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
Volume 5 Fall 2009

"Suggestions" and "Pitfalls" of Foreign Laws Concerning Takeover Bid (TOB) Rule

Hiroyuki Watanabe, Professor of Law, Waseda University,
Global COE Waseda Institute for Corporation Law and Society

Large gap between statutory rules and practices

Amid calls for reconstruction of Japan's takeover bid (TOB) rule, there has been a growing interest in takeover bid rules in Europe. I myself have done many researches on TOB rules of European countries including the UK for several years and strongly feel that we often misunderstand the real picture when we see only written rules and it is very important to understand dynamic structures concerning the balance between the rules and the practices including social norms.

"Shareholder decision-making" in TOB in Europe

First, we must be aware of the fact that a consensus of "shareholder decision-making" is generally strong concerning TOB rules in Europe. We also need to understand that the meanings of "shareholder decision-making" and "maximizing shareholder values" are completely different. A TOB is a system based on "shareholder decision-making". Shareholders voice if they accept an offer or not. In the U.S. advocating "maximizing shareholder values", however, a poison pill (rights plan) is widely adopted and the power of management is strong. There has been a notable deviation from "shareholder decision-making" in takeovers.

In Europe where "shareholder decision-making" functions well in takeovers, it is believed that adopting defensive measures such as poison pills might cause the pursuit of responsibilities of the directors etc. There is little room for adopting such defensive measures. In takeovers, will "the logic of financial capitalism" rule the world, then?

'Distinction' between "shareholder decision-making" and "worker protection"

It is widely known that EU's takeover rule stipulates the offeror's obligation to provide information to workers of the target company as well as worker's right to voice their opinions. However, in European countries including the UK, Germany and France, there exists a consensus that shareholders make the final decision on the consequence of takeover bids. Also, the offer price is significant when the target company makes clear whether it recommends the offer or not. It is believed that an easy adoption of defensive measures such as poison pills against the offer might bring the directors (etc)' responsibility. Therefore, not only in the UK where institutional investors have huge influence but also in Germany where workers have strong power, defensive measures have rarely been taken against TOB. Generally in European countries, there exists a distinction between "shareholder decision-making" and "worker protection" in the cases of takeover. These points must be recognized as the difference from Japan's circumstances or the way of thinking when we discuss takeover and workers' involvement as well as the adoption of defensive measures.

"Balance" and "cushion" regarding TOB rules

In Germany, a surprising "balance" is maintained regarding the TOB rule. Workers' influence is strong in Germany which has laws like codetermination law. Adoption of defensive measures based upon approval of a general shareholder meeting or consent of auditors stipulated in German takeover Act seems to be very strong in rhetoric. In practice, however, defensive measures against TOB are rarely taken and the consequence of TOB is left up to the judgment of shareholders ultimately. If the offer price is high, the TOB is basically successful. Due to "potent worker protection", however, it is difficult to run the company without workers' cooperation even if a TOB is successful. As a result, there is little hostile TOB and so far, the cases which had started as a hostile TOB ended up as a friendly TOB. Germany keeps a balance by having "potent worker protection" as a "cushion (adjuster)" against "shareholder decision-making" in the case of TOB.

On the other hand, in the UK or France, mandatory offer rule (which requires the offeror to offer all shareholders at the highest price in some previous months) is applied to the addition of shareholdings between 30% (one third) and 50%. This plays a role as a cushion. In short, the ruling

strictly restrains “acquisition of halfway control”.

In the U.S., adoption of poison pills also plays a role as a cushion. However, we need to fully pay attention that poison pills are accompanied with the battle of proxy solicitation in the U.S. and there is little possibility of considering poison pills as legal in Europe.

“Moderate mandatory offer rule” as a basic type in Europe

“Mandatory offer rule” adopted through Europe is basically applied when more than a certain amount of shareholdings of the target company (basically, 30% or one third of voting rights) is acquired (it is different from Japan where compulsory tender offer is based on “the ratio which the offeror is about to acquire”.) The basic type of this rule seems to be very strict. However, if you understand “the balance” which arises over the rule, it is not so strict after all and could be “a soft cushion” as a deterrent against easy acquisition of control.

In applying mandatory offer rule, inhibitory effectiveness against transfer of control is often pointed out. Mandatory offer rule could not be an obstacle to M&A if an offer is generally made without applying the rule (voluntary offer).

In TOB practices in the UK or Germany, the offeror generally makes a voluntary offer by holding the buying in the market below threshold of mandatory offer rule (the initial requirement is 30%). In voluntary offer, there is also an “obligation of whole solicitation”. It is possible to realize “whole solicitation and partial acquisition” by determining the price strategically through voluntary offer (and surplus selling after the buying). If these measures are used, mandatory offer rule or obligation of whole solicitation will not be an obstacle basically to business restructuring or hostile takeover. The “obligation of whole solicitation” is not considered as strict among M&A practitioners in Europe.

