

How the Japanese laws are viewed externally

- Specified Field Research: “Transparency of Japanese Law Project”

Summary of the first symposium

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Feature Articles: Promoting Translation of Laws

I. Introduction

The six-year “Transparency of Japanese Law Project (“Transparency Project”)” was initiated in 2004 with the aim to serve the development of infrastructure for making Japanese laws widely available global users. In particular, the project selected several areas of the law related to international transactions, and sought organic clarification of the relevant areas of law in perspective, by uploading English translation of basic case laws combined with original outlines, and providing additional articles by the project members and related material laws in English, on the project webpage¹. This article presents a summary of the “Specified Field Research: “Transparency of Japanese Law Project,” First Symposium: How the Japanese Laws are Viewed Externally,” held in Tokyo on March 3, 2006, as part of the Transparency Project.

At the symposium, various opinions were stated on a wide range of topics such as technical issues concerning translation skills, legal publication, and the role of the court including how the decisions should be written, legislative procedures, jurisdiction of government agencies, legal education, and the law school system. It was a wonderful symposium which made the participants forget time by literally non-stop discussions (with excellent humor!) from 9 a.m. to 6 p.m. You may wonder how it could have been so good or interesting; for those of you who could not attend the symposium, hopefully you would get a glimpse of the event through this article. Although this article merely presents something similar to a tedious music review by a musical critic who cannot

¹ <http://www.tomeika.jur.kyushu-u.ac.jp/>, and “Overseas Transmission of Information Concerning Japanese Laws - Launch of a Comprehensive Japanese Law Portal for Global Users,” Toshiyuki Kono, *Jurist* 1284, (2005) 37. See the webpage above for the members of the project.

communicate the excitement of a magnificent concert. This article is a summary of various opinions and issues presented through the symposium at the author's responsibility. Although I have sought prior review from all the panelists, but the author takes full responsibility for its content.

The panelists and their presentation topic, and the moderator for the symposium were as follows:

Ms. Hiroko Namura (Attorney, Namura Law Office), "Japanese Laws in International Civil Actions";

Mr. Mark Levin (Associate Professor of Law, University of Hawaii Law School) "A Foreign Scholar's view on the Japanese Law";

Mr. Yasushi Kinumaki (Takushoku University Faculty of Commerce Department of International Business, Chairman of the Academy for International Business Transactions) "Japanese Corporations and Laws in Overseas Business";

Mr. Robert F. Grondine (Senior Partner, White & Case LLP, Governor and former Chairman of the American Chamber of Commerce in Japan) "Foreign Corporations' views on the Japanese Law";

Mr. Hiroshi Yamada (Executive Director, Office of Legal Affairs, Morgan Stanley Japan Limited) "Japanese Laws in International Finance";

Mr. Yoshimasa Furuta (Partner, Anderson Mori & Tomotsune, Professor of Law, Seikei University School of Law) "Japanese Laws in International Arbitration";

Mr. Yoshihisa Hayakawa (Professor of Law, Rikkyo University Faculty of Law, Moderator)

II. Translation Techniques and System Conversion

Ever since Japan inherited the legal codes from the Chinese Tang dynasty in Nara era, legal translation in Japan involved translation into Japanese. In this situation, even coined words could be expected to be eventually adopted by the society by leaving it to

the efforts of the readers. On the other hand, the “transparency” project is an external activity, and such optimism is not acceptable. Merely translating words would not necessarily convey the meanings², and cooperation by native speakers of both languages is indispensable. Standard translation dictionary is important but not sufficient by itself, and we must pay attention to translation of idiomatic expressions³ and legalese⁴ in court decisions, and how to distinguish the nuance of a same word in different contexts⁵. We must also be careful that there are frequent cases where the English translation is correct grammatically, but does not make sense because the translator did not have sufficient understanding of the legal concepts⁶. A problem that the increase of number of legal professionals educated in the United States is resulting in lack of

² Mr. Levin noted that he misread the word “delict” as “delicious,” and that it was impossible to associate “tort” with this word.

³ Mr. Levin paraphrased a section in a court decision that would have been “the brine that the decision was ‘pickled in’” in literal translation to “the circumstances which were brewing at the time of the decision.”

