUCTION[1]

Transport law is a primary and substantial component of commercial law. The importance of transport activities in the business field is undeniable.[2] Nevertheless, there are relatively few opportunities for transport law to become a subject for any commercial legislation.[3] In fact, the fundamental legislation on contracts of carriage in Japan remained untouched for over 100 years.[4]

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In the meantime, however, the situation surrounding this paper's topic has changed dramatically. According to a news report of 23 March 2013, the Japanese Ministry of Justice decided to launch the *Hōsei Shingi-kai* [the Legislative Council of Ministry of Justice] in 2014 to revise the current Commercial Code, mainly the part related to transport law (*Unsō-hō, kaishō-hō 110 nen buri no kaisei* [Reform of Transport and Maritime Law for the First Time in ca. 110 Years], Nikkei Shinbun, 23 March 2013, 1). The statements included in this presentation paper have been revised accordingly.

2 According to the *2012 Economic Census for Business Activity* by the Statistics Bureau, Ministry of Internal Affairs and Communications, the market scale of transport and postal activities was ca. 49 trillion yen (available at *http://www.stat.go.jp/english/data/e-census/2012/index.htm*).

3 On the other hand, almost the whole industry is regulated by some regulatory laws that have been amended several times, e.g., *Kamotsu jidō-sha unsō jigyō-hō* [Motor Truck Transporta-

This ignorance, however, was recently terminated. Several works at the academic level and also among practitioners trying to revise the current transport law have been activated in the last few years. Most recently, the Japanese Ministry of Justice (*Hōmu-shō*, hereinafter: MOJ) decided to launch an official council whose final goal is to furnish an MOJ draft bill for the reform of the current transport law.[5]

Regrettably, the only thing that has been officially decided to the present is merely to revise the current transport law, even though there should be great progress in this field. The MOJ, of course, has no draft bills, nor even as yet any concrete policy for revision. This fact indicates that the substantial problems – such as the direction, sphere, and means of reform – are still open to free discussion.

This article, therefore, does not aim to introduce, comment upon, or evaluate any fixed draft bills, but just to review the current situation of transport law reform in Japan as a matter of fact. In particular, the main focus is on the analysis of defects in the current law and the introduction of several works heading to reform. Finally, some topics that seem relevant for future reform will be examined.[6]

II. THE CURRENT SITUATION OF TRANSPORT LAW REFORM

1. Structure of Japanese Transport Law

In order to understand the reform, one must be familiar with the current system to be revised. In Japan, there is no one body of law of transports;[7] instead, several laws and regulations make up Japanese transport law as a whole. The structure of current

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tion Business Act], Law No. 83/1989 (for trucking companies); *Dōro unsō-hō* [Road Transportation Act], Law No. 183/1951 (for bus and taxi companies); *Tetsudō jigyō-hō* [Railway Business Act], Law No. 92/1986 (for railway companies); *Kōkū-hō* [Civil Aeronautics Act], Law No. 231/1952 (for airline companies); *Kaijō unsō-hō* [Marine Transportation Act], Law No. 187/1949; *Naikōkaiungyō-hō* [Coastal Shipping Business Act], Law No. 151/1952 (for shipping companies); *Kamotsu riyō unsō jigyō-hō* [Consigned Freight Forwarding Business Act], Law No. 82/1989 (for forwarding companies). Each regulatory law generally provides entry conditions, regulation of price, and safety of transportation (somewhat liberalized in the last two decades).

4 Actually, the council did try to revise the transport law, but finally it did not accomplish the revision and did no more than publish a few agendas for future reform; cf. HŌSEI SHINGIKAI, *Shōhō kaisei yōkō* [Outline of Revision of the Commercial Code], in: Hōsō Jihō 8-3 (1936) 265, 266).

5 See *supra* note 1 (*Nikkei Shinbun*).

6 Although the author is / was a member of some projects that are referred to in this article, the author does not represent such groups, including the MOJ, the Japanese government, or other organizations. The opinions, presumptions, and inaccuracies (if any) in this article belong exclusively to the author.

7 In this context, the *Code des transports* in France (available at *http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000023086525&dateTexte=20101202*) should be kept in mind.

transport law is visually explained in Table 1. The following sections will give a further explanation of each rule.

Table 1: Japanese Transport Law

	Land (incl. lake, river and bay[8])	Sea	Air
Inland	· Commercial Code (Book 2, ch. 8) · Rail · Railway Operation Act	Commercial Code (Book 3)	No laws (standard forms)
International	No rules	· Japanese COGSA · No rules for passenger transport	· Warsaw Convention 1929, amended by the Protocols · Montreal Convention 1999

a) National Laws

aa) Commercial Code

In the same way as in Germany, the main and general rules relating to transport law in Japan are stipulated in the *Shōhō* (the Commercial Code[9]).

The first Commercial Code in Japan, *Meiji 23 nen shōho* or *Kyū-shōhō*[10] (Old Commercial Code) was established in 1890. Its draft was furnished by the German scholar Hermann Rösler[11] in 1884. In fact, he elaborated the draft by paying attention to commercial law in several foreign countries, such as France, Italy, Spain, The Netherlands, Egypt, and even common-law countries, and of course Germany.[12] Regarding transport law, the draft was broadly influenced by the German system. The German commercial code that was in force during Rösler's writing of the 1884 draft was the *All-*

8 The boundary of lake, river, and bay is concretely decided by some regulations: *Shōhō shikko-hō* [Act for Enforcement of the Commercial Code], Law No. 49/1899, *Shōhō shikko-hō dai 122 jō no kitei ni yoru kosen kōwan oyobi engan shōkō-kai no han-i ni kansuru ken* [Ministerial Ordinance for the Definition of the Navigation in Lake, River, Harbors and Coast stipulated in Art. 122 of Act for Enforcement of the Commercial Code], *Teishin-shō rei* No. 20/1899, *Senpaku anzen-hō shikō-kisoku* [Ordinance for Enforcement of the Ship Safety Act], No. 41/1963.

9 Law No. 48/1899.

10 Law No. 23/1890.

11 The full text and commentary of his draft are published in Japanese as well as in German: H. RÖSLER (transl. SHIHŌ-SHŌ), *Shōhō sōan* [The Draft of Commercial Code], vol. 1 and 2 (Tokyo 1995 [reprinted]); H. RÖSLER, *Entwurf eines Handelsgesetzbuchs für Japan mit Commentar*, Bd. 1-3 (Tokyo 1996 [reprinted]).

12 H. TAKADA, *Meiji-ki nihon no shōhō-ten hensan* [Elaboration of Commercial Code in Meiji Period in Japan], in: Kigyō to Hōsōzō 34 (2013) 61–64.

gemeines Deutsches Handelsgesetzbuch (hereinafter: ADHGB). The Old Commercial Code, following the same system as the ADHGB, has several provisions on transport businesses as a commercial act (*shōkō'i*, the same concept as *Handelsgeschäfte*), including transportation by sea (in German, *Seehandelsrecht*).

