WASEDA University Global COE Program
Creating a New Corporate Legal Framework for a Mature Civil Society
- Restructuring Corporate, Financial, and Capital Market Laws and Asia's Challenges to the World -
NEWSLETTER
Waseda Institute for Corporation Law and Society
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Message from Leader Tatsuo Uemura

Financial Crisis and the Purpose of Financial Instruments and Exchange Law

In the recent financial crisis, the functional failure of capital markets has harmed the sound development of national economy. It clearly revealed that many people who have never ever purchased stocks or bonds before suffer very badly in this financial crisis. Securitization is a financial method highlighting the comprehensive power of law. We expected the United States had been ahead of us in this field, however, look at the state now. Functional failure of rating also means the quality of investment choices had not been fairly presented in the rating system.

In the past, junk bond was used for leveraged buyout, LBO, of companies in debt. Subprime loan this time is also a junk securitization product in a real sense. Sub-prime gives us an impression it comes next to prime. However, it is not close to prime, but a junk in fact. It is obvious that the sub-prime problem was derived as an extension of American style environment where the junk bond was born.

Even if we understate the impact of this financial crisis, the victims of malfunctioned capital markets are obviously all the people in the nation. The crisis has resulted in business bankruptcies, crowds of jobless people, social anxiety, and the increase of crimes. If it were in 1930s, the problem would have caused a war by shifting decrease in asset value to colonial occupation of overseas. Coincidentally, Article 1 of the new Financial Instruments and Exchange Act advocates fulfilling capital market functions and securing fair price formation. If the Financial Instruments and Exchange Act does not function well, victims are not only investors who are the other parties to the contracts in securities exchanges, but also all the people in the nation. Ahead of the rest of the world, the Article showed the investors should be protected as one of citizens, first of all. We should be proud of that. The Article 1 of the Act states that it is clarifying such capital market functions and "by doing so", it bring in investor protection and a sound development of national economy. In short, it concludes the protection of the other parties to the contract such as investor protection is merely a result of fulfillment of policies to make capital markets function properly.

Therefore, it can only be described as strange that the authoritative work of Financial Instruments and Exchange Law ("Guide to Financial Instruments and Exchange Act", Ichiro Kawamoto and Yasunami Ohtake, 2008/12, Yuhikaku Publishing) determined the only purpose of the Act is to protect investors (p.3), ignoring such major changes in establishing the purposes of the Act. Before anyone else, Professor Ichiro Kawamoto recognized my opinion stating the purpose of the Securities Exchange Act was to secure the capital market functions as well as fair price formation. He agreed to accept the criticism that traditional argument of investor protection had serious flaw and to reconsider what the traditional investor protection was, showing remorse fully. Although he used a phrase of investor protection, he advocated it was "investor protection through the establishment of securities market" ("The Purpose of Securities Act", Hougaku-Kyoshitsu Vol.151, pp.64-66).

I wonder the book was published regardless of Professor Kawamoto's such intention. Various systems in the Financial Instruments and Exchange Act need to be interpreted in line with the conditions about purposes. Times have changed and the conditions about purposes have apparently changed. Nevertheless, if people are made to believe the book which seems to stick to old mind-set is authoritative, the victims here would be the whole nation.

Tatsuo Uemura, GCOE Leader

Introducing Research Projects (1)

In our Institute, many research groups independently promote activities sharing a common awareness of the issues under the keyword as “corporation, market, and civil society”. This newsletter features the project overview of each research project group in series.

Basic Juristic Concepts and Theoretical Studies of Civil Society Group

A1-1. Critiques of Basic Juristic Concepts

To analyze the structure of Japanese corporate society, it is necessary to clarify what changes occurred to the modern law categories originated from Europe when they were interpreted and adopted in Japanese modern society. This group’s foremost task is to position the concepts right by tracing back ideological backgrounds where fundamental legal concepts were originally created. In addition, in the subject of “creating new legal system”, it is indispensable to think about the meaning and limitation of the basic concept of modern laws as fiction since that the concepts were built as fiction in a manner. This joint research aims at finding possibilities of new jurisprudence as well as constructing new collaborative relationship between positive and basic jurisprudence. In short, it is to provide an explanation of various concepts in the major field of positive jurisprudence, an explanation which is “explication =Auslegung” under two conditions as Savigny specified. First of all, it is to imagine as vividly as possible what the ideology exists behind each legal concept and article, and what spiritual activities generated that ideology. Second, it is to position those legal concepts, articles, ideologies and spiritual activities into the whole picture of law that gives light on each issue.