In addition, the ratio of mandatory offer (compulsory tender offer) is generally small in transfer of control. For example, the UK rule “is ‘misunderstood’ as a typical example putting everything on TOB”. However, the reality is totally different. In most cases, British companies transfer control by allocation of new shares to third parties using “whitewash” as an “exemption of the TOB rule” (independent shareholders pass the resolution of general meeting by applying mutatis mutandis only the disclosure regulation in the TOB rule) . Principles and exceptions are reversed between the formal rule and the reality. In the UK, most TOB cases are voluntary offers. In Germany, “intentional” TOB is basically a voluntary offer. This does not mean that mandatory offer rule is toothless. Because the rule itself is strict, the offeror would not easily acquire more than 30 % of sharing in the market. We have to understand the mandatory offer rule functions as a deterrent against easy acquisition of control in that meaning.

“Strict mandatory offer rule” in some jurisdictions

On the other hand, it is necessary to consider unique social norms and accompanied structures of shareholding in each country from other perspectives. In the UK, it is not preferable to remain as a minority shareholder in a company which has block holders. It is preferable to acquire 100% as closely as possible if the ratio of shareholding is more than 30%. Therefore, there is little case of acquiring 30% to 50% voting rights (large volume holding without acquiring control) “as a result of the offer”. The mandatory offer rule is also applied to slight adding by more than 30% but less than 50%.

Like the UK, several legal jurisdictions in Europe such as France, Ireland, and Greece also apply the mandatory offer rule to “30% (one third) to 50% adding”. Adopting the “strict mandatory offer rule” as such will be an effective deterrent against transfer of control in the legal jurisdictions where the ratio of block holders is high. In Europe as a whole, however, urgent capital infusion or business restructuring within a group for corporate reconstruction is exempted from the application of the mandatory offer rule. It is also important to understand “the existence of legal exemption” as such.

Comparative study on takeover regulatory organization

It is also risky to simply schematize systems of various countries for designing an ideal takeover regulatory organization. For example, the UK has “self-regulation totally relying on moral or disciplines of market participants” and Germany has “detailed and strict regulations based on the statutory law by administration (Bafin)”. Making such a comparison is very misleading. In the early regulation by the UK Takeover Panel, what played an important role was the City norm called cold shouldering: “we do not work for those who break the rules of the City” because the rules were brief and lacked enforcement. After the FSA was established, the FSA rule succeeded the cold shouldering rule. Recently, the Code rule is upgraded to be equivalent to German rules in terms of detailed structure when note or

practice statement is included. After adopting the EU Takeovers Directive into domestic laws, there is little difference between the UK and German regulatory organizations in daily practices for TOB regulations, coupled with the fact that the TOB rule was included in the statutory law (UK Companies Act 2006). Rather, what is considered as an important difference between the UK and Germany includes ①whether they can voluntarily establish and maintain concrete rules, ② whether private M&A practitioners constitute a majority, and ③whether they can refer to the "principle base" when it is difficult to apply the rule (currently, yes to the all questions for the UK, no for Germany).

An outlook for Japan

For predictability of the related parties, we need to have a detailed rule concerning TOB which causes transfer of control. However, it is "difficult to write down everything in the detailed rule" including exceptions and considering the characteristics of M&A, it is necessary to have speedy and flexible regulations by specialists.

In referring to TOB rules in European major countries, it is important to understand the structure of "a distinction between shareholder decision-making and worker protection". Regarding concrete rules, it is also important to fully understand the difference and meanings between two mandatory offer rules stated in this article and to pay attention to rational exemption or reversals between principles and exceptions in the reality (for example, "Whitewash" in the UK).

"Shareholder decision-making" has a vital role as a precondition for the smooth functioning of TOB rules. What "cushion" should be put is important in order not to let only the logic of financial capitalism carry through. In Japan, for good or bad, defensive measures play a role as a cushion. In addition, "de facto influence" of stakeholders such as workers in TOBs is very strong and "shareholder decision-making" does not function well. It is a quite difficult challenge to assess these realities and find out what direction we should lead to and how to do so. We should carefully work on restructuring TOB rules, looking at the structure of social norms and the impact of introduction of rules.

UPDATE

Professor Ryu Takabayashi and Judge Setsu Shimizu was invited to Taiwan

On September 22, "International Review Conference of New Patent Litigation System in 2009" was held in Taipei. Invited by the Intellectual Property Office of Taiwan, Professor Ryu Takabayashi, Waseda University, and Judge Setsu Shimizu, Tokyo District Court, made a presentation.

In the following "round-table conference" moderated by Wang, Mei-Hua, Director-General of Intellectual Property Office, MOEA, experts including Professor Chaho JUNG from Korea, and Dr. Stanley Lai from Singapore gathered to have a discussion. More than 300 people participated.

Workshop: Search for a better financial and capital market regulatory regime after the Crisis

The workshop was held in London on September 28, 2009 under the auspices of Waseda Global COE, Capital Markets Association for Asia (CMAA), and International Capital Market Association (ICMA). Participants included Waseda Global COE, Bank of Korea, Yonsei University, Asian Development Bank (ADB), ICMA, Bank of England, legal practitioners, Embassy of Japan, Bank of Japan London, Korea FSS London, and Japanese financial institutions. Based on the result in "Asian Capital Market Law and Regulation Forum: Japan, China, and Korea" held in Seoul in July, Professor Shigehito Inukai of Waseda University, Mr. Satoru Yamadera, ADB, and Dr. Suk Hyun, Bank of Korea introduced the recent discussions about financial regulations after the crisis in Japan and Asia, and they discussed the ideal financial and capital regulation and the direction of regulatory reform in England and Europe.