Unfortunately, the enforcement of the Old Commercial Code along with the newborn Civil Code was postponed for a long time because of several objections against the Western-originated Codes (so-called *hōten-ronsō*). It entered into force partly in 1893 and wholly (including transport law) in July 1898 according to economic and political need. Simultaneously, the Japanese government ordered a few Japanese scholars to draft a new Commercial Code and Civil Code by taking Japanese commercial customs and Japanese nationality into account. At last, the New Commercial Code, the current Commercial Code, was adopted and entered into force in 1899, abolishing the former Code.

The New Code was completely composed by Japanese writers, but they did refer to the Old Commercial Code, which is a mixture of several European laws, and they also referred to the new German Commercial Code (hereinafter: HGB), established in 1897.

Like the former Code, the new Code regards transport activity as one of the commercial acts. According to Art. 569, all transport by land was regulated by Book III (current Book II), Chapter 8, and for transport by sea, Book V (current Book III) would be applied. With regard to the commission agency for contract of transport, Book III (current Book II), Chapter 7 provides some rules.

Detailed contents of the current Commercial Code relating to transport activities are as follows:

- Book II – Commercial Acts
  - Chapter 7 – Commission Agency for Contract of Transport (Article 559–568)
  - Chapter 8 – Transport Business
    - Section 1 – General Provisions (Article 569)
    - Section 2 – Carriage of Goods (Articles 570–589)
    - Section 3 – Carriage for Passengers and Baggage (Articles 590–592)
- Book III – Business by Sea
  - Chapter 1 – Ship and Ship Owners (Articles 684–704)
  - Chapter 2 – Captain (Articles 705–721)
  - Chapter 3 – Transport
    - Section 1 – Carriage of Goods
      - Sub-Section 1 – General Provisions (Articles 737–766)
      - Sub-Section 2 – Bills of Lading (Articles 767–776)
    - Section 2 – Carriage for Passengers and Baggage (Articles 777–787)
  - Chapter 4 – Sea Damages (Articles 788–799)
  - Chapter 5 – Salvage (Articles 800–814)
  - Chapter 6 – Marine Insurance (Articles 815–841-2)
  - Chapter 7 – Maritime Claimant (Articles 842–851)

bb) Japanese Carriage of Goods by Sea Act (Japanese COGSA)

As for the carriage of goods by sea, the new convention, "International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading," called "the Hague Rules," was produced in 1924 and entered into force in 1931. In 1957, the Japanese Parliament ratified this convention and made a new national law, *Kokusai kaijō buppin unsō-hō* (Japanese Carriage of Goods by Sea Act 1957, hereinafter: Japanese COGSA[13]).

The Japanese COGSA doesn't incorporate the convention as is. It covers some spheres that are excluded in the application of the Hague Rules. For example, the Japanese COGSA applies to the contract of carriage of goods itself, not only the carriage under bill of lading (Art. 1). Furthermore, as long as it is a contract for carriage of goods, a charter party will fall under the coverage of the Japanese COGSA (see Art. 16).

On the other hand, as is internationally required, the contract of carriage of goods by sea in respect of this Act should be carriage only from Japan to another country or from another country to Japan (Art. 1). Collaterally, the contract of transport by inland sea doesn't fall into the coverage of the Japanese COGSA. Thus, according to the enactment of the Japanese COGSA, the line of demarcation was drawn between inland sea carriage and international sea carriage.[14]

Japan is also a member of the 1968 Protocol ("Visby Protocol") and the 1979 Protocol ("SDR Protocol") to that convention. Correspondingly, the Japanese COGSA 1957 was amended in 1992.[15]

cc) Other National Laws and Conventions

Other than the Hague Rules (i.e., the Japanese COGSA), Japan is a member of several other conventions on transport. Concerning the liability of the ship owner, Japan ratified the "International Convention Relating to the Limitation of the Liability of Owners of Seagoing Ships 1957" and promulgated the domestic law "Ship Owners' Limitation of

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13 Law No. 172/1957. As for the method of implementation of the convention, the Japanese government examined three different ways; see N. YOSHIDA, *Kokusai kaijō buppin unsō-hō kaisetsu* [Annotation for the Japanese COGSA], in: Hōsō Jihō 9(6) (1957) 692, 693; S. TANAKA / N. YOSHIDA, *Kommentâru kokusai kaijō buppin unsō-hō* [Commentary on the Japanese COGSA] (Tokyo, 1964) 44, 45. The first way was to adopt the convention itself is as a national law. The second was to integrate the contents of the convention into existing national law (i.e., the Commercial Code), modifying it to harmonize the national law. The third method was to make a completely new act relating to only the international carriage of goods by sea, apart from existing national law. The Japanese government and Parliament finally chose the last option.

14 It was considered to be premature at that time for internal sea carriage to be subject to the same rule as international sea carriage; see YOSHIDA, *supra* note 13, 693; TANAKA / YOSHIDA, *supra* note 13, 44, 45. Therefore, the chosen option was just "provisionary" and not absolute.

15 Law No. 69/1992.

Liability Act"[16] in 1975. In 1982, in order to accommodate it to "The Convention on Limitation of Liability for Maritime Claims 1976 (LLMC)," the Act was amended.[17] The Act also was amended for incorporating the 1996 protocol to that convention.[18] In addition, Japan also ratified the "International Convention on Civil Liability for Oil Pollution Damage 1969" with the 1992 Protocol, and the "International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage" with the 1992 Protocol, along with the corresponding national law, "Act on Liability for Oil Pollution Damage 1975"[19], revised in 2004[20] (renamed "Act on Liability for Ship Oil Pollution Damage").

As for transport by air, Japan is a member of the "Convention for the Unification of Certain Rules Relating to International Carriage by Air 1929," the "Warsaw Convention," including the Hague Protocol 1955 and the Montreal Protocol No. 4. In 2000, Japan entered into the "Convention for the Unification of Certain Rules for International Carriage by Air 1999," known as the "Montreal Convention." These air conventions have no corresponding national law; therefore, they will directly apply to the matter subject to the Convention: international carriage by air.[21]

For the rail transport, *Tetsudō eigyō-hō*[22] [Railway Operation Act], complemented by *Tetsudō un'yu kitei* [Ministerial Ordinance for the Rail Transportation] will be applied prior to the Commercial Code as a special rule.

b) Other Rules

Most provisions of the Commercial Code are considered to be dispositive law, contrary to the conventions and corresponding national laws.[23] In ordinary cases, therefore, each company arranges its own standard form or contract conditions by negotiation with its customer in order to settle the problem incurred in a contractual circle. In most cases, the parties barely rely on the Commercial Code.

16 Law No. 94/1975.
17 Law No. 54/1982.
18 Law No. 58/2005.
19 Law No. 95/1975.
20 Law No. 37/2004.
21 "International carriage" in these Conventions means carriage whose "place of departure and the place of destination, whether or not there be a break in the carriage or a transshipment, are situated either within the territories of two States Parties, or within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a State Party" (Art. 1(2)).
22 Law No. 65/1900.
23 Art. 15 of the Japanese COGSA as well as Art. 26 of the Montreal Convention express its one-way mandatory nature.

c) General Standard Forms

Although the parties can enjoy the freedom of contract as a default, in some types of contracts, especially a contract that is open to the public and inevitably may be a consumer contract, a company is rather obliged to make a standard form and should be officially authorized for using it.[24] In Japan, transport business is a regulated industry, even though it has been gradually liberalized to some extent. The organization that is supposed to regulate these activities is *Kokudo Kōtsū-shō*[25] (the Ministry of Land, Infrastructure, Transport and Tourism, hereinafter: MLIT). In some areas where the authorization of standard forms is needed, the MLIT provides some *hyōjun yakkan* (General Standard Forms). If a company accepts a General Standard Form as its own standard form or makes a standard form according to the General Standard Form, the obligation to obtain the authorization is exempted.[26]

The following table (Table 2) indicates the situation of the institution relating to standard forms and General Standard Forms for the carriage of goods.