Project Leader: Professor Yoshiki Kurumizawa

A1-2. Economic Law and International Economic Law

This group examines various issues in economic law and international economic law, which occur with the progress of economic globalization. International cartel and international business combination have been occurring with economic globalization, having a serious impact on Japanese market. The issues include extraterritorial application of the Anti-monopoly Law and international enforcement of competitive laws. One of important subjects will be to examine whether EPA and FTA have the roles to establish collaborative relationships towards peaceful coexistence of East Asian nations other than the perspective of economic integration.

Project Leaders: Takao Suami, Kazuhiro Tsuchida

A1-3. Theoretical Studies of Civil Society, Juridical Person and Corporation

The “structural reform” in Japanese society from the 1990’s mainly aimed at so-called company-oriented society or corporate society aspects in the structure of Japanese society. However it is questionable whether the structural reform has truly helped Japanese society to shift from such company-oriented society to a civil society of independent citizens. The issues are how to examine the current changes in Japanese society as a corporate society as well as to find out what roles can be taken by laws and legal theories in order to establish a mature civil society. This project group approaches these issues from a basic juristic point of view. In particular, (1) organize the issues raised by “civil society theory” flourishing not only in Japan but also in the world and consider the roles and limitation of “civil jurisprudence”, which is a law study version of civil society theory, (2) figure out changes in Japanese corporate society during these periods, especially compared with changes of corporations in Germany, working closely with corporate law and labor law research groups, (3) pursue the state of association in a mature civil society by analyzing voluntary citizen associations or local associations which can be considered as one of bearers of civil society. Revaluation would be done for traditional associations and their norm structure which “the modern age” and laws in the modern age have treated negatively. (4) Developing countries or countries in systemic transformation also confront the same issue of establishing a mature civil society just like Japan. Although Japan has helped these countries in developing legal systems, it remains questionable whether it has really contributed to civil-socialization of those countries. Through the discussions on the issues including the relations between universality of laws on the one hand and historical social context in countries at the other hand, positions of laws, and the possibility to transplant laws, our group aims at reconsidering whether “laws” have the power in terms of social composition in civil-socialization of Japanese society.

With those above-mentioned activities, our purpose is to give a concrete image to the power of social change in fictional categories such as “civil society” or “civil laws”.

Project Leaders: Hideo Sasakura, Michiatsu Kaino

A1-4. Studies of Contemporary Issues of Comparative Law in Books and in Practices

The expansion of the interface between comparative legal research and Roman law research in Europe seems to have developed closer relations between comparative laws and substantial laws=interpretive jurisprudence. In considering the different structure of the reception of Roman law among each country, the relations between the development of European laws and "identity" of laws in each country have been becoming an important issue theoretically and practically. This research field will become more distinctive when it covers the relations with EU focusing on Eastern Europe at the same time. On the other hand, as clearly depicted in the international symposium "The Direction of Pandekten" held as the 50th anniversary of Waseda University Institute of Comparative Law, it was revealed that the issues including the movement of lawmaking in East Asia centered on Japan have shaped close linkage with Western Europe which is "advanced" in terms of comparative law. At the level of lawmaking and interpretation, the viewpoint from the comparison of legal structure as well as history requires global joint research more than ever before. The basic concept of our Global COE is "new corporate legal systems for mature civil society". It is indispensable to reach "ideal type" in the relations of "market", "civil society", and "corporation", which are reaffirmed as major issues in the above-stated movements. We will expand the theoretical and practical issues in comparative jurisprudence, which is originated from the West, to Asia for verification and conduct comprehensive research on those issues with help of internal and external researchers. The intent and purpose of this project is to build the axis of the Global COE as well as to show the significance of existence of Institute of Comparative Law by conducting such research activities.

Project Leader: Kaino Michiatsu

UPDATE

Beijing Financial Conference

"Respond to Financial Crisis: Creating a New Order for Asian Financial Market"

On November 16 of 2008, the Global COE, Waseda Institute of Corporation Law and Society held the Beijing Financial Conference (International Academic Discussion) in China, co-hosted with Institute of Japanese Studies, Chinese Academy of Social Sciences (CASS), National Development and Reform Commission of China, and Capital Markets Association for Asia. It was held ahead of schedule due to the strong request from the CASS asking Japan to share experience and wisdom with researchers and policy-makers in China in order for the reform of financial capital market system in Asia and China after the financial crisis originated from the U.S.