Introducing Research Projects (4)

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

6. Financial/Capital Markets and Law

A6-1. General Research of Financial/Capital Markets and Law

Playing a central role in the comprehensive research of Japan’s financial and capital market legislation, this group comprehensively addresses issues that are not handled under other projects and works with other research groups focusing on particular issues related to corporate and capital market law systems. Specifically, it examines the deliberations of the Financial Services Agency and in some cases makes proposals. It also responds to important public comments. Efforts are being made to overcome the current situation in which deliberations are not possible without an inquiry from the government. For example, it aims to make proposals for system reform including a proposal concerning Japanese financial services market law system, which comprehensively reconstructs the financial legal system. It will also conduct theoretical research into carrying out the outline of Publicly-Traded Company Law drafted by the Japan Association of Corporate Directors, which clarifies the significance of publicly-traded corporations in the law of capital markets. Other issues will be also addressed such as the significance of securities market regulations and the problems of securities markets establishing legal systems for publicly-traded corporations. Joint research is conducted with research groups on Western corporations and markets. A research agreement has been concluded with the National People’s Congress of China and a three-party research agreement has been concluded with the Chinese Securities Regulatory Commission and the Tokyo Stock Exchange. These activities have been praised by the Chinese side, and will be continued in the future.

Project Leaders: Tatsuo Uemura

A6-2. Grand Design for Financial/Capital Market Legislation

The adoption of the 2007 Financial Instruments and Exchange Law, on which we believe our initial research proposals had a modest positive effect during the legislative process, was a major milestone for Japan in achieving the legal system that is ultimately sought, but does not reach the final goal. It is necessary to appropriately develop and enhance infrastructure for market regulatory systems and to make fundamental changes in design from the perspectives of members of citizens and users who participate in the market. The group hopes to make proposals on a grand design for the multi-disciplinary and comprehensive reconstruction of Japan’s financial service market legislative systems into a flexible structure through an accessible and highly feasible process.

Project Leaders: Shigehito Inukai, Tatsuo Uemura

A6-3. Research on Financial ADR/Ombudsman System

In Japan, out-of-court resolution of the complaints and disputes of individuals and others concerning financial matters is handled by industry ADR, court conciliation, the National Consumer Affairs Center of Japan, other consumer centers, and other bodies. But individuals often do not know where they can turn for assistance, and the assistance is not always effective and does not always lead to the resolution of disputes. From the perspectives of ease of use, speed, flexibility, cost, and so on, consumers find it difficult to use the courts for financial problems concerning relatively small amounts. It should be possible to resolve disputes through comprehensive and multi-disciplinary financial ADR that is impartial and easily accessible, but as of yet there is no such system in Japan, and expectations are rising for the creation of a new consumer-driven system. The “Financial ADR/Ombudsman Research Group”, which was established in the spring of 2007 as an independent and voluntary organization to make proposals on a financial ADR/ombudsman suitable for Japan, included among its participants Waseda GCOE members, and independent research was conducted. The Waseda GCOE promotes exchanges and cooperation among members of the research group and ADR experts from around the world and conducts mutually-beneficial research. At the same time, the group also conducts research on ISO (JIS) international standards on complaint response and dispute resolution systems that should be at the foundations of such a system.

Project Leader: Shigehito Inukai

A6-4. Asian Capital Market Legislation Research

The Capital Markets Association for Asia (CMAA), which is chaired by Nobuyuki Idei and has Shigehito Inukai as its

representative and director-general, was established in June 2007 with the participation of Waseda GCOE members to gather practitioners and researchers in capital markets in Japan and Asia and investigate capital markets in Asia. In the future, the Waseda GCOE and the CMAA will cooperate to conduct continuous research on legislative systems concerning shared capital markets in Japan and Asia and on self-regulatory rules. Key points of discussions on “shared Asian capital markets” have yet to be shared among market participants. Asian countries each have different currencies, and it is difficult to find common ground for currency exchange management, tax systems, and disclosure systems within each country. Following the Asian financial crisis in 1997 and 1998, however, the governments and central banks of the major Asian countries have built cooperative relationships to prevent a re-occurrence of such a crisis. Ten years later, the world is now facing a financial crisis that originated in the United States. It is significant for researchers and market practitioners in Japan and Asia to share a common perspective concerning Asian capital markets, and to have discussion of market infrastructure such as a framework for self-regulatory rules applicable to shared capital markets in Asia that go beyond the domestic regulations of each country. The Waseda GCOE and the CMAA will strengthen ties with the ICMA, a body that develops voluntary rules and makes recommendations for professional market participants in the Euro market and will conduct research aimed at adopting a Waseda CMAA Rule Book applicable to shared capital markets in Asia.