Table 2: Necessity of Authorization of Standard Forms and Other Applicable Forms (Cargo Only)

Mode	Authorization	General Standard Forms for…	Other Standard Forms
Truck	Necessary	Transport by truck in general, express home delivery services, moving services, etc.	N/A
Rail	Unnecessary	N/A	Each company's form
Inland air	Necessary	N/A	Each company's form
Int'l air	Necessary	N/A	Each company's form
Inland sea	Unnecessary*	Inland sea transport in general	Japan Shipping Exchange Form
Int'l sea	Unnecessary*	N/A	Each company's form
Forwarding	Necessary	Each type of freight forwarding (truck, rail, inland sea, int'l sea, int'l air)	JAFA Model Form, JIFFA Standard Conditions, etc.

* *If the company intends to run a business toward many and unspecified people, it shall make a standard form and submit it to the MLIT.*

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24 Art. 10 of *Kamotsu jidōsha unsō jigyō-hō*, Law No. 83/1989 (contract of carriage by truck); Art. 11 of *Dōro unsō-hō*, Law No. 183/1951 (by bus and taxi); Art. 106 of *Kōkū-hō*, Law No. 231/1952 (passenger and cargo transport by air); Art. 9 of *Kaijō unsō-hō*, Law No. 187/1949 (passenger transport by sea); Art. 8 and 26 of *Kamotsu riyō unsō jigyō-hō*, Law No. 82/1989 (forwarding contract).

25 *http://www.mlit.go.jp/en/index.html*

26 This institution has two main functions. First, it works as a consumer protection rule. This argument would be persuasive, for example, in the express home delivery service (*Takuhai bin*) which tends to be run by a few major logistic companies. The same situation also applies to the moving service of household goods. Secondly, it will be beneficial for companies as well. The contract of transport is likely to be a volume business, so the standard form is indispensable in any event. By using the General Standard Form, a company can reduce costs to make their own standard form. It would be especially convenient

Some General Standard Forms, as for contracts of carriage by truck in general, do substantially succeed the provisions of the Commercial Code with complements.[27] Some seem to be slightly different from the Commercial Code.

d) Standard Forms by Companies or Associations

In an area where there is no obligation to properly authorize it like transport by sea, companies voluntarily make their own standard forms, mainly in order to fill a lack of national laws. As for air transport, which requires obtaining authorization relating to the standard form in spite of having no General Standard Forms, Japanese airlines such as Japan Airlines[28] (JAL) and All Nippon Airlines[29] (ANA) have their own standard forms for both inland and international carriage of passenger and goods.

Each railway company, such as Japan Railway East (JR East) and Japan Freight Railway Company (JR Freight), also has its own standard forms. In fact, as Japan Rail Company was originally a state enterprise, the form they're using now was also originally a state regulation until 1987, the year of privatization.[30]

In addition, some associations and private organizations make special standard forms or conditions. For example, Japan Shipping Exchange[31] stipulates several General Contract Forms and documents for inland sea carriage. As for forwarding activities, Japan AirCargo Forwarders Association (JAFA)[32] and Japan International Freight Forwarders Association (JIFFA),[33] which is an association mainly for international shipping forwarders, prepare their own forms, bills of lading, and waybills for associate companies.

2. Background of Expectation for Reform

Under these circumstances, the current law reform, especially of the Commercial Code, is undoubtedly expected not only by academics but also practitioners. Finally, as seen above, the MOJ decided to revise the current Commercial Code and is trying to organize the Council. The following section explains the background of this expectation. It should be noted in advance that the expectation for the reform is not necessarily based on any

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for the trucking industry, 99 % of whose operators are SMEs (small and medium enterprises) with no ability to make their own form.

27 S. KOZUKA, *Unsō-hō gendai-ka no kihon shiten* [Basic Perspective for Modernization of the Transport Law], in: E. KURONUMA / T. FUJITA (eds.,), *Kigyō-hō no riron* [Theories on the Law of Enterprises], 2nd vol. (Tokyo 2007) 242.

28 *http://www.jal.co.jp/en/*

29 *http://www.ana.co.jp/asw/index.jsp?type=e*

30 *Nihon kokuyū tetsudō kaikaku-hō* [Act on the Reform of the Japanese National Railways], Law No. 87/1986.

31 *http://www.jseinc.org/index_en.html*

32 *http://www.jafa.or.jp/english/index.html*

33 *http://www.jiffa.or.jp/en/*

grievous cry to change current circumstances in practice. Rather, the reasons that endorse the reform are somewhat passive.

a) Necessity for Modernization of the Current Commercial Code

First, there is a reason inherent to the Commercial Code. It has seemed that the current Commercial Code should be modernized in any event. In this context, "modernization" includes two things: modernizing the contents of the Code and modernizing its wording.

aa) Modernization of Wording

The current Commercial Code, established in 1899, has remained almost unchanged until now. This means that it was written in old Japanese that was commonly used 114 years ago, and it appears archaic when read through the lens of the present time.

More correctly, the current Book I and a part of Book II were already modernized in 2005 at the same time as the enactment of *Kaisha-hō*[34] (the Companies Act 2005). But the rest, including transport law, is still in old Japanese, making it too difficult even for law students to read smoothly. Therefore, no one opposes modernization in the light of wording.

bb) Modernization of Contents

With respect to the contents of the current Commercial Code, the modernization has mainly been called for by academics. The reasons are as follows.

Age of the Code

The current Commercial Code is very ancient. Without a doubt, the transport activities of 1899 were quite different from modern activities. There have been great innovations in the area of transport activities in the meantime, such as the emergence of steam engines, containerization, and the development of GNSS (global navigation satellite systems) like GPS.

It may be less famous, but trucking activity has also progressed in the meantime. It is said that the transport business by truck was generalized in the first decade of the twentieth century in Japan. Furthermore, expressways for cars nowadays cover almost all of Japan. In 2013, a truck has the ability to go everywhere in Japan in one or two days; however, the Commercial Code could not predict this capability.

Substantial Omissions

In addition, the Code omits substantial matters of the law of transport. As indicated in Table 1, there are no national laws formally dedicated to inland air carriage in Japan. The reason must be that the drafters of the Commercial Code did not anticipate that such

34 Law No. 86/2005.

activity would emerge in the future.[35] The first airline in Japan was *Tōzai Teiki Kōkū-kai*, established in 1928, and the civil aviation developed after World War II.

To fill such a lack of legal provisions, some say that because the provisions for land transport in the Commercial Code are a general rule for all transport activities, even though such business wasn't anticipated from the beginning, it would apply to inland air transport as well. This means that, in theory, there is no lack of provisions on this point. On the other hand, others insist that the Commercial Code does not take care of transport by air at all, so it would apply only mutatis mutandis, if possible.