Starting with the greetings by Director Li Wei, Institute of Japanese Studies, CASS and Director Tatsuo Uemura, Waseda Institute for Corporation Law and Society, the conference constituted presentations and discussions by market experts of Japan and China.

In addition to the Waseda delegation, the Japanese attendees participated including several ministers and counselors from the Japanese Embassy in China, the chief representative of Tokyo Stock Exchange Beijing Office, the chief representative of Japan Bank for International Cooperation Beijing Office, the representative of Bank of Japan Beijing Office, and the head of Beijing Office of the University of Tokyo.

For mid-and-long term development of financial capital market in Asia and China, all the attendees strongly agreed the importance of establishing infrastructure for financial capital markets. The discussions included especially the establishment of a safety net system like a deposit insurance system, the necessity of financial ombudsman system to protect individual investors as well as to avoid systemic risks in the financial field, and the necessity of cross-border capital markets for professional users in Asia.

After the conference, the CASS reported the result of the conference to the Communist Party of China. According to the CASS in mid of December, China proclaimed a positive opinion about establishing Asian bond market at a tripartite summit of China, Japan, and ROK which was held on December 13, 2008, in Japan. Reportedly, the Communist Party Central Committee attached importance to Japanese experts' opinion about establishing Chinese domestic

financial market (three issues: deposit insurance system, financial ombudsman, and common capital market in Asia). The CASS expressed gratitude again, stating that, thanks to Japanese experts, they could place their report on the desk of the highest organ before the Central Financial Work Commission and the tripartite summit. (Please refer to our web page for the list of the attendees of the conference)

Visit to the China Securities Regulatory Commission

On the following day of the Beijing Conference, the delegation visited the China Securities Regulatory Commission (the CSRC) in the financial district of Beijing. In a friendly atmosphere, a meeting was held about the future exchange based on the agreement of the CSRC and the GCOE. The CSRC showed gratitude to the GCOE for sincerely providing substantial assistance to development of law systems in China and appreciated Professor Uemura for his contribution to invite the leading academics and practitioners from Japan to provide advice to China. Emphasizing the research of regulatory laws as part of the respond to the global financial crisis, the CSRC is now translating laws of various countries. In the meeting, the CSRC asked the GCOE to work on translation of Japanese financial laws and to add authoritative comments. They agreed to start the translation of "Financial Instruments and Exchange Law" within this fiscal year and to continue further discussion for the future plans. Regarding researcher exchange, Professor Uemura pointed out potential risks that Chinese younger researchers might have when they only focus on the United States. The CSRC also expressed similar thoughts, saying they wanted younger researchers and government officials to learn more from Japan which had developed necessary law making after the collapse of huge economic bubble. As part of the exchange, they agreed to develop a program to send Chinese younger researchers to Japan in the future.

(Report by Shigehito Inukai and Chen Jingshan)

Financial ADR Will Be Legislated

In December 2008, the Financial Services Agency officially announced the policy that it would legislate for financial ADR. It is an important step for us to realize our proposal in the "NIRA Market Governance Report 2005" made by National Institute for Research Advancement (NIRA) and our Institute in 2005. It is an outcome of Japan Financial ADR/Ombudsman Study Group which established based on the proposal and has conducted research on financial ADR (Official: Professor Shigehito Inukai and Advisor: Professor Tatsuo Uemura, Waseda University) .

Symposium & Seminar

■ "**Critiques of Basic Juristic Concepts" Workshop(1)**
"Terre-capital- Commons-Wastelands" (2008/11/29)

The Group of "Critiques of Basic Juristic Concepts" aims at redefining basic juristic concepts (ownership, association, etc.) by historical and academic researching as well as from the view of comparative law. It also aims at deepening the meaning of corporate law systems from the side of basic jurisprudence. As a speaker for the first workshop, Professor emeritus Shigeaki Shiina of the University of Tokyo was invited, having British history as a theme in order to examine land ownership. Concerning the theory of "modern land ownership", Marx predicted that it could not be explained with the theory of land rent only and it was necessary to "handle land ownership systematically". Professor Shiina has keenly approached this matter, which Marx predicted but could not complete, by not only conducting historical analysis on aristocratic latifundism in the modern Britain but deepening "ideology of agronomics" ultimately referring to the relations between nature and humane as well as the association theory to conquer fixed division of labor. Participants examined issues such as the state of land ownership in England based on his lecture. Especially, what became a topic was the relation between agriculture and land ownership as well as the relation between enclosure and nature conservation groups. A new vision for commons was obtained such as the variety of commons concepts and what should be imagined as a main body of commons.