Project Leader: Shigehito Inukai

A6-5. General Research on Financial Principles

Principles are “guidelines” that can clearly show the basis for the conduct of any organization, corporate group, or individual when engaging in new activities as well as the original point one should return when facing uncertainty, difficult circumstances, or failure. Principles are core fundamentals and can be called mainstays, pillars, philosophies, doctrines, and code of conduct that can never be the subject of criticism, never shake, and allow for no compromise. When considering a grand design for financial and capital market legislation and conduct guidelines for market participants (traders, procurers, investors, regulatory bodies, etc.), when considering the principles for the establishment of systems governing financial ADR bodies in Japan, and when considering the optimal state of voluntary rules for capital markets in Japan and Asia, profound insight and comprehensive research into principles is essential. The problem in Japan, however, is that the principles and code of conduct in the background to the conduct of the various entities active in markets have to a great extent deviated from their original purposes and objectives and their underlying principles, and those principles are not always clear and in many cases, they are often not shared using easy to understand and common language. The group seeks to learn from collections (principles as well as ISO and other standards developed based on them) in Europe (the United Kingdom and the EU) and relevant discussion in the United States to conduct comprehensive research on financial principles characteristic of the Waseda GCOE.

Project Leaders: Shigehito Inukai, Tatsuo Uemura

A6-6. General Research on Fund Laws

Today, investment funds have an extremely large presence in financial and corporate legal fields. This project believes it is important to have the idea that funds managing massive assets for the benefit of a small group of persons will bring the downfall of individual- or citizen-oriented corporate and financial law systems which the Western nations have historically maintained and that it will lead to the destruction of Western principles, the agreements of civil society, and awareness of historical norms. The question of how the West has responded to the concept of the major anonymous shareholder has particular significance for legal research concerning funds in Japan. The group will also research the significance of the interest in this issue on the part of labor unions that represent individual workers.

Project Leader: Tatsuo Uemura

A6-7. Research on Financial Instruments and Exchange Law/the U.S. Capital Market Legislation

The Financial Instruments and Exchange Law governs the relationships among publicly-traded corporations, investors, and brokers between them (financial product brokers) to contribute to corporate fund-raising as well as fund management by the public and plays an important role in linking corporations and civil society. The law includes provisions on disclosure, regulation of unfair transactions (market regulations), and regulation of brokers, but recently, the provisions of the regulation of brokers have been extensively revised. In reference to developments in EU

legislation, this law was adopted in 2006 as a fundamental revision of the Securities and Exchange Law, which was largely based on American securities legislation and had been revised repeatedly as a result of influence from American legislation. Under this project, a research group is established to conduct research on the content of the Financial Instruments and Exchange Law referring to developments in American law with an emphasis on governing corporate behavior.

〈Disclosure〉

Recently, there have been many lawsuits by investors against publicly-traded corporations and their directors seeking civil damages for violations of disclosure regulations. Accumulation of judicial precedents is expected to have a substantial impact on corporate behavior. The group will conduct research on the regulation of corporate behavior through disclosure requirements based on an examination of American and Japanese judicial precedents.

〈Regulation of Unfair Transactions〉

The prohibitions on manipulation and insider trading has a major impact on the conduct of market players including publicly-traded corporations, investors (individual investors and institutional investors), and financial instrument brokers. The regulation of unfair transactions was the only area not subject to major revision at the time of the 2006 revisions, and examining the appropriate regulation of unfair transactions is important preparation for the next revision of the Financial Instruments and Exchange Law. Also, there have been developments concerning the regulation of the conduct of corporations and brokers by financial instrument exchange markets and financial instrument exchange industry associations. The importance of such regulation is expected to increase in the future, and consequently, self regulations by these regulatory bodies will also be covered by the research.

〈Regulation of Brokers〉

The regulation of brokers has a private law aspect that regulates the relationship between brokers and customers and an administrative law aspect that regulates the relationship between brokers and the state. This project will focus on the latter, which is becoming more important in financial and investment fields amidst developing globalization, and will investigate appropriate regulation of brokers by making comparisons with developments in the regulation of brokers in not only the U.S. and the EU but also in neighboring East Asian countries (which are making reference to Japanese law in the development of their own laws).

Project Leader: Etsuro Kuronuma

A6-8. General Research on Derivatives Trading

〈Northern European Law〉

Northern Europe, including the three Nordic countries, has attracted global attention in recent years, and the economic and legal aspects of this region will be examined with a focus on corporate legal systems, taking into consideration the cultural and historical background that supports these legal systems.

〈Derivatives〉

The group will examine appropriate legal systems concerning derivatives, an area that has undergone rapid development in recent years. It is often difficult to understand actual circumstances in this field because economic needs and practical innovation has made great advances, leading to numerous cases where legal systems are lagging behind. Based on an awareness of the need for legal research on questions such as how traditional legal principles can be applied to these modern financial products and financial transactions and what types of new legal principles must be created, this project will serve as a forum for gathering a broad range of knowledge and experience to conduct comparative legal research on areas that are believed to have common issues.

Project Leader: Yasuo Osaki

A6-9. Insurance Contract Law

The Insurance Contract Law underwent major revisions for the first time in approximately 100 years to reflect changes in social conditions and was adopted as a separate law independent from the Commercial Code. The nonpayment problem of life and casualty insurance companies has been broadly reported and given rise to considerable debate. With the aim of bridging theory and practice, this group is intended to conduct comprehensive research on judicial precedent using cases concerning the interpretation of the Insurance Contract Law, the Insurance Business Law, and insurance policies in the life and casualty insurance fields with the participation of researchers, attorneys, and insurance practitioners. It will also seek to collaborate with various Western countries that have had major influences on Japan's legal principles concerning insurance policies.