Other relatively new activities such as multimodal transports, third-party logistics (3PL), and commercial transportation by spaceship (such as a sub-orbital plane) or other to-be-developed equipment are, of course, outside the scope of the Commercial Code.

cc) Result of Ineffectiveness of the Code: Inflation of Different Rules

The ineffectiveness of the Code due to its age and lack of appropriate content leads to another problem: the inflation of rules. As seen above, the substantial rules for transport activities are scattered about the several dimensions of rules: not only the Code and other national laws, but also the General Standard Form, some regulatory laws, orders or circulars by the MLIT, forms by associations, companies' forms, etc.

That situation must bring uncertainty to the participants in these activities to the extent that one can hardly foresee the applicable law in the court. Although by its nature a Code should be the most apparent rule for everyone, at least for the interested parties, the Japanese Commercial Code does not work as a primal rule either substantially or formally.

b) De-codification

The second reason that makes the reform of transport law inevitable is the "de-codification" (*datsu-hōten-ka*) of the Commercial Code. A "de-codification" is not a legal term, so there may be several definitions by various authors.[36] Generally, however, this word is applied to describe a situation where it seems difficult for a code to retain its original form and substance due to spillage of matters originally devoted to that code.

In the area of commercial law, a de-codification seems to be more or less universal. For example, before 2000 the French Commercial Code (*Code de commerce*) was called *coquille vide*,[37] an "empty shell," because it had kept only the framework of the code

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35 Nevertheless, one drafter pointed out that "if a transport business by balloon came about in the future, it would fall under land transport"; see K. OKANO, *Shōkō'i oyobi hoken-hō* [Law of Commercial Acts and Insurance] (Tokyo, 1928) 218.

36 As to the definition of "de-codification," see C. PEROT-REBOUL, Recherche sur la codification du droit commercial, II (Paris 1999) 48.

37 B. OPPTIT, La décodification du droit commercial français, in: Études offertes à R. Rodière (Paris 1981) 198. For the de-codification of the French Commercial Code and its re-codification, see M. SASAOKA, *infra* note 51, 59-69.

while its contents – such as company law, maritime law, and insurance law – had dramatically flown out of the original code of 1807.

However, the situation of the Japanese Commercial Code may be the most prominent. Table 3 indicates the process of de-codification of the Commercial Code in Japan.

Table 3: "De-codification" of the Japanese Commercial Code

Commercial Code as of 1899	Commercial Code as of 2013	Laws detached from the Code
Book 1: Commerce in General	Book 1:Commerce in General (excl. company)	Companies Act 2005 (as to Company)
Book 2: Company	Deleted	Companies Act 2005
Book 3: Commercial Activities	Book 2: Commercial Activities	N/A
Ch. 8: Transport	Ch. 8: Transport	N/A
Ch. 10: Insurance	Deleted	Insurance Act 2008
Book 4: Bill of Exchange and Promissory Note	Deleted	Bill of Exchange and Promissory Note Act 1932 Check Act 1933
Book 5: Business by sea	Book 3: Business by sea (excl. int'l carriage of goods)	Japanese COGSA 1957 (as to int'l carriage of goods)

First, at the time of the enactment of the current Commercial Code, the bankruptcy matter was eliminated from its scope, while the Old Commercial Code drafted by Rösler included such provisions (Book III) modeled on the French system.[38] Second, *Tegata-hō*[39] [the Bills of Exchange and Promissory Notes Act] and *Kogitte-hō*[40] [the Check Act] were promulgated in 1932 in order to implement "the Convention providing a uniform law for bills of exchange and promissory notes 1930." Correspondingly, the related provisions in the Commercial Code were deleted.

The third and biggest change was brought by the enactment of the Companies Act in 2005. It extinguished former Book II (*Kaisha-hen*), which had occupied the greater part of the Code. Fourth, the law of insurance business, which had been one of the Commercial Acts in the same way as transport activities in the Commercial Code (Chapter 10, current Book II), was detached from the Commercial Code as *Hoken-hō*[41] [the Insurance Act] in 2008. Furthermore, as a predictable future, some parts of the Commercial Act – such as offer and acceptance (Art. 507), agency (Art. 504), legal interest (Art. 514), prescriptions

38 Instead of it, the (former) Bankruptcy Act (Law No. 71/1922, replaced by the current Bankruptcy Act, Law No. 75/2004) was promulgated in 1922. The Bankruptcy Act will apply not only to merchants but also to the general public.

39 Law No. 20/1932.

40 Law No. 57/1932.

41 Law No. 56/2008.

(Art. 522) for commercial contracts, and sales contracts between merchants (Art. 524–528) – are to be deleted and integrated into the *Minpō*[42] [the Civil Code], according to its upcoming reform.[43]

In the face of this situation, it may be natural to pose the following question: "Should we retain the Commercial Code hereinafter?"[44] This argument relates deeply to the reform of transport law. That is why the most substantial rule in the Commercial Code after the recent de-codification is definitely "the law of transport" (Chapter 8, Book II and Book III). As a matter of fact, the necessity to revise current transport law seems to be provisionally provoked as part of the future complete revision (including abolition) of the Commercial Code as a whole.

c) Effect of Recent Developments in the Area of Law of Transport

The third is an extrinsic reason. In the last two decades, transport law experienced some modern and innovative legislation. For example, in 1998, German transport law reform[45] and new French legislation (*Loi Gayssot*[46]) were accomplished. In 2008, an innovative international convention in the area of carriage of goods mainly by sea, "the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea" also called the "Rotterdam Rules", was adopted by the United Nations and is expected to enter into force.[47] In 2010, a large code on transports (*Code des transports*) was elaborated in France. And in 2013, the reform of maritime law was finished in Germany.[48] They all became a stimulus for reform in Japan, and of course will be models for the future reform.

3. Works Heading to Reform

As noted above, the MOJ has decided to revise the current transport law or, more correctly, the provisions relating to the contract of carriage in the Commercial Code. This

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42 Law No. 89/1896.

43 In March 2013, the Working Group on the Civil Law (Law of Obligations), the Legislative Council of Ministry of Justice published "the Interim Draft Proposal" (available at *http://www.moj.go.jp/shingi1/shingi04900184.html*) and collected opinions through the public comment procedure from 1 April to 17 June 2013. In the Draft Proposal, the possibility to eliminate or integrate some provisions of the Commercial Code is indicated.

44 For this problem, see T. FUJITA, De-codification of the Commercial Code in Japan, in: GCOESOFTLAW 2012-5 (2012) 1-12.

45 Gesetz zur Neuregelung des Fracht-, Speditions- and Lagerrechts (Transportrechtsreformgesetz, TGR) vom 25. Juni 1998, BGBl. I. S. 1588. For the influence of this legislation, see also YAMASHITA, *infra* note 50, 11; KOZUKA, *supra* note 27, 230-239.

46 Loi n°98-69 du 6 février 1998 tendant à améliorer les conditions d'exercice de la profession de transporteur routier, JO 7 févr. 1998, p. 1975 (available at *http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000388282*)

47 Shamefully, Japan has not yet decided whether it should enter into or even sign this Convention. It must be on the agenda in the near future.