■Waseda/Berkley Joint Seminar "Corporate Crimes Investigation and Compliance in the U.S. after SOX"

(2008/12/13)

With Enron crash in 2001 as a start, Sarbanes-Oxley Act, SOX Act, was enacted in 2002 to strengthen corporate governance. The symposium invited an expert from the UC Berkley to have a presentation about what changes the SOX Act brought about in investigation of corporate crimes and the role of lawyers after in compliance as well as what issues could be suggested to Japan from the US after Sarbanes-Oxley. In addition, as commentator, a Japanese expert joined to examine what is suggested to Japan.

In the first part, Professor Charles Weisselberg, UC Berkley Law School made a presentation on "U.S. Department of Justice Policies and Corporate Criminal Investigations: Uncovering Wrongdoing in a Shifting Legal and Political Landscape". In addition to SOX, he explained about significant events at the U.S. Department of Justice such as the Holder, Thompson, and McNulty memoranda and reported on corporate criminal liability, criminal punishments and the SEC's authority. In the second part, Professor Tetsuya Ishii of Chiba University and Professor Toshiro Ueyanagi of Waseda University made comments based on the lecture by Professor Wisselberg, with the moderation by Kyoko Ishida, Research Associate of Waseda University Institute of Comparative Law. There are differences in proceedings, law systems and legal culture between the U.S., which has a plea-bargain system and Japan, which does not have such a system officially. Various issues were raised including the impact of such difference on corporate or individual punishment in corporate crimes as well as the differences and the future direction of both countries. Active discussions took place having questionnaires from the floor.

■Constitution and Economic Order" Workshop No.1

(2009/1/11)

After briefly describing the Global COE, Professor Tatsuo Uemura presented his report first. He pointed out the basic problem that "judicial person" was treated like a "human being" in Japan in large excess. He also stated the purpose of the Global COE research to make proposals to establish law systems for a mature civil society, having such awareness of the issues.

Next, Professor Yasuhiro Okudaira (Professor emeritus of the University of Tokyo and former director of Institute of Social Science, the University of Tokyo) made a report. Professor Okudaira, who will be 80 years old this year, is a living witness to the postwar constitutional jurisprudence. In his report, he pointed out various issues needed to be considered in examining the relations between constitution and economic order. Especially, he revealed that an important issue was left behind such as how we should control a nation's activity when a nation got more involved in the state of economy. Constitutional scholars at the forefront participated in the workshop from universities nationwide including the University of Tokyo and Hitotsubashi University. Active discussions took place with more than 25 scholars attending in this first workshop.

(Report made with support of Yoshiki Takeda)

■Symposium: Expansion of Poverty and Roles of Safety Net - Employment and Social Security

(2009/1/17)

As one of pillars in research, labor law and social law group (5-3. Labor/Civil Society and New Social Laws) focuses on the issues related to "poverty and gap-widening society", which has recently triggered serious social problems, as well as on social laws (labor law and social security law) which should respond to such issues. This symposium invited Professor Toshiaki Tachiki, Doshisha University, and Professor Masami Iwata, Japan Women's University, as presenters and Professor Kohei Komamura, Keio University and Professor Jyunichi Saito, Waseda University, and Professor Hiroya Nakakubo, Hitotsubashi University as commentators. Based on the presentations from the two traditional viewpoints such as the views from economics and social welfare, they discussed the recent "poverty and gap-widening society" issue from various views including juristic and political theories.