Project Leader: Hideaki Otsuka

A6-10. Education Institute of Corporate and Financial Legislation‹plan›

The driving force behind legalized civil society and the law school concept were likely the corporate, financial, and capital market fields, which are believed to have substantial increases in disputes as a result of broad deregulation and liberalization. However, the experts in the field of legal philosophy and constitutional law played a main role in establishing law schools and there was little interest in the corporate, financial, and capital market fields. In addition, the Legal Research and Training Institute (LRTI) did not respond to these fields. Law schools exhibit strong influences from the LRTI. This project, a joint project with the Center for Professional Legal Education and Research, is based on the idea that it is necessary to develop a concept of private legal research and training institute of corporate and financial law systems as a education al institution concerning corporate, financial and capital market law systems, which is independent of all organizations and bodies, for law school graduates and legal profession practitioners. This is, however, an extremely broad concept, and a final decision on this project has not yet been made.

Project Leaders: Tatsuo Uemura, Kaoru Kamata, Center for Professional Legal Education and Research

Symposium & Seminar

■<Europe TLO Seminar>

"Technology Licensing Systems in European Major Countries and The EU Incentive towards an Improved Transfer of Technologies" **(2009/9/7)**

This seminar invited Mr. Luca Escoffier who has experience as Technology Licensing Manager at Italian bio-related research center to explain about technology transfer systems in European major countries.

The lecture overviewed the EU's focus on technology transfer in line with the Lisbon strategy agreed at the EU in 2000 and also introduced concrete circumstances concerning technology transfer organization in each country. In April 2008, the Commission passed a recommendation "on the management of intellectual property in knowledge transfer activities and Code of Practice for universities and other Public Research Organizations. He introduced the difficulties to carry through the principles in the recommendation among researchers, referring to his practical experience in Italy. Next, Professor Toru Asahi, School of Advanced Science and Engineering, Waseda University, made a presentation titled "What Is Important at the Initial Stage of International Collaboration – The Case of the LIMES of University of Bonn and ASMeW of Waseda University". He introduced the collaboration in the life and medical science field between the Consolidated Research Institute for Advanced Science and Medical Care, Waseda University (ASMeW), and Life and Medical Sciences Center (LIMES), University of Bonn, showing numerous concrete experiences including personnel exchanges. Associate Professor Kaori Iida, Intellectual Property Division of Tokyo Medical and Dental University, made a speech titled "An Introduction of Industry-Academia International Collaborative Activities in Tokyo Medical and Dental University – Efforts with Western Technology Licensing Organizations". She introduced collaborations with German Universities as well as TLOs of University of Washington and Harvard University by referring concrete examples. In the following panel discussion, participants exchanged opinions vigorously.

(Report made with the support of Noriyuki Shiga)

■Constitution and Economic Order: Workshop No.5

(2009/9/16)

We invited Professor Atsushi Tsuneki and Professor Toshiyuki Munesue from Osaka University to present a report for this workshop.

With the theme of "constitutional base of the legal policy analysis", Professor Atsushi Tsuneki talked about the constitutionality of policy proposals based on neoclassical economics. He mentioned the right to the pursuit of happiness in Article 13 of the Constitution and the public welfare which limits the right of the pursuit of happiness. Given the constitutional review to the right of psychological freedom, the legislative discretion concerning the right of economic freedom is quite broad and the legal policy analysis based on welfare economics has constitutionality

broadly. He concluded that we should discuss the adequacy of policies separately from the constitutionality because two are in different spheres. Next, Professor Munesue explained about three models concerning the relations between the Constitution and economic order in the theme of “the Constitution and economic order - the problems in interpretive theory”: ① institutional theory (Rousseau model), ② the theory of pure spontaneous freedom (Hayek model）, and ③eclectic theory (Locke model) and discussed the interpretation of “institutional security of private property system” in Article 29-1 of the Constitution. In Q&A, active discussions took place about the issues including the relation between “public welfare” and “public order” (the field which requires national enforcement).

(Report made with the support of Takashi Kanazawa)

■Waseda Global COE Special Seminar (No.1)

《The Present Situation of Finance, Law, Management, and Accounting from the Perspective of the UK》

（2009/9/18）

As the first seminar of the three-part series of Waseda GCOE Special Seminar, this seminar invited Professor John McEldowney, Warwick University, England.

Professor McEldowney talked about “the development of the Bank of England and the significant of finance and the public interest in the UK” for the Part I and “recent development: a public law analysis of the future of financial regulation by the FSA in the light of the Turner review” for the Part II. In the Part I, he outlined the history of banking regulation in the UK. Then, Professor Shuji Yanase (attorney at law, Visiting Senior Fellow and Professor of Waseda GCOE) and Associate Professor Kenji Kawamura (Kanto Gakuin University), and Professor Michiatsu Kaino (Waseda University) respectively made a comment.

In the Part II, Professor McEldowney explained about principles based regulation, roles of the Treasury and Bank of England, the overview of Turner Review, the UK regulatory culture, and the importance of Public law. Then, Professor Yanase and Associate Professor Kawamura made a comment.