⁴ To refer to an example given by Mr. Levin, he believes that the phrase “distinct nature” that appear in Article 4, Paragraph 1 of the Administrative Procedure Act (“The provisions of this Act shall not apply to Dispositions (limited to where the organs and entities referenced infra. that are made the subject parties of the applicable Dispositions are made so with regard to their distinct status as governmental entities) and Administrative Guidance rendered to state organs or to local public entities or its organs, nor shall they apply to Notifications made by the said organs or entities (limited to where the obligation to make the Notification of the involved organs and entities arises with regard to their distinct status as governmental entities).) would not be understood without adding the following translation note: “The ‘distinct nature’ of an entity as a governmental body describes those activities that can only be undertaken by governmental bodies. Thus, for example, operation of public transit systems, which may also be undertaken by private entities, is not within the ‘distinct nature.’ In contrast, the issuance of public finance bonds falls within the description.” However, the authority that requested Mr. Levin for translation deleted this note when they made it public.

⁵ Mr. Levin asserts that the word “*motomeru*” used in the Administrative Procedure Act should be distinguished as “request,” “demand,” “solicit,” “seek,” or “require” depending on the context, “*mitomeru*” as “perceive,” “recognize” or “authorize,” and “*teishutsusuru*” as “present” or “submit.”

⁶ A U.S. law firm could not understand the translation of Japanese Civil Procedure Law and commentary prepared by a Japanese law firm, and sought explanation from Mr. Levin.

awareness that the Japanese laws are based on civil law concepts but the terminologies are adopted from the common law was also pointed out⁷. Also, completed translations should not be fixated; rather, means for upgrading should be thought, including consideration of use of Wikipedia and other available IT solutions.

Historically, translation meant verbatim translation in Japanese legal studies. However, the goal of the “transparency” project is a virtual system conversion from one legal system to another, and this should be clearly recognized. The reason why translation was given categorically low value in terms of assessment of research performance in the past may be because of the general lack of understanding of the nature of and the efforts required for translation as system conversions; and the number of translation that should have received high recognition may have remained low also due to the lack of awareness on the researchers’ part. It is essential to foster translators who are capable to perform the system conversion.

III. The Role of Laws and Regulations

Japanese legal system operates under statutory laws, and the project for translation of Japanese laws and regulations into foreign languages promoted by the Cabinet Secretariat (<http://www.cas.go.jp/jp/seisaku/hourei/data1.html>) is praised as a valuable project. However, in many cases, the meanings of Japanese laws and regulations are not clear on its face. It is not uncommon for basic principles and rules applicable to such law to be omitted as self-explanatory, and many lay terminologies are included in the laws and regulations without clear definition of scope of applicability⁸. It is the role of court decisions to clarify these matters; however, court decisions themselves have problems. I shall provide detailed discussion on this issue in the following section⁹.

⁷ Mr. Grondine gave “abuse of powers” and “reservation” as examples.

⁸ For example, “defect,” “ordinarily” and “safety” in Article 2 of the Product liability Act.

⁹ To note on complimentary publications, it is not possible to grasp the structure of a law in its entirety without reference to court decisions in other countries that utilize statutory law such as France and Germany, and commentaries support this function. For example, in Germany, various commentaries large and small for broad range of laws are being revised annually or once every two-to-three years, and published as a virtual bird’s-eye-view presentation of the most recent documents and information on court decisions. In Japan, the representative Japanese commentary “Civil Code Commentary: New Edition” (Yuhikaku) is yet to be completed, presenting a fatal void. This

In addition to the technicalities of the legal drafting, the lack of consistency between laws and regulations caused by the fact that different government authorities exercise jurisdiction over multiple laws. For example, let us turn to take over bids and exchange of shares. Exchange of shares under the Company Law is deemed an organizational law issue which may be executed pursuant a resolution of the shareholders' meeting, but foreign companies cannot utilize this method, and must make a take over bid. Then the issue is not ruled by the Company Law but by the Securities Exchange Law, governed by a different authority, requiring various efforts for disclosure. The issue is whether such discrepancy in treatment is rational for the globalized capital market and investors.