Professor Ishida Makoto and Professor Yoshimi Kikuchi of Waseda University, the leaders of the group, moderated the

discussions in the symposium. First, Professor Kikuchi explained the purpose of this symposium. Then, Professor Tachiki made a presentation from the viewpoint how the problems of poverty could be seen from the economic standpoint. He elaborated the history and the current condition in Japan regarding a conflict between market fundamentalism (neoclassical economics/neoliberalism) and Keynesian economics in the modern economics. Based on that, he presented the recent reevaluation of Keynesian which has been criticized and pointed out that establishing the welfare states based on Keynesian theory would be one measure taken by the economics in order to provide a solution to the problems of poverty in the future. Next, in his presentation, Professor Iwata explained how the problems of poverty should be taken on the premise of diversity in thinking of the problems and then, he pointed out the ideal political response to the problems of poverty and the issues in the current Japan. Especially, regarding the relations with labor, it was pointed out that non-regular laborers under unstable employment were dependent on employers for housing.

The commentators made comments respectively based on the presentations stated above. Professor Komamura stated from the view of economic analysis of social welfare and Professor Saito examined the ideological background at the root of social security and social welfare. Professor Nakakubo explained how labor jurisprudence and labor policy have tackled with the problems of poverty.

In addition to internal and external researchers mainly of labor law and social security law, many general people participated in the symposium. That showed the high interest in this issue among the public and made the symposium very enthusiastic and successful.

(Reported by Ryo Hosokawa)

(Photo: Houken Corp., “Weekly Social Security”)

■Open Seminar: Legal Origin, Company Law and Financial Development: New Evidence from Time Series Data (2009/1/15)

Co-hosted by Waseda Global COE and Waseda Institute for Advanced Study, an open seminar was held inviting Professor Simon Deakin of Cambridge University. In the seminar, there was a discussion about the impact which the changes of law systems gave to development of financial markets, human resource development, and company’s performance. International comparison was made to discuss similarities and differences. Professor Deakin, who is a leading scholar in this field, presented the qualitative and quantitative result of analysis based on the data of the large-scaled project about law systems of various countries. The project was conducted for years at University of Cambridge. Associate Professor Takashi Saito of Waseda Institute for Advanced Study made comment on the report. After that, a QA session took place with participants.

■International Intellectual Property Seminar

EU IP Enforcement: Present and Future （2009/1/17）

Intellectual property research group decided to add European nations to IP precedents database project which the group has worked on since 2003 focusing on major Asian nations. This seminar invited European scholars and practitioners to speak about IP enforcement in EU.

In the part I, Professor Joseph Straus, Director of Max Planck Institute made a keynote speech on IP Enforcement System in Europe. He referred to the current issues for IP laws in EU and the challenges for EU/EPC (European Patent Convention). Next, Mr. Stefan Luginbuel, European Patent Office reported on EPC and EU patent judicial system. Mr. Michael Elmer (Finnegan, LLP) made a presentation from the view of a US attorney. In the part II, based on the discussions in the first part, Professor Toshiko Takenaka, University of Washington, moderated a panel discussion on “Implementation of EU IP Enforcement Directives”. After the introduction of the IP Enforcement Directive and comparison with Japan by Professor Takenaka, Dr. Michael Fysh QC SC, Patents County Court, London, U.K., Dr. Gabriella Muscolo, Tribunal of Rome, and Dr. Peter Meier-Beck, Federal Supreme Court of Germany made a presentation respectively from the view of UK, Italy and Germany. Last, Judge Ryoichi Mimura, Tokyo High Court, and Professor Ryu Takabayashi, Waseda University, made comments. The seminar successfully ended with a vigorous QA session with the participants.

■ Japan and Korea: Financial Capital Market Law Systems Forum – co-hosted by Waseda GCOE& Financial Supervisory Service(FSS), Korea（2009/1/17）

In Japan, more than a year have passed since Financial Instruments and Exchange Law was enacted in fall 2007 (JSOX part was in 2008). In contrast, Capital Market Consolidation Act of Korea will be enacted in February 2009. Before the enactment, we held a forum to have opinion exchanges among Japan-Korea related parties from regulatory authorities, capital market researchers, and practitioners. Waseda GCOE and Financial Supervisory Service (FSS) of Korea co-hosted the forum.

Three presenters each from Korea and Japan made presentations in the forum. Korean presenters explained the Capital Market Consolidation Act from the various aspects. Japanese presenters spoke respectively from the viewpoint of financial institutions, management, and consumer protection. We could understand both legislations in a multilayered and comprehensive way.