In the Part III, Professor Tatsuo Uemura presented on “Waseda GCOE Declaration: the Financial Crisis - Proposing a Japanese Perspective to the West” which was announced this August. Professor McEldowney made a comment on the Declaration from the perspectives of the UK and the U.S. He mentioned that the accountability of the UK financial system needs to be improved.

Moderator: Professor Tatsuo Uemura, Director of Waseda Global COE

(Report made with the support of Han Keongsin)

■<International IP Seminar> Newly-Modified Patent Act of China: Its Operation and Prospects

（2009/10/5）

This seminar was organized by Waseda University Research Collaboration and Promotion Center and co-organized by the Research Center for the Legal System of Intellectual Property (RCLIP) of the Waseda Global COE. The new Chinese Patent Act was drastically revised for the first time in eight years and enacted on October 1. To respond this enactment, we invited three experts representing China such as an expert who directly involved with the amendment, a professor, and a practitioner. In the keynote speeches, the first speaker was Dr. He YueFeng, Deputy Director General, State Intellectual Property Office of People's Republic of China. Dr. He explained about the changes in the patent examination rules and the scope of patent right occurring in accordance with the enforcement of the new Patent Act. Professor Zhang Ping, Law School of Peking University reported on the theme of “Analysis of ‘Prior Art’ Defense”. The third speaker was Professor Tao XinLiang, President of Shanghai University IP School but he was unable to come due to illness. So Professor Li Xu,

President, School of Liberal Arts and Law of Tianjin University read Professor Tao's report. In the following panel discussion, various topics were discussed among the panelists.

(Report made with the support of Fei Shi)

■"Theoretical and practical issues facing comparative law research in the new millennium", lecture No.6 (2009/10/9)

This workshop was co-organized by Institute of Comparative Law and our Institute, inviting Professor Hisakazu Matsuoka, Kyoto University to speak on "European Civil Code – focusing on the DCFR's Book VII on unjustified enrichment". In European private law, there has been a move toward convergence and leveling of property laws including not only contract law but also law of obligations, tort law and so forth. This lecture explained about the outline and characteristics of the Draft Common Frame of Reference (DCFR) published at the beginning of this year as the first step toward European Civil Code and examined the significance and issues concerning unjustified enrichment in the Book VII.

Comment: Professor Masanobu Kato, Sophia University

Moderator: Professor Kaoru Kamata, Waseda University

■Waseda Global COE Special Seminar (No.2)

《The Present Situation of Finance, Law, Management, and Accounting from the Perspective of the UK》

(2009/10/22)

With the theme of "measures against financial crisis and the present situation of the company law in the UK", this seminar invited Mr. Richard Fleck, Attorney at law, Herbert Smith, who is one of the best renowned lawyers around the world, as a speaker.

In the Part I, Mr. Fleck presented on "financial crisis and the measures against it in the UK" and explained about the UK response to the financial crisis. To that presentation, Professor Hiroyuki Watanabe, Waseda University, and Associate Professor Kenji Kawamura, Kanto Gakuin University made a comment. In the Part II, on "the movement of company law in the UK", Mr. Fleck talked about the corporate governance issues including enlighten shareholder value (Article 172, 2005 the UK company law), transparency, "Comply or Explain" principle, remuneration, the role, composition, and term of board, risk management, and investor involvement, focusing on the Combined Code and Walker Report. Then, Professor Watanabe, Associate Professor Kawamura, and Professor Uemura made a comment. In the Part III, Professor Uemura presented on "Waseda GCOE Declaration: the Financial Crisis - Proposing a Japanese Perspective to the West" and then, Mr. Fleck, and Professor Hiroshi Oda, London University College made a comment. Mr. Fleck showed sympathy with the Declaration, stating the systems in each country have different characteristics and aspects based on the differences in society, culture and history.

Moderator: Professor Tatsuo Uemura, Director of Waseda Global COE

※ The Special seminar No.3 will be held on January 21.

(Report made with the support of Han Keongsin)

■International Symposium: Legal Aspects of Human Biological materials

(2009/10/24)

This symposium was held inviting specialists in the field of human biological materials from Germany, Canada, New Zealand, and Japan in order to deepen the discussion concerning "legal aspects of human biological materials" based on the understanding of the legal environment in each country and aim to develop the legal framework surrounding human biological materials.

First, Professor Emeritus Bernard M. Dickens, University of Toronto, Canada, explained about an overview of the Canadian, English, and the U.S. legal control of human tissues and their similarities with the theme of "control of human tissues in Anglo-North American Law". Next, with the theme of "the use of human biological material for research purposes: the legal situation in Germany", Professor Jochen Taupitz, University of Mannheim, Germany introduced that there was no specific law for "biobanks", which are collections of medical data on human materials, and the recommendations issued by the German National Ethics Council in 2004 was widely accepted

although it was not legally binding.

Then, Senior Lecturer George Mousourakis, University of Auckland, New Zealand, outlined ethical issues concerning body commodification and analyzed the current legal responses to various problems with the theme of “body commodification and organ procurement: ethical and socio-legal challenges”.