Above stated distinction of organizational laws and transactional laws are frequently used as the standard for categorization of applicable laws. In so doing, transactional laws are deemed permissive and organizational laws are deemed obligatory; however, it is unclear to what extent the provisions of the Company Law are obligatory. In particular, the text of the Company Law does not clarify whether or not the articles of incorporation may set forth items that differ from the provisions of the Company Law. Unless these issues are clarified beforehand, it would be impractical to use the Japanese law as the governing law, as there would be too many risks involved.

IV. The Role of Court Decisions

The competence of Japanese courts is praised highly in and out of Japan¹⁰. However, especially with international matters, there are many issues that the courts should improve upon. Firstly, apart from courts in metropolitan areas, the judges generally seem to be "hesitant" against international matters¹¹. This is not necessarily a

situation is caused by various reasons such as the management policy of publishers and over-burdening of researchers who should be writing such commentaries (Germany allows for hiring of an assistant for preparation of commentaries, however, researchers must even make photocopies of materials themselves in Japan. Increased burden of providing education in law schools is another issue.), and it may be impossible to resolve this problem unless it is adopted as a national project with large-scale funding.

¹⁰ For example, the prompt and appropriate decisions by the Japanese courts concerning the acquisition of Nippon Broadcasting System, Inc., by livedoor Co., Ltd., and the battle between Mitsubishi Tokyo Financial Group, Inc., and The Sumitomo Trust & Banking Co., Ltd., over UFJ Trust and Banking Corporation should be highly appreciated.

¹¹ Fore example, even attaching translation to approximately 20 page contract reportedly draws

character limited to the courts, and perhaps a discussion involving the entire Japanese legal community is required.

Secondly, there may be a tendency by the Japanese courts to draw a conclusion solely based on findings of facts, by over-emphasizing processing of individual incidents. That is to say, although most of the Japanese laws are abstract as stated above, and requires objectification and clarification by the courts, the courts may have a tendency to avoid establishing rules necessary for social control. There is a counter-argument that the trial courts should focus on fact finding, and establishment of legal interpretation is a duty of the Supreme Court¹². In addition, although individual judges should have done extensive research on precedents and legal theories, their decisions routinely includes only a few references to the Supreme Court decisions¹³. In such an environment, even if there is a court decision, it would not clarify the thought process and legal interpretation adopted by the judges to reach their conclusion, and the predictability of court decisions would be lowered. And ultimately, this would reduce the appeal of Japan as the venue by half.

Furthermore, although the release of court decision information to the public has been expedited significantly by the Supreme Court website, the website has numerous problems from user-friendliness perspective. The time required to public release of legal interpretation by lower courts is too long by far. The number of decisions published on legal journals is limited to begin with, and for them to routinely take approximately six months for publication from the time of the decision is a matter to consider improvement on.

V. Japan as a Venue for Legal Actions and Mediations

hesitant reaction.

¹² However, there is another argument that after the implementation of the discretionary appeals system (Article 318, Paragraph 1 of the Civil Procedure Law), the number of civil cases that would reach the Supreme Court would be extremely limited, so that a comparison with the United States, where the courts of appeal are not considered trial courts, are inappropriate. If the trial court reaches a decision based on findings of the fact, and the appeals court could conclude to dismiss after one hearing, with extremely limited chance for final appeal, how can rules be established through case law in Japan?

¹³ It was pointed out that the judges may be reluctant to have their interpretations dismissed by the courts of appeal. Another question was raised about the relocation of judges.

The basic rule in business is to make maximum efforts to avoid a law suit. Whether or not Japan is chosen as the venue in case a law suit is unavoidable is closely related to whether or not the judicial services of Japan is being used, and consequently, whether or not Japanese laws are sufficiently transparent, or requires further transparency. However, Japan is generally avoided as a venue. There are multiple possible reasons for this from the legal procedure perspective¹⁴ and the first and foremost is the lack of the discovery system. In Japan, although elaborate theoretical rationale is necessary at the time of submission of a petition, one must litigate solely based on available evidence, as the lack of the discovery procedure prohibits access to the opponent's evidence. This makes it very difficult for clients to decide litigation. Although systems such as the interrogatories, order to submit evidence and protective order exist in Japan, they are rarely used in practice. There may be many reasons for this, such as the lack of sanctions such as the contempt of court in the U.S.¹⁵, and the attorneys' reluctance to disclose their evidence to the opponents. There is also strong criticism about the excessive time required for service of process (service of process to the U.S. requires two months!!).