It was found out at the forum that there exist different intentions or own social and cultural factors behind the legislation of each country although Korea and Japan have many similarities in law systems. About 80 people in total participated and the half of all were from Korea although it was held in Tokyo. Such multilayered and cross-sectoral exchanges just like this forum will be expected to contribute to development of Asian financial capital markets which will be consolidated in the mid-to-long term.

Waseda Global COE has conducted research exchange with the National People's Congress of China and the China Securities Regulatory Commission (the CSRC) for the past five years by agreement. After holding several workshops or symposia in China, the related parties became so close and had very fruitful results. We expect we also continue gradual collaborative research exchange with the FSS of Korea, incorporating the exchange with China. The forum was a great start leading to fruitful results in research as well as development of friendship between researchers or related parties of financial capital markets in Japan and Korea.

(Report: Shigehito Inukai)

■Waseda Global COE Lecture: Causation and Natural Laws in Italian Criminal Law （2009/1/29）

We invited Professor Mauro Catenacci, Roma University, to have a lecture entitled "Causation and Natural Laws in Italian Criminal Law" (interpretation: Toshimasa Nakazora, Professor of Meiji University). Different from other countries of continental laws like Germany, causation is stated in great detail in Italian criminal law. It is closely related to the political and cultural conditions in Italy. Professor Catenacci explained about the background of causation theory and the related issues and discussions, referring to judicial decisions. He especially introduced the Supreme Court decision on Franzese case in 2002, which became a firm standard for recognizing causation and being used practically.

■<Urgent Symposium> Complete Check of Financial Crisis That Began in the U.S. - A Message from Japan- （2009/1/31）

We held a symposium to analyze financial crisis that began in the U.S. from the various viewpoints and to propose a message from Japan to the world. Detailed report will be posted in the next issue.

Participants:
Masaaki Kanno, Chief Economist, JP Morgan
Yasuhiro Harada, Chairman, R&I
Syuji Yanase, Attorney at Law, Nagashima Ohno & Tsunematsu
George Hara, CEO, DEFTA Partners
Yasuto Ohmori, FSA, Japan
Tatsuo Uemura, Professor of Waseda University, GCOE Leader
Yoshiaki Onodera, Associate Professor of Ritsumeikan University
Moderators: Tatsuo Uemura, Professor of Waseda University
Shigehito Inukai, Professor of Waseda University

Column

The UK Takeover Rules – Misunderstanding and Reality–

The UK Takeover rules currently get a lot of attention in Japan. Since its establishment, our Institute has especially focused on European corporate laws and capital market laws, especially, on the UK laws.

The set of the UK Takeover rules is characterized by a complete "shareholder decision-making principle". **Different from the so-called "shareholder value maximization principle"**, it completely entrusts the targeted company's shareholders to decide whether or not to accept an offer (takeover offer). In order to make the principle work, **sufficient and reasonable information disclosure** is ensured in the UK including the **information of substantial beneficiaries**. In addition, **appropriate timetables** are prepared and **prohibition of unfair trading** is strict.

In Japan, it often becomes an issue in courts whether the offeror is a "green-mailer" or an "abusive acquirer". In contrast, instead of judging the attribute of the offeror, the UK has established **concrete rules to naturally select abusive acquirers**. There exist detailed rules and explanatory notes. If there is no direct rule, decisions are made by going back to "the principles". There is almost no loophole at all.

"**Takeover Panel**", a specialized organization for takeover regulation, has existed in the UK since 1968. Based on the rules in the City Code (the current **Takeover Code**), specialists has provided market-oriented regulation of takeover promptly and flexibly. Influenced by the UK, Japan is now seriously considering adoption of "Japanese version of the Takeover Code or Takeover Panel".

I myself visited the UK many times and found out the UK Takeover rules had such characteristics and advantages. On the other hand, I also have learned **our general understanding is greatly different from the reality in the UK**. I would like to raise some points as far as space permits.

(1) The facts are now different from the traditional understanding that the Takeover Panel is a complete self-regulatory (non-statutory) organization. We should withhold the understanding even for the past condition. As a result of adoption of the Takeovers Directive(European Directive on Takeover Bids), **authorities or organization of the Panel are now considered to have grounds on the UK Companies Act 2006. Courts can be asked for execution.** Despite this, the Panel still holds self-regulatory character because the Panel is **authorized to make and enforce rules by law** and the courts also respect Panel's decision.