Last, Professor Waichiro Iwashi, Waseda University explained about Japan’s circumstances with the theme of “Legal issues surrounding human biological materials: Japanese context”. A panel discussion followed to have a lively discussion.

Moderator: Professor Katsunori Kai, Waseda University
Commentator: Professor Shin Utsugi, Tokai University

(Report made with the support of Satoshi Ohsaka)

■Seminar: Regulatory Classification between Listed and Unlisted Company – Discussions in Germany –
（2009/10/30）

In Japan’s existing Company Act (enacted in 2006), the legislation for limited company was abolished and unified as stock company. The legislation of stock company based on limited company also includes listed company which is in the scope of the application of Financial Instruments and Exchange Act. The regulatory classification of those two laws comes to an issue. Regarding this topic which is also a controversial issue in Germany, we invited Professor Gerald Spindler, University of Göttingen to make a report.

A German theory concerning articles of listed companies or classification of stock company laws was introduced and Professor Spindler added his analysis on that.

(Report made with the support of Takaya Sakurazawa)

■ Criminal Law Group Lecture: Ethics, legal frame and criminal sanctions in corporate activities
（2009/10/31）

This lecture invited Professor Emeritus Harro Otto from University of Bayreuth, Germany, to present about logical analysis of corporate crimes.

Professor Emeritus Otto analyzed what impact the financial crisis had made on corporate activities using findings in terms of economics. He also stressed that corporate sanctions must be imposed on the society-violating acts which could not be restrained by social ethics or civil and administrative legal measures. On the idea that criminal sanctions must be used after civil and administrative sanctions, the discussions was held about what the concrete measure is, on what grounds criminal sanctions are imposed, and what sanctions should be used. In addition, there was a discussion about how the issues in Japan can be solved through Professor Otto’s theory including who should be regulated in future-exchange regulations, and how we should deal with the concrete acts such as “short selling”.

(Report made with the support of Shinya Onogami)

■International Symposium:
Creative Law：A Challenge of New Comparative Law
Theoretical and Practical Issues in Comparative Law in the New Millennium （2009/11/14-15）

These two symposia were held under the joint auspices of Institute of Comparative Law and Waseda Global COE supported by Japan Society of Comparative Law.

Symposium 1: New Era of Comparative Law: Challenging for Civil Society and Harmonization of Law
Symposium 2: Global Economic Crisis and Role of Labor Law : a Comparative Law Perspective

The details will be reported in the next issue of this Newsletter.

■ **International Conference: Business Law and Innovation** (**2009/10/30-31**)

This conference was held for two days organized by Hitotsubashi University, Research Institute of Economy, Trade, and Industry (RIETI), and Waseda Global COE.

ORGANIZERS

Aoki, Reiko, Hitotsubashi University
Fox, Merritt B., Columbia Law School
McCahery, Joseph A., Tilburg University
Miyajima Hideaki, Waseda University, RIETI
Nagaoka Sadao, Hitotsubashi University, RIETI
Shishido Zenichi, Hitotsubashi University,RIETI
Scott, Robert E., Columbia Law School

Day 1

Finance I: Innovation and Capital Markets

"Promoting Innovation: The Law of Publicly Traded Corporations"
Merritt B. Fox, Columbia Law School
Discussant – Atsushi Koide, Gakushuin University
"Behind the Scenes: The Corporate Governance Preferences of Institutional Investors"
Joseph A. McCahery, Tilburg University and Duisenberg School of Finance, (with Zacharias Sautner and Laura T. Starks)
Discussant – Takuji Saito, Kyoto Sangyo University
Contracts I: Contracting for Collaborative Innovation from Japanese Perspectives
"Ownership of collaborative research"
Sadao Nagaoka, Hitotsbubashi University and RIETI
Discussant – Sharon Belenzon, Duke University
Collective Rights Organizations and Upstream R&D Investment"
Reiko Aoki, Hitotsbubashi University
Discussant - Arnoud W.A. Boot, University of Amsterdam

Finance II: Private Financing and Innovation

"Market Liquidity, Investor Participation and Managerial Autonomy: Why Do firms go Private"
Arnoud W.A. Boot, University of Amsterdam (with Radhakrishnan Gopalan, and Anjon Thakor)
Discussant – Shinichi Hirota, Waseda University
"Locating Innovation: Technology, Organizational Structure and Financial Contracting"
Ronald J. Gilson, Columbia Law School and Stanford Law School
Discussant – Michael Korver, Hitotsubashi University, International Corporate Strategy

Day 2

Finance III: Governance and Innovation

"Governance and Innovation"
Sharon Belenzon, Fuqua School of Business, Duke Univ. (with Patrick Bolton and Tomer Berkovitz)
Discussant – Hideshi Itoh, Hitotsubashi University, Graduate School of Commerce
"Braiding: The Interaction of Formal and Informal Contracting in Theory, Practice and Doctrine"
Ronald J. Gilson, Columbia Law School and Stanford Law School, (with Charles F. Sabel and Robert E. Scott)
Discussant – Noriyuki Yanagawa, University of Tokyo, Faculty of Economics
Contracts II: Contracting Mechanisms and Private Enforcement
"Satisficing Contracts"
Patrick Bolton, Columbia Graduate School of Business, (with Antoine Faure-Grimaud)
Discussant – Hiroshi Osano, Kyoto University, Institute of Economic Research
"Equity Markets and Institutions: The case of Japan"
Hideaki Miyajima, Waseda University, RIETI and WIAS, (with Julian Franks and Colin Mayer)
Discussant – Patrick Bolton, Columbia Graduate School of Business