48 Gesetz zur Reform des Seehandelsrechts vom 20. April 2013, BGBl, I, S. 831.

decision did not come about suddenly. As far as the author perceives, there were five activities concerning the reform of transport law that preceded this decision. These are basically private, but the MOJ or another organization has been involved to some extent.

The purpose of these works seems to be to seek an agenda for the future reform rather than to solve any concrete problems that would have already been recognized in practice. As a matter of fact, however, these somewhat preparatory works were unavoidable to some extent. As already mentioned, the Commercial Code has barely worked as a rule in real transactions for quite a long time, and substantial rules have developed outside of the Code. Thus, the MOJ and even academics rather familiar with the Commercial Code were not familiar with the real world, while on the other hand, practitioners were not prone to pay much attention to the Commercial Code. These works would be able to fill the gap between the Commercial Code and the real transactions.

a) The Beginning: Symposium on "Reform of the Commercial Code" in 2010

The biggest preoccupation for scholars of commercial law until 2005 and during the following few years was undoubtedly the Companies Act 2005. Afterward, interest gradually turned to the Insurance Act 2008. After that, the Code itself, from which the companies and insurance matters had been detached, has come up for discussion among commercial law scholars.

In October 2010, a symposium titled "Reform of the Commercial Code" was held as one of the events at the 74th Conference of the Japan Association of Private Law.[49] In this symposium, Professor *Tomonobu Yamashita*, University of Tokyo, presented the situation of current transport law and pointed out some topics relating to the liability of carrier and transport documents in contracts of carriage of goods that should be amended in the future reform.[50, 51]

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49 The Conference of the Japan Association of Private Law is the biggest conference in the field of civil law, commercial law and civil procedure law in Japan.

50 The material for the Symposium was published in advance; see T. YAMASHITA, *Unsō eigyō, sōko eigyō, jō-oku eigyō* [Transport Business, Warehouse Business and Business Using Indoor Equipment], in: NBL 935 (2010) 49-58).

51 The scope of this symposium was very broad. Other symposium contents and material are as follows: T. FUJITA, *Sō-ron: Shōhō sōsoku, shōkō'i-hō no genjō to mirai* [General Remarks: The Current Status and Future of General Provisions and Commercial Acts of the Commercial Code], in: NBL 935 (2010) 7-16; G. GOTO, *Shōhō sōsoku: Shōgō, eigyō-jōto, shōgyō-shiyōnin o chūshin ni* [General Provisions: Especially on Trade Name, Transfer of Business, and Business Employees], in: NBL 935 (2010) 17-26; H. KANSAKU, *Kōgo keisan and tokumei kumiai* [Account Current and Silent Partnership], in: NBL 935 (2010) 27-37; H. SUZAKI, *Dairi-shō, nakadachi-nin, toiya: Torihiki chūkai-gyō no kisei* [Commercial Agent, Broker, and Commission Agent: Provisions on the Business Intermediation], in: NBL 935 (2010) 38–48. The author also participated in preparation meetings for the symposium for almost one year and published the research paper on the French Commercial Code as a model for a future Japanese Commercial Code; see M. SASAOKA, *Furansu ni okeru shōhō-*

b) Study Group on Commercial Law (Transport Law) (July 2011–February 2012)

The next step was to investigate transport law legislation in foreign countries. In 2011, a study group, *Shōji-hō (Unsō Kankei) Benkyō-kai* (Study Group on Commercial Law (Transport Law)), was launched at the initiative of the MOJ and a few academics. The chairperson was Professor *Tomotaka Fujita*, University of Tokyo; in addition, six young or middle-aged commercial law scholars belonging to several universities were gathered in Tokyo.[52] Seven meetings including a pre-meeting were held in approximately eight months, and the result of the examination was collected in an unpublished book.[53] The purpose of this group was not only to make clear the provisions and institutions from foreign countries, but also the whole systems that those countries have adopted related to transport law. Then by comparing these institutions and systems, they could isolate the matters commonly covered, such as special rules for liability of carrier (regardless of substance) in case of damage of goods (except for delay), along with the somewhat peculiar institutions in each country, such as the right of control during carriage.

c) Study Group on Transport Law Legislation (August 2012–present)

The Study Group dissolved in February of 2012. In August of the same year, a substantially successive but much broader group, *Unsō Hōsei Kenkyū-kai* (Study Group on Transport Law Legislation), was formed and is still running (as of June 2013) under the more proactive promotion of MOJ. This group also seems to be organized for finding problems rather than resolving any concrete problems. The substance of this Study Group is more practical than the former group. Namely, while the former one coped with foreign legal systems in the light of academics, the new group is engaged in exposing and resolving practical problems that are likely to occur in current transport activities. Therefore, the members of the group are not only scholars but also many practitioners from each

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ten ["A Commercial Code" in France], in: NBL 935 (2010) 59. A detailed discussion between speakers and audience on that day is reported in the bulletin of the Conference; see H. KANDA et al., *Shōhō no kaisei* [Reform of the Commercial Code], in: Shihō (2011) 53 and 254.

52 The members of the group and their assigned topics were as follows: (1) H. MATSUI, prof. of Rikkyo University (Tokyo), German law researcher; (2) M. SASAOKA, assoc. prof. of Ryutsu Keizai University (Ibaraki), French law researcher; (3) M. SHIMIZU, assoc. prof. of Tohoku University (Sendai), English law researcher; (4) W. TANAKA, assoc. prof. of University of Tokyo (Tokyo), United States law researcher; (5) F. MASUDA, assoc. prof. of Kyoto University (Kyoto), multimodal transport law researcher; (6) G. GOTO, assoc. prof. of University of Tokyo (Tokyo), in charge of comparison of each law. As observers, Prof. T. YAMASHITA, University of Tokyo (Tokyo) and Prof. M. OKINO, University of Tokyo (Tokyo), whose specialty is civil law, also participated in the meeting.

53 SHŌJI HŌMU KENKYŪ-KAI, *Shōji-hō (unsō kankei) benkyō-kai hōkoku-sho* [Report of the Study Group on Commercial Law (Transport)] (2012), unpublished.

transport industry. The affiliation of each member is as follows:[54] *Nippon Express*[55] (from the trucking industry), *East Japan Rail Company (JR East)*[56] (from the railway industry), *All Nippon Airlines (ANA)*[57] (from the air transport industry), *Nippon Yusen Kaisha (NYK Line)*[58] (from the shipping industry), *Kawasaki Kinkai Kisen Kaisha (K-Line Kinkai)*[59] (from the inland sea carriage industry), *JIFFA* (as seen above, the association for freight forwarders), *Japan Foreign Trade Council (JFTC)*[60] (the association for trading companies), the *Japan Shipping Exchange* (an organization for shipping activities), and *Tokyo Marine & Nichido Fire Insurance*[61] (an insurance company). In addition, some professional lawyers and MLIT officers participated.