(2) In the past self-regulation, rules did not apply only based on the reputation in the City. **The system worked with strict "cold shouldering" that "the people in the City do not work for those who do not follow the Takeover rules in the City"**. Losing the adviser's support is fatal in the UK where **both parties must have advisers from investment banks etc**. It could be said that the cold shouldering allows enforcement against even those who are not within the City. Succeeded by the Financial Services Agency as a legal rule, this measure was functioned as **"self-regulation under the shadow of statutory laws"**.

(3) "Mandatory offer rule" is one of the core issues in the UK Takeover rules (mandatory offer rule to buy at the highest price paid within the preceding 12 months). It will apply when the offeror **"has already obtained" more than 30% of voting rights of the targeted company.** It is different from Japanese system which has regulation based on the ratio to be obtained in the future.

(4) Mandatory offer rule has actually applied to only a few cases in the UK in a year. Offerors avoid this strict rule and **as a result, it acts as a deterrent against easy transfer of control**. Mandatory offer rule applies generally in a very strict manner, however, **in the case of control transfer by issuing new stocks**, **it does not apply** when independent shareholders give approval at the shareholders meeting on the premise of sufficient information disclosure equivalent to offer document (**whitewash**). It is also an **exception** to provide urgent capital injection into companies in serious financial position(**Rescue**). Also, the Takeover Core rules are flexibly applied in certain **"Schemes of arrangement"**. No specific rule exists in the Code on **organization restructure by selling and buying company's assets (except offer period)**.

(5) **In the UK, takeover defensive measures are not prohibited**. It is possible to adopt defensive measures before and after the offer by getting approval from shareholders (such as decision made in the shareholder's meeting). However, in (listed) companies in the UK where **the power of institutional investors is quite strong** and "the shareholder decision-making principle" is carried

through, **the measures such as rights plan (poison bill) are rarely adopted** different from the U.S. or Japan.

It is also important to understand the difference between the UK and other European countries in shareholding structure and concrete application of rules. **It must be fully noted that the function of "mandatory offer rule" will change depending on what shareholding structure is assumed.**

In the UK, there are few block holders holding more than 30% of shares and in many cases, such block holders hold most of the shares. The mandatory offer rule is considered to be a suitable system to realize a certain level of control transfer under such a shareholding structure like the UK.

If we apply the mandatory offer rule under the shareholding structure which has a high block holder ratio, the rule will work very effectively to restrain the transfer of control. For example, Germany adopted "mandatory offer rule" as well as "board neutrality rule" in implementing the Takeovers Directive into national law. There are some influential views that the rule made the success of takeover bids more difficult because the block holder ratio is high and the board neutrality rule is not thorough.

In order to increase the number of control transfer in such a condition, one measure would be adjusting offer price flexibly from the highest price. Some of the European countries have actually taken such a measure. If the condition of the highest price is abolished, the mandatory offer rule will be close to "the duty to offer to all of the target company's shareholders". In the UK, the offer must lapse if the result of the offer didn't reach the"minimum acceptance condition (50% or more)"within 60 days from posting. Therefore, the duty would not be so strict for strategic bidders who are not abusive if some exceptions for a certain types are reasonably established, I think.

Considering these issues stated above, **an important political decision of our own is needed** about what level and what kind of transfer of control we aim at based on the premise of the current shareholding structure in our country. The design of mechanism could vary greatly depending what topic is focused on, for example, (1) promoting transfer of control, (2) restraining unfair transfer of control, or (3) restraining all transfer of control.

On the other hand, suggestions from the UK Takeover rules include not only the mandatory offer rule and the tradition of self-regulation, but also the issues like "**sufficient and reasonable information disclosure**" or "**speedy and flexible regulation by experts with support of statutory laws**". Those are also very important factors to remember. **I hope we hold sincere and serious discussions** about whether or not to adopt what rules into Japanese law system with or without modification after fully understanding what the UK Takeover rules are in a real sense.

Hiroyuki WATANABE
Professor, Faculty of Law, Waseda University

From the Research Field

Long Journey to Judicial Cases

Akiko Ogawa, Visiting Research Associate, the Faculty of Law, Waseda University

Research Center for the Legal System of Intellectual Property (RCLIP) has been developing a database of judicial precedents regarding intellectual property. During the first COE (the 21st COE) period, we mainly focused on precedents of non-English speaking Asian countries. Collaborators in each country summarize their precedents and then the summaries are translated into English. As of January 2009, the number of cases at the database on the Web is 1642 including the cases in Thailand, Indonesia, Taiwan, China, Korea, Vietnam, and India and will reach over 2000 in the near future.