Finance IV: Innovation, Finance and Governance Structure in Japan

"Why Japanese Entrepreneurs Don't Give Up Control to Venture Capitalists"
Zenichi Shishido, Hitotsubashi Univ. and RIETI
Discussant – Merritt B. Fox, Columbia Law School
"Innovation and the Regulation of the Capital Markets in Japan" Sadakazu Osaki, University of Tokyo Law School, Nomura Research Institute and "Venture Capital Financing In Japan" Hajime Tanahashi, Mori Hamada & Matsumoto,
Discussant – Joseph A. McCahery, Tilburg University and Duisenberg School of Finance

---

Grimm's Argument Concerning the Term of Copyright Protection

Noriyuki Shiga
Waseda University Global COE Research Associate

The year 2009 almost comes to the end. At the close of a year, we often have a chance to hear Beethoven's Ninth Symphony. This year is the 20th anniversary of the fall of the Berlin Wall. As a historic event, many people remember that Leonard Bernstein conducted the Symphony in Berlin after a month of the wall and this melody became the symbol of German reunification. As everyone knows, this famous melody in the fourth movement was composed for "an die Freude" of Friedrich von Schiller (1759-1805).

To celebrate the 100th anniversary of Schiller's birth, a large-scale ceremony was held at the Prussian Academy of Sciences on November 10, 1859, and eminent celebrities attended for Schiller whose name had been well known as a national poet in the world. Jacob Grimm, the elder of the Grimm Brothers who are famous linguists for publishing collections of fairy tales, made a speech at the ceremony. The latter part of his speech is also well known as the remarks which partly got at the heart of the idea of copyright (although the recent study suggested his inaccurate awareness of the systems in those days). Although more than 50 years have passed since Schiller's death, an exclusive right with the extended protection term exceptionally for a great writer is still granted to his family and publisher for this speech. Because they do not make commemorative publication or permit use of Schiller's works even at the 20th year milestone, people criticized that any revision to the works or criticism of historical sources could not be reflected to the works and they would impede the advancement of learning. Based on the idea that a writer originally provided his works to all readers (the public), but the successors who only helped the writer to do so obtain an excessive exclusive right, Grimm said, "no writer can predict whether his work becomes successful and makes a fortune in the future", and the profit that the successors benefit from the work after the success is "too excessive and it is hardly to say that it is based on the original contract", and "although the whole honor must be within Schiller himself, only the successors live a life of ease". While he admitted the necessity of the protection from pirated production, the speech strictly pointed out the negative effect of protecting those which must be public property after the stipulated term (30 years after the author's death at that time in Prussia) by exceptionally extending the protection term. Grimm described such a protection as "deplorable thought" from the perspective of the coordination with the public (readers) benefit. In another part, it said that the support activities for artists by foundations that had developed at that time "merely foster mediocre poets or writers who should be encouraged to give up rather than promoted to do artistic work". Such acrimonious criticism can be applied to the present days.

The argument concerning the term of copyright protection – whether the protection term must be extended or how many years are appropriate – especially draws attention among various issues in intellectual property law. In the recent Japan, triggered by the 2003 amendment of Copyright Law that extended the protection term for a cinematographic work from fifty years to seventy years following the making public of the work (Article 54 – (1)), there were lawsuits over cinematographic works released in 1953 such as the Roman Holiday case (Tokyo District Court Decision on July 11, 2006) and the Shane case (the Supreme Court Decision on December 18, 2007). Also, in the U.S., the U.S. Supreme Court decision on January 15, 2003 on the Eldred case challenging the constitutionality of the 1998 Sonny Bono Copyright Term Extension Act (CTEA) which is pejoratively called as the "Mickey Mouse Act", is still a fresh memory. Grimm's speech 150 years ago from now tells that such an argument has not started recently, but has been always perceived since the time when the modern copyright law was born. It is endlessly interesting to imagine what Grimm or Schiller thinks if they see the today's argument of extending the protection term.

《References》

Jacob Grimm, Rede auf Schiller, Gehaiten in der feierlichen Sitzung der königlichen Akademie der Wissenschften am 10 November 1859, in: ders, Kleinere Schriften 1., S.375-399; neu herausgegeben von Otfrid Ehrismann. Hildesheim: Olms, 1991-1992., Elmar Wadle, Jacob Grimms Kritik an der Privelegierung der Werke Schillers, in: ders, Geistiges Eigentum : Bausteine zur Rechtsgeschichte, Bd.2, S.155-164, C.H. Beck, München, 2003

Waseda Global COE Program
Waseda Institute for Corporation Law and Society
Director: Tatsuo Uemura
1-6-1 Nishi-waseda Shinjyuku-ku, Tokyo, 169-8050
TEL: 03-3208-8408 Fax:03-5286-8222
E-mail: webmaster@21coe-win-cls.org
http://www.globalcoe-waseda-law-commerce.org