The meetings are scheduled every month, beginning at 6 pm and lasting more than three hours. At this time, there have been ten meetings. The manner of discussion at the meetings is quite interesting. First, the MOJ prepares a paper that enumerates almost every provision of the current Commercial Code, including omitted parts with annotations and legislative proposals. Second, the member-practitioners examine whether that provision is needed, or whether it should be revised in the light of real transactions. Not every meeting achieves any concrete end regarding revision, but it makes clear which provisions are still working in the real world, which are already outdated, and which may disturb the transaction or are absolutely dismissed in the business field.[62]

The substantial discussion will be terminated in September 2013. Then the group is supposed to furnish a provisionary draft by taking account of discussions on that point.

d) Survey on the Actual Circumstances of the Japanese Transport Industry (October 2012–March 2013)

At almost the same time, based on a request from the MOJ, a survey study project[63] started. The purpose of this project is profoundly related to the activity of the Study Group

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54 The name of participants is open to the public on the website of *Shōji Hōmu Kenkyū-kai* (*http://www.shojihomu.or.jp/unsohosei.html*).

55 *http://www.nipponexpress.com/*

56 *http://www.jreast.co.jp/e/*

57 *http://www.ana.co.jp/asw/index.jsp?type=e*

58 *http://www2.nykline.com/*

59 *http://www.kawakin.co.jp/index_e.htm*

60 *http://www.jftc.or.jp/english/home_e.htm*

61 *http://www.tokiomarine-nichido.co.jp/en/index.html*

62 The preparation papers and minutes are uploaded on the website (available at *http://www.shojihomu.or.jp/unsohosei.html*).

63 The supervisor was T. FUJITA, University of Tokyo, and the other research members are as follows: M. SHIMIZU, Tohoku University (chief); F. MASUDA, Kyoto University; G. GOTO, University of Tokyo; and M. SASAOKA, Ryutsu Keizai University. The research paper was completed with the assistance of several lawyers distinguished in maritime and transport law: T. NAKAMURA, *Yoshida & Partners*; T. SAWAKI, *Yoshida & Partners*; T. TOZUKA, *Okabe & Yamaguchi*; T. CHIBA, *L&J Law Office*; K. YASUDA, *Momo-o Matsuo and Namba*; N. SUGIMOTO,

on Transport Law Legislation. Namely, the final goal of this project was to clarify the actual situation of all transport activities more thoroughly than the Study Group, which is relatively closed.

A serious concern raised from the beginning was the method of research. The transportation industry is tremendously huge and broad. The coverage of this research was as follows: cargo transport included the (1) trucking industry, (2) rail transport industry, (3) air transport industry, (4) inland sea transport industry, (5) international sea transport industry, (6) rail freight forwarding industry, (7) air freight forwarding industry (inland and international), and (8) international sea freight forwarding industry, and (9) each passenger transportation industry (bus, taxi, rail, air and ferry). Furthermore, the applicable rules seem to be considerably divided by mode or by territory. In addition to them, the matters to be investigated were quite loose and abstract: "the situation of the current transport activities," not "the impact of such institutions on the real transaction," for example.

Finally, the research was carried out according to the qualitative method, and sampling companies were purposively selected according to some preliminary hearings from experts in each industry. Basically the research was implemented by sending questionnaires standardized for future evaluation and comparison, and this was complemented by hearing some companies and associations. As a result, numerous companies and associations were subject to this investigation. Some of the companies are indicated in Table 4.

Table 4: Companies and Associations Subject to the Investigation (Cargo Only)

Mode	Companies' or Associations' Name
Truck	Japan Trucking Association,[64] Japan Long Haul Trucking Association,[65] Nippon Express, and other companies
Rail	Japan Freight Railway Company[66]
Air (inland and int'l)	JAL CARGO,[67] ANA CARGO,[68] and Nippon Cargo Airlines[69]
Inland sea	Japan Federation of Coastal Shipping Associations,[70] The Japan Shipping Exchange,[71] "K"LINE KINKAI, and other companies
Int'l sea	MOL,[72] NYK, and "K"LINE[73]
Rail FF	JIFFA and its associate companies
Air FF (inland and int'l)	Associate companies of JAFA
Int'l sea FF	JIFFA and its associate companies

Momo-o Matsuo and Namba; and S. SHIGEMATSU, *Momo-o Matsuo and Namba*. They also received helpful advice from distinguished professors of subjects other than commercial law.

64 *http://www.jta.or.jp/english/*
65 *http://www.rosen-renmei.jp*
66 *http://www.jrfreight.co.jp/english/*
67 *http://www.jal.co.jp/en/jalcargo/*
68 *http://www.ana.co.jp/cargo/en/int/*
69 *http://www.nca.aero/e/*
70 *http://www.naiko-kaiun.or.jp/e/*
71 *http://www.jseinc.org/index_en.html*
72 *http://www.mol.co.jp/en/index.html*
73 *http://www.kline.co.jp/en/*

Table 5 shows the number of companies and sharing ratio of each industry in inland cargo transportation.

Table 5: Profile of Each Industry[*] (Inland Cargo Only)

Mode	The Number of Companies	Quantity of Inland Cargo Movement (1) (1,000 ton)	(%)	(2) (1 million ton-kilometers)	(%)
Truck	63,083	4,496,954	91.8	231,061	54.1
Rail	22	39,886	0.8	19,998	4.7
Inland air	274	960	0.0	992	0.2
Inland sea	2231	360,983	7.4	174,900	41.0

[*] *Created based upon latest data of MLIT*

The research term expired in March 2013, and the reporting paper was submitted to the MOJ and published on its website.[75] Unfortunately, however, the research was not carried out sufficiently due to lack of time and manpower, and the examination of the data was also insufficient. Thus, the members launched another study group to complement the insufficiency of the reporting paper in April 2013, and the completed book will be published in 2014.

e) Study Group on Legislation for Marine Insurance (Nov. 2011–present)

A completely different project, the Study Group on Legislation for Marine Insurance, was launched in November 2011, chaired by Professor *Seiichi Ochiai*, Chuo University (professor emeritus of the University of Tokyo), and composed of scholars specializing in insurance law, big insurance companies, and the Japan P&I Club. The founder is *Sonpo Sōken* (The Non-Life Insurance Institute of Japan). This project was also encouraged by the necessity of reform of the Commercial Code, especially Book III, Chapter 6 (Marine Insurance). The group intends to submit a draft for the reform to the Study Group on Transport Law Legislation in the near future.

III. TOPICS OF THE REFORM

Regrettably, at the present time no draft bills or even private drafts have been published. More regrettably, as mentioned above, we are still seeking an agenda for reform. Nevertheless, during the author's involvement as a member in some of these activities, a subtle direction seemed to be determined, at least in some points. In the following section, some topics that might be subject to future reform are explained. Of course, the

74 This figure indicates two big airlines in Japan: JAL and ANA (NCA is exclusively specialized for international air transportation). However, it must not be accurate because it is assumed there would be other companies undertaking inland cargo transportation in spite of this very small number. See NIHON KOKU KYOKAI, *Kōkū tōkei yōran 2012* [Statistical Abstract of Air Transportation 2012] (Tokyo, 2012) 225-295.

75 *http://www.moj.go.jp/MINJI/minji07_00126.html*

description in the following section is based on the author's presumption only and does not represent an official opinion.