On the litigation process, Japanese courts are highly praised for the management of timing and its results (conclude a trial court decision within two years), but many complain about the simultaneous application of provisional disposition while the case is pending. In addition, Japanese hearings tend to be extremely document-oriented, making it generally impossible to foresee the convictions of the court during while the case is pending. A system that would disclose this is desirable.

Turning to Japan as a mediation venue, while the Japan Commercial Arbitration

¹⁴ With regards to international jurisdiction of Japanese courts, "specific circumstances" theory has been widely accepted since the Supreme Court's Third Petty Bench decision on November 11, 1997 (51 Minshu 10, 4055), thus it is only a matter of application of this framework; as the U.S. courts also apply a moderate decision framework (due process, minimum relevancy), it is not difficult to compare the two. A comment was made that the exercise of jurisdiction by the Japanese courts may be rather too modest. On the other hand, the plaintiffs in particular choose U.S., as the venue because of the discovery system, penal damages and the jury system. The lack of stamp duty for petition documents in the U.S. was also pointed out.

¹⁵ A question was raised as to whether the judges who are nurtured through an isolated training system could be expected to apply the theory of contempt of court even if it is introduced to Japan. Another point was made that attaching criminal sanctions to the protection order for the Patent Act made it less popular. On the other hand, a sanction that obligates payment of the opponent's legal fees is worth considering.

Association (JCAA) accepts ten to twenty cases annually, the Korean Commercial Arbitration Board (KCAB) accepts over thirty, and the Singapore International Arbitration Centre (SIAC) accepts forty to fifty, indicating that Japan is clearly lagging behind. Why is Japan not popular as a venue for mediation? First of all, an extremely negative article written in the 1980s on the Japanese mediation practices, such as the mediation rules and the qualities of mediators (that the Japanese mediation is biased towards Japan and not neutral), and its effects are still present. Japan Commercial Arbitration Association has amended its rules to make it world-class, foreigners are allowed to act as mediators since 1995, and with the amendment of the Mediation Law, the issue has been resolved for the most part from the infrastructure perspective¹⁶. The bad publicity has been left untouched regardless of these improvements, so an aggressive campaign to negate this is necessary. In addition, there is room for further improvement concerning the mediators. Firstly, Article 72 of Practicing Attorney Law, “Prohibition of Unauthorized Practice,” is not clear on its face, as to whether receipt of a compensation for mediation by a person who is not an attorney would violate this provision. This should be clarified by a legislative exemption clause. Also, practical issues such as the small number of attorneys (perhaps less than 100 in Tokyo), interpreters, and stenographers who are capable of handling mediation in English language; and the small number of foreign residents other than nationals of the mediating parties who has legal education and can be third party mediator candidate (perhaps less than 200 in Tokyo), have become obstacles to make Japan lag behind Korea and Singapore¹⁷. It is essential to train mediators. On the other hand, Japanese corporations who are parties to the mediation perceive mediations as equivalent to conciliation, and not as a system that results in legally binding decisions. It is not sufficiently recognized that international commercial mediation involves “legal” mediation, and that it should be distinguished from domestic mediations (which are similar to conciliations). Further, Japanese corporations seem to have tendencies not to make efforts to designate Japan as the venue for mediation in their contracts. This point also needs to be brought to attention.

¹⁶ The quality of hotels in Tokyo and the access to the airport were also problematic, but these have been improved in the recent years.

¹⁷ Singapore did not have a good reputation as a mediation venue in 1980s, but has become a popular venue after the government led a significant improvement.

VI. Are Japanese Laws being used?

To what extent are the Japanese Laws being used by the global users? The scope of “global users” in this context differs by area.