To gather these precedents, we need to establish close relationships with collaborators in each country. We have to visit non-English speaking Asian countries and negotiate with people in such countries in many cases. Thanks to their support and cooperation in a public and private manner, we always could finish the negotiation without problems. However, we sometimes encounter funny mistakes or misunderstandings.

In October 2008, I was on the way to Jakarta in Indonesia with my colleague at the RCLIP. Our plan was to visit the Supreme Court on the next day in order to confirm the current selection of precedents and the progress in the work; and to discuss future prospects for the project.

I went to bed early for the next day's meeting. Then a phone ring at midnight made me

awake. It was from a Justice of the Supreme Court in Jakarta whom we could not contact on that day. He asked me to visit their place on the next day because a ceremony was planned to be held and he cannot move out of the place. He said that the site was 16 kilometers from our hotel and he would send a chauffeur to pick us up at the hotel lobby at nine o'clock. I gratefully accepted this kind offer.

In the next morning,

At 9am, we were waiting at the hotel. It seemed the car was late. Anyway, the place of ceremony, 16 kilometers from here, is not so far. We thought of waiting for the car for a while.

At 9:30am, the car had not arrived yet.

At 10:00am, "I think the driver might have missed us."

At 10:30am, "Today seems to be a bad day."

At 11:00am, "probably I must have misheard yesterday's call."

At 11:30am, a car stopped in front of the hotel entrance. A driver came to us saying, "Miss Ogawa, Sorry." Then he asked me, "Do you speak Indonesian?"We cannot speak Indonesian, so we said to him that we could speak only English. Our communication with the kind-looking driver was over.

The car ran really fast on the straight road in Jakarta and gets on the expressway. It was more than 45 minutes after we left the hotel. Obviously we had already traveled more than 16 kilometers. But there was no way to talk to the driver. After a while, the car got off the expressway and came to a tranquil country town. It was climbing up the path which was almost unpaged. It seems we were heading to a hill or mountain.

When the colleague and I started talking that we might have taken a wrong ride, the car arrived at the training facility. It was the opening day of the training facility of the Supreme Court of Indonesia. The facility is about 60 kilometers from Jakarta. What the Justice said in his call last night was not 16 kilometers but 60 kilometers. Perhaps the car left the training facility after nine and traveled 60 km in a traffic jam heading for our hotel. Looking at the brand sparkling new facility, we greeted many people and successfully finished our meeting.

The future project of the database will be extended not only within Asia but also in Europe. In 2009, we will add precedents of Germany, France and Italy to the database. We are looking forward to build a human network with collaborators in each country in addition to establishing the database of precedents.

International Survey on Corporations

Kazuaki Shintani, Visiting Research Associate, the Faculty of Law, Waseda University

Criminal Law Group plans the "survey on corporate social responsibilities and compliances" in various countries by having necessary modification. The survey was conducted on Japanese corporations during the 21st COE period.

Last November, we visited Max Planck Institute for Foreign and International Criminal Law in Germany to discuss our survey's purpose and the overview of questionnaires which we had in our minds. With the help of Professor Katsunori Kai, I managed to tell them about our plan and decide the survey outline despite my poor English.

Next month, we invited professors from Chinese Academy of Social Sciences to have a meeting on the survey. Everything went smoothly in the meeting on the first day because one of the professors could speak fluent Japanese and they made a draft of questionnaires in advance. Next day, when we were about to start a meeting concerning issues like a concrete contract for the joint research, one of the professors started talking, "we have something to tell before the meeting".

What he said was "we were sorry that our interpreter had errors in some parts in yesterday's meeting". It was an apology. When I heard that, I rediscovered their enthusiasm and deep respect on the project of the survey. In addition, I felt ashamed because I wondered if I had been in such a tension when I had visited Germany.

We will conduct the corporate survey in Italia, Australia, the U.S., and England in addition to Germany and China. Meetings will start to discuss concrete contents one after another. I would like to fully prepare for the meeting and achieve a fruitful result of the survey research to return the professors who support us despite their busy schedules.

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