1. Scope and Principle of the Commercial Code

a) National Law for Inland Air Transport

As for transport by air, undoubtedly the omission should be filled by future reform in any event.[76] The problem is this, however: how should we do it? There are three different standpoints on that problem. The first is that the same rules as other modes should be applied to inland air transport as well. This standpoint seems to be influenced by German legislation in 1998. The second is that the international regime on air transport should be extended to inland transport like the French system.[77] The third and unlikely option is that Japan should refrain from providing any substantial rule on that point at all. This would mean that the problem would be left to interpretation, as it is now.

b) Unification of Rules among Several Modes of Transport

aa) Inland Transport

The problem above will be related to another question: should we set the same rules for every contract of transport, at least those that operate inland? This question, of course, seems to be stimulated by the German legislation of 1998. Therefore, we are investigating whether there is the same situation in Japan as there was in Germany at that time: namely, a need to unify the contract conditions and competitive conditions between each inland mode.

bb) Transport by Sea

The next unification problem is this: how should we draw a line between the Commercial Code and the Japanese COGSA with respect to transport by sea, or should we rather accommodate the two? For example, in inland sea transport, the carrier doesn't exempt in case of nautical fault on the part of the captain and crew, whereas the Japanese COGSA, following the Hague Rules, has the nautical fault exemption (Art. 4(1)). Furthermore, the carrier's liability relating to unseaworthiness in the Commercial Code (Art. 738) will apply to a case where the carrier exercised due diligence as to the ship and crew at the beginning of the voyage, contrary to the Japanese COGSA (Art. 5(2)). In order to avoid such relatively strict rules compared to international sea carriage, inland sea carriage operators ordinarily make a special contract form stipulating

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76 See S. OCHIAI, *Unsō-hō no rippōteki kadai* [Legislative Problem on Transport Law], in: S. KURASAWA / T. OKUSHIMA (eds.), *Shōwa shōhō gakushi* [History of Jurisprudence of Commercial Law in the *Shōwa* Period] (Tokyo, 1996) 205 *et seq*.

77 Art. L. 6421-3, L. 6421-4 and L. 6422-2 in the sixth part of French Code of Transports (Civil Aviation).

exemption from liability in cases of nautical fault and unseaworthiness with due diligence. A standard form provided by the Japan Shipping Exchange, *Naikō unsō keiyaku-sho* [Contract Form for the Inland Sea Carriage] has the same rule (Art. 17).

As seen above,[78] the rules on shipping activities of the Commercial Code were not inherently devoted to inland sea carriage.[79] The current division was brought about just in a "provisionary" manner as a result of the enactment of the Japanese COGSA 1957. In any event, therefore, rules dedicated to inland sea transport seem to be needed by unifying all sea carriage or by completely new provisions. Undoubtedly, the conclusion must depend on whether Japan intends to become a member of the Rotterdam Rules or not.

2. Legal Position of the Consignee

As for the contents of the Commercial Code, the reflection of the current legal position of the consignee would be on the agenda for future reform.

a) The Future of the "Arrival Rule"

According to Art. 583 (1) of the Commercial Code, a consignee is able to obtain the rights of the shipper after the arrival of the goods at the place of destination. This rule is almost the same as Art. 435 a. F., (421 n. F.) of the HGB (The Arrival Rule).

> Article 583 (1) When the goods have arrived at the place of destination, the consignee will be granted the rights of the shipper which are generated from the contract of carriage.

According to this Article, if the goods have been totally lost before arrival – for example, because of theft or missing during carriage – the consignee would not be able to enjoy the right to sue the carrier. However, the shipper, the only person who has the right to sue in this case, would not claim against the carrier unless he / she has an interest in the goods, such as a property right. Therefore, in this case, no one can claim against the carrier, at least on the basis of the contract of transport.

On the carrier side, on the other hand, this scenario would be unforgivable: in the case of a sea waybill or similar document being emitted,[80] when the carrier and the named consignee know each other, the consignee insists that "the goods have not arrived yet, so as a third party who is not bound by the contract terms, I will file a claim against you in tort". Taking account of these problems, a reasonable rule on this point should be set in the future reform instead of the current "arrival rule."[81]

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78 *Supra* note 14.

79 For example, the Commercial Code still retains the rules on the bills of lading (Art. 767-776) even though such documents have not been emitted in inland sea transport at all.

80 Art. 583 will apply to the international sea carriage without bills of lading (Art. 20(1) and (2) of Japanese COGSA). The same will apply to inland sea carriage in spite of no explicit rule; see Imperial Court, 20 May 1924, Minshū 3, 253.

81 In this context, the provisions of the Montreal Convention (Art. 13(3)), according to which the right of the consignee will be enjoyable even in case of the total loss, have often been referred to as a model for the future reform.

b) Allocation of Right of Control between Shipper and Consignee

Article 582 provides for the rights of control of the shipper and the consignee. According to it, the shipper's right of control will become extinct at the time of the consignee's claim for delivery to the carrier at the destination. This fact indicates that the consignee will prevail over the shipper after the arrival of goods at the place of destination. Some General Standard Forms have almost the same rule.[82]

> Article 582 (1) The shipper or the holder of an inland Bill of Lading may give an instruction to the carrier not to do further carriage, to turn the goods back to the shipper, or to take other disposition, provided the carrier may ask for the freight of the carriage which has been done, the fee paid on behalf of the shipper, and the additional costs.
> (2) The right of the shipper in the preceding sub-section ceases when the goods arrive at the place of destination and the consignee claims for the delivery.

Nevertheless, at least in inland transport, we realized that it was unlikely for the consignee to prevail over the shipper, even after the arrival of the goods, unless the shipper had become unknown or insolvent in that very short period of time. Therefore, the adequacy of this rule may be reconsidered.[83]

c) Duty to Accept the Delivery of Goods by the Consignee

One of the advanced points of the Rotterdam Rules is undoubtedly the duty of the consignee to accept delivery of the goods (Art. 43). Introduction of this duty should be on the agenda for future reform.

3. Liability of the Carrier

The main stage of transport law must be the rules on the liability of the carrier. In the works mentioned above, the liability matter has been the subject of long-term discussions. In this paper, a few relatively important issues will be treated, though there may be several problems on this matter.

a) Special Rule for Precious Goods

The first is the precious goods exemption. According to the Commercial Code, the carrier will be exempted from liability on the damage of precious goods unless the shipper declares the nature and value of it at the time of deposition to the carrier (Art. 578). This rule will apply to sea carriage both inland and international (Art. 766 of the Commercial Code and 20(2) of the Japanese COGSA).[84]

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82 For example, Art. 27, 28 of General Standard Form for Transport by Truck in General.

83 The extreme form of this point must be Art. 12(4) of Montreal Convention. According to it, the right of control of the shipper will become extinct at the time of the arrival of goods to the destination, even in cases of no claim by the consignee. In contrast, the Rotterdam Rules introduced the concept of "the controlling party" and recognized that the right of control could be transferred independently (Art. 51).

> Article 578 – The shipper shall declare the nature and price of goods whenever the goods are deemed to be precious goods such as money and commercial paper; otherwise the carrier is not liable.