For trading transactions and direct investments, large corporations conduct business thorough subsidiaries; therefore, disputes arise between the overseas subsidiary and the local corporations, and main issue in such cases would be the laws of the relevant country. However, in case of small- to medium-sized companies without subsidiaries, whether or not the Japanese laws are user-friendly becomes a direct concern. In addition, international transactions involving trades except for high-tech products are usually on-going, and troubles tend to be resolved through negotiation in such cases. The governing law becomes an issue usually for sub-contracts, and here, the necessity to enhance understanding of Japanese laws become prominent. Many manufactures seem to adopt the laws of the State of New York or California as governing laws, but particularly for mediations, there are numerous cases where the UNIDROIT Principles of International Commercial Contracts is adopted instead of a domestic law of a nation. The use of U.K. laws are also increasing as a result of aggressive promotion by the British government, and currently two-thirds of business in the Asian region, and over 80% of securitization projects originated in Japan for overseas investors are governed by British laws¹⁸. Furthermore, the fact that the Japanese courts tend to apply good faith principle to contractual issues between corporations, or that they make assumptions of the intents of the parties that differ from the wording of the contract, makes it impossible to predict their conclusion even when the parties have executed a contract. This would promote the trend to choose New York State law or British law as the governing law instead of Japanese laws, and choose such area as the venue. Cases where the circumstance of one party requires specific consideration such as protection of consumers, and where agreements should be binding such as transactions between corporations should be treated differently when making interpretations of contracts.

If you turn to financial transactions, cross-boarder securities transactions such as international securities offerings are not the only issue; we must bear in mind that the domestic financial market itself has become globalized (e.g., presence of foreign

¹⁸ One may say that the U.K. achieved the current international presence because it has good control on finance and laws.

shareholders and foreign institutional investors). I would also like to remind the readers that the foreign laws are being chosen in favor of Japanese laws not only because of the limitations in the legal structure, but also due to practical reasons.

For example, the legal environment surrounding securitization is interesting. Significant legislation was made in late 1990s, leading to the quick expansion the securitization market in Japan based on the establishment of the legal infrastructure. However, special purpose companies (“SPCs”) established in the Cayman Islands and charitable trusts continue to play important roles. Originators patchwork Cayman laws into the structure, upon transferring the assets to the SPC. They do not complete the structure solely based on Japanese laws because on the issue of precluding the effect of the originator’s bankruptcy to the transfer of assets to the SPC, using the package of SPCs and charitable trusts provided by the Cayman law offers more practical experience, and is easier in terms of negotiation with attorneys and rating agencies¹⁹²⁰.

On the other hand, there are certain cases where the Japanese laws are designed to become obstructive to expansion of transaction opportunities (knowingly or unwittingly). An example of this is the Article 23 of the *Laws Concerning the General Rule of Application of Laws* (draft). This applies the doctrine of applicable laws of the assigned obligation as the applicable laws on the requirement to assert against third parties concerning assignment of obligations. An originator (the creditor) usually assigns the credit to an SPC in order to securitize an obligation. If the debtor is located abroad, to clarify the issue of whether or not the assignment to the SPC can assert against the debtors if the SPC seeks to enforce its obligation, or can the assignment to the SPC assert against the bankruptcy procedures in case of the originator’s bankruptcy, would require the determination of governing laws pursuant to the international private laws of the relevant jurisdictions. Where Japan was chosen as the forum, the originator was only required to satisfy the requirements to assert against third parties prescribed in

¹⁹ Along the same line of thought, there is an example where a soft-mandatory featured convertible bond (a product which provides the issuer with an option to redeem with a combination of shares and cash at maturity instead of solely with cash if the share price is below the conversion price at maturity) was issued by utilizing Cayman law.

²⁰ It is worth noting that recently, there are structures being introduced which allows completion within the Japanese law framework by utilizing limited liability intermediate corporation instead of a Cayman charitable trust.

the Japanese Laws if the law of the forum of habitual residence of the creditor was adopted, but if the doctrine of applicable laws to the obligation adopted by the current amendment is applied, the originator will not be able to assert against third parties unless the requirements under applicable laws for all of the obligations are satisfied. This could become a large obstacle for securitization of overseas obligations held by Japanese corporations.