Some say that this "all-or-nothing solution" is prone to invoke a serious conflict of interests. In fact, even if the application of this Article were assumed, the courts have often compelled the carrier to compensate for the full damage, on the one hand, and on the other hand have deducted the total amount because of the comparative negligence of the shipper, even with no declaration.[85] This practice would express the inadequacy of this rule as a solution, so the abolition of this institution has always been insisted upon. But whether we should maintain this rule seems to depend on the next issue, the limitation of liability.

b) Limitation of Liability for Inland Transports

In the Commercial Code, there are no rules providing for limitation of liability of the carrier, while other legislation and forms provide for this.[86] It would be desirable to set a general limitation rule in the Commercial Code. However, the problem is this: is there any concrete and common amount or criterion that legitimates the limitation in all transport activities? This problem is still under investigation.

c) Rules for Concurrence of Claims in Contract and in Tort

According to the Japanese Supreme Court,[87] several claims may stand in concurrence as long as the requirement of each provision is met. In the case of the damage of goods, the shipper may claim against the carrier in the contract.[88] In addition, if the shipper is also an owner of the goods, the claim in tort may be available at the same time.[89] In this situation, may the shipper enjoy full compensation according to the tort law, while the contract law provides reasonable limitations? There is no answer to this question in the Commercial Code. However, there seems to be no conflict in establishing the new provision to prohibit claims in tort beyond the limitation stipulated in the contract law, at least by the original party and holder of the transport document. In fact, Art. 20-2 of the

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84 It might be an infringement of the convention (the Hague-Visby Rules) to insert such an exemption not endorsed by the convention. See T. FUJITA, *Tōitsu jōyaku no juyō to kokunaiteki henyō* [Acceptance of Convention for the Unification and Its Arrangement in the National Law], in: *Henkaku-ki no kigyō-hō* [Law of Enterprises in the Transition Period] (Tokyo 2011) 382, 383.

85 Tokyo District Court, 28 March 1990, Hanrei Jihō 1353, 119; Kobe District Court, 24 July 1990, Hanrei Jihō 1381, 81; Tokyo District Court, 20 April 1989, Hanrei Jihō 1337, 129.

86 For example, Japanese COGSA (Art. 13(1)), Montreal Convention (Art. 22), HGB (Art. 431).

87 Supreme Court, 5 November 1963, Minshū 17-11, 1510.

88 E.g., Art. 577 and 766 of the Commercial Code and Art. 3(1) of Japanese COGSA.

89 Art. 709, 715 of Civil Code and Art. 690 of Commercial Code (Liability of the ship owner with respect to the captain's and crews' fault).

Japanese COGSA allows the carrier to invoke the exemptions and limitations in the Act even against the claimants in tort, as long as they are the shipper, the consignee, or the holder of bills of lading at the same time.[90]

The further question is as follows: if the claimant in tort were a completely third party, would the same rule apply? In this context, the very famous Supreme Court case in Japan (*The Nippon Express Case*[91]) should be referred to. In this case, precious jewelry was lost during a low-cost home delivery service, but the shipper did not declare the price of the goods at the time of deposition. If the shipper claimed in tort, it would be rejected partly on the grounds that the contract term limits the amount due.[92] However, the claimant in that case was the consignee named on the waybill. The goods had not arrived at the place of destination, so the consignee did not obtain the contractual claim (Art. 583(1)). Therefore, the named consignee claimed against the carrier to compensate for the damage incurred as the cargo owner by subrogation. So the claimant should be the cargo owner itself in theory.

As a result, The Supreme Court rejected the main part of this claim on the basis of *bona fides* (Art. 1(2) of the Civil Code). It took into account the situation that the claimant, the named consignee, had approved in advance that the goods would be transported by the low-cost home delivery service, and had known that such a low-cost service would be unsuitable for precious goods like jewelry.

The scope of this decision may be ambiguous, because the case contains slightly special elements. But at least if there is the approval of the third party in question, it would be legitimate that the carrier could extend the contractual regime to him / her and the future Commercial Code would express this rule.

The working group is examining whether further solutions beyond "the approval rule" should be provided in the future Commercial Code, as is found in German legislation (Art. 434(2) of the HGB[93]).

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90 See also Art. 29 of the Montreal Convention.

91 Supreme Court, 30 April 1998, Hanrei Jihō 1646, 162.

92 In this case, the contract term was the company's standard form for the home delivery service modeled by the General Standard Form for Express Home Delivery Services, which limited the amount due to 300,000 yen, while the damage was approximately 4,000,000 yen.

93 According to Art. 434(2) of the HGB, even if the third-party cargo owner did not approve the transportation of the goods, if the carrier was convinced that the shipper should have obtained authority from the cargo owner to send the goods, the carrier may invoke the contract terms against the third party. In Japan, it might be difficult to adopt the completely same rule regarding transport activities, because we don't have a similar institution in our whole legal system. Still, such a consideration deserves discussion in the future reform debate.

IV. Conclusion

The direction for the reform of current transport law has been decided already. However, the agenda for this reform is still being investigated through the work of the several study groups. This article is therefore inevitably destined to be an interim report on the reform of transport law in Japan.

It has always been indicated that commercial contract law legislation brings with it considerable difficulty.[94] There are two reasons. First, since law provisions are almost dispositive law in this field and the parties can freely arrange their own contract conditions regardless of the law, the need to revise the current situation barely occurs. Second, the revised rules, especially where they are compulsory, are in danger of disturbing the sane development of industry.

Certainly, the future work for the reform of transport law will be awfully hard. But fortunately, no one objects to the reform itself; the surrounding circumstances of the Commercial Code duly endorse the reform. The next stage will be to elaborate a systematic and modernized draft of transport law. This must be done by full cooperation among scholars and practitioners who specialize in transport law.

Summary

This article shows the current situation of the reform of transport law in Japan, including an explanation of current transport law to be revised and the introduction of some working groups for the reform.

It was officially decided to revise current transport law in 2013, even though the official work has not started. Actually, this direction was not endorsed because of a serious need in the field of transport activities; instead, it was motivated by the surrounding situation of the Commercial Code, which contains transport law, such as the ineffectiveness of the Code and de-codification. Nevertheless, it is a good opportunity to think about "a systematic and modernized transport law" without adhering to any specific interests.

Zusammenfassung

Der Beitrag gibt einen Überblick über den aktuellen Stand der Reform des Transportrechts in Japan, wobei unter anderem die revisionsbedürftigen Teile des

94 J. Matsumoto, *Shōhō kaisei yōkō kaisetsu (1)* [Explanation of Outline of the Revision of the Commercial Code], in: Hōgaku Kyōkai Zasshi 49-9 (1931) 107 *et seq*. In fact, the former project was frustrated (*supra* note 4).

Transportrechts analysiert und die Arbeit verschiedener mit der Reform befasster Arbeitsgruppen vorgestellt werden.

Die offizielle Entscheidung, das Transportrecht zu reformieren, fiel im Jahr 2013; allerdings haben die offiziellen Reformarbeiten bislang noch nicht begonnen. Anlass für die Entscheidung war weniger ein sich unmittelbar aus dem Transportgeschäft ergebender Reformbedarf als vielmehr die aktuelle regulatorische Situation: das Handelsgesetz, welches eigentlich das Transportrecht regelt, spielt in der Praxis im Zuge der sogenannten „De-Kodifikation" eine zunehmend geringere und ineffiziente Rolle. Insgesamt ist dies eine gute Gelegenheit, um über die Schaffung eines „systematischen und modernisierten Transportrechts" nachzudenken.

(Übersetzung durch die Redaktion)