The registration of assignment of obligations under the Special Rules Law for Assignment of Obligations require including the postal code of the debtor, however, if the debtor resides abroad, this requirement cannot be satisfied, thus this law is deemed not applicable to foreign obligations²¹. This is an example of limitation of a law with possibility for global use by operation.

Japanese corporation are currently issuing Euro Bonds with British laws as the governing law, due to the influence of an interpretation that foreign bonds issued by Japanese corporations would require establishment of a bond management company if Japanese law was selected as the governing law of the bond. Japan is virtually the only industrialized country where its corporations do not adopt the laws of the home country to issue Euro bonds, and the above interpretation is making Japanese law unusable²².

In addition, New York State law is usually selected as the governing law instead of Japanese law for underwriting agreements for global offerings where Japanese corporations offer securities internationally as well as domestically, because the overseas underwriters are taking the risks related to the offering. In other words, by selecting New York State law, the predictability concerning the overseas underwriter related to the provisions of the underwriting agreement is better.

VII. Personnel Development

²¹ Nishimura & Partners, “The Complete Financial Laws Update” (Shoji Houmu, 2006) page 439. Justice Ministry’s Assignment of Obligations Registration Application Data Format (updated April 1, 2006) (<http://www.moj.go.jp/MINJI/minji13-2.pdf>) page 11 indicates that an eight figure postal code with one-byte numbers and one-byte symbol (-) as requisite data.

²² Keiji Matsumoto, “Cross-boarder securities transactions and corporate finance-its practice and stagehands behind the capital market” (KINZAI Institute for Financial Affairs, Inc., 2006) page 68.

Perhaps the importance of personnel development for judges, attorneys, mediators, etc., who can respond to internationalization has been clarified from the above. By the commencement of the law school system, the legal population is certain to increase, and from the perspective of personnel development to foster the “transparency” of Japanese law in today’s globalized Japan, it is a natural requirement that the increased legal population to possess international sense. However, the current law school system is not sufficient to respond to such expectation. The cause is the system design for the bar examination, which pre-establishes the number of successful applicants. As a result, the bar exam became a competitive examination, and those regardless of their undergraduate major, be it law or foreign language, the law students must concentrate on mainly studying subjects related to the examination during the three year course. This has made the ideal of producing personnel who can comprehend international agreements and handle international negotiation upon graduation from a law school virtually impossible to achieve. This is not a problem caused by the curriculum of the law schools, or the quality of education, or the individual students; it is a result of pre-determination of pass rates for the new exam, a consideration completely unrelated to the essence of education. If the new bar exam becomes a qualifying examination instead of competitive examination, a competition to increase added value would naturally occur among law schools and students, leading to development of personnel who are capable of internationalization. Even though a project to translate laws and regulations to foreign language has been launched with national funding, the structure for development of personnel who can use its fruit is turning its back on the project²³.

VIII. Beyond the “Transparency” Project

Being “incomprehensible” is a country-risk, and how to increase the transparency and predictability is our greatest concern. It is a problem if the Japanese market (which is already globalized) is incomprehensible, and from seeing how foreign corporations successfully reorganize bankrupt Japanese corporations in today’s globalized society, it may serve our national interest to presume participation of foreign players, and to present clear rules comprehensibly to such foreign players. In such an environment, the Japanese laws will be constantly compared to foreign laws, and if the foreign players

²³ Kyushu University, where the author is a member of the faculty, offers LL.M and LL.D courses in English (please see the programs’ website [<http://www.law.kyushu-u.ac.jp/programs/english/>], with parts of it open to students of the law school, but the number of Japanese observers are very limited.

see something puzzling, they may voice their concerns²⁴. Japanese law may certainly possess unique values, but the Japanese legal industry (including legal professionals, regulators and researchers) has the obligation to support and be held accountable for such uniqueness. This requires multiple resolution at various levels, that cannot be concluded by mere “translation.”

²⁴ It is difficult to understand why the provision regarding pseudo-foreign corporations which presumed German and British trading companies that had already started business in Yokohama prior to the enactment of the Commercial Code in Japan should remain as a general clause (Article 821 of the Company Act). If there is a need to restrict cases where a Japanese person establishes a foreign company for the purpose of evading Japanese laws, establishing a special law particularly for such purpose should suffice.