

Newsletter

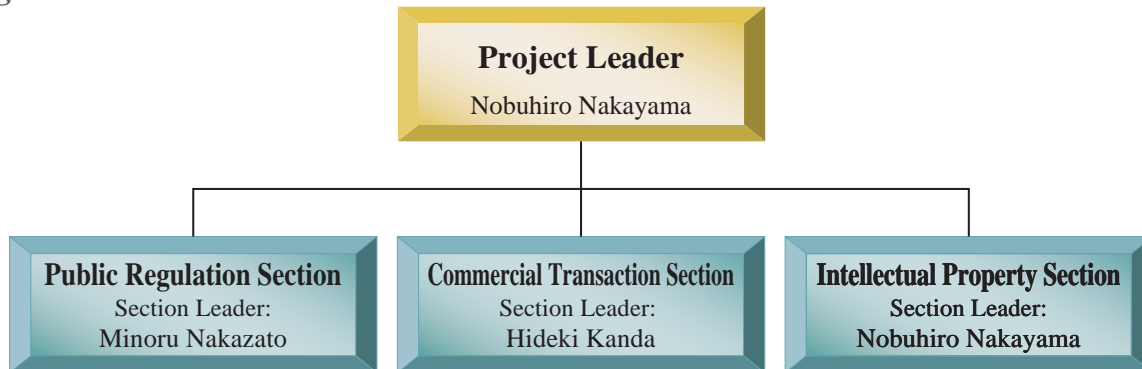
English Edition No.5 Spring-Summer 2007



21st Century Center of Excellence Program "Soft Law" and the State-Market Relationship

1 Organization of Research and Education

Organization Chart



(Dated as of August 31, 2007)

Project Scholastic Member

<p>Minoru Nakazato (Section Leader): Graduate Schools for Law and Policies (“GSLP”)/Tax Law Takeshi Igarashi: GSLP/American History of Politics and Diplomacy Mitsuaki Usui: Taxation Akira Kotera: Graduate School of Arts and Science/International Economic Law Katsuya Uga: GSLP/Administrative Law Masahiko Iwamura: GSLP/Social Security Law Yoshihiro Masui: GSLP /Tax Law Tadashi Shiraishi:GSLP/Competitive Law</p>	<p>Hideki Kanda(Section Leader):GSLP/ Commercial Law Yoshiaki Miyasako:GSLP/ International Business Law Shinsaku Iwahara:GSLP/ Commercial Law Tomonobu Yamashita:GSLP/ Commercial Law Takashi Uchida: GSLP/Civil Law Tomotaka Fujita: GSLP/Commercial Law Hiroyuki Kansaku:GSLP/ Commercial Law Toshihiro Matsumura: Institute of Social Science/Industrial Organization, Public Economics Akira Kamo: GSLP/Civil Law</p>	<p>Nobuhiro Nakayama (Section Leader): GSLP /Intellectual Property Daniel Foote: GSLP/Law and Society Kichimoto Asaka: GSLP/Anglo-American Law Tetsuya Obuchi: GSLP/Intellectual Property Takashi Araki: GSLP/Labor Law Hiroki Morita: GSLP/Civil Law</p>
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Project Professor

Hiroyasu Watanabe: Waseda Graduate School of Finance
Hidetaka Aizawa: Graduate School of International Corporate Strategy, Hitotsubashi University
Noboru Kashiwagi: Chuo Law School
Masato Dougauchi: Waseda Law School
Takeshi Nakashima: Bank of Japan
Masanobu Kato: Shinsei Patent Office
Hiroyuki Seshimo: Senshu University, Faculty of Commerce

Project Associate Professor

Hiroyasu Ishikawa: Gakushuin University Faculty of Law
Kazuaki Kagami: Toyo University, Faculty of Economics
Naoki Okubo: Gakushuin University, Faculty of Law
Kiyokazu Yamagami: Tokyo Metropolitan University, Graduate Schools of Social Science
Takeshi Fujitani:Hokkaido University School of Law
Hiroyuki Watanabe: Waseda University, Graduate School of Law
Sota Kimura: Tokyo Metropolitan University, Faculty of Urban Liberal Arts
Yuri Matsubara: Meiji University, School of Commerce

Project Researcher

Koichi Shirasaki: Trade Win Co., Ltd
Rei Kawazoe: Graduate Schools for Law and Politics
Julien Mouret: Universite Montesquieu Bordeaux 4
Kei Yoshinaga: Graduate Schools for Law and Politics
Yoko Manzawa: Rikkyo University, Faculty of Law
Tomoko Mise: Musashi University, Faculty of Sociology
Kengo Tanaka: Tokyo Stock Exchange
Yuko Kishimoto: Graduate Schools for Law and Politics
Huh Sookyeon: Graduate Schools for Law and Politics
Yuichi Nishimura: Graduate Schools for Law and Politics

Project Assistant

Hitomi Nagano: Graduate Schools for Law and Politics
Masashi Takeo: Graduate Schools for Law and Politics

2 Activities

International Exchange

< Visitors from Overseas >

2007

April 9

Dr. Christian Förster (Tuebingen University); Lecture: “Recent developments in European Corporate Governance,” at the Nineteenth COE Soft Law Seminar.

April 17

Harry C. Sigman (Attorney at Law, California Bar); Lecture: “The UNCITRAL Legislative Guide on Security Interests,” at the Twentieth COE Soft Law Seminar.



May 15

John Lott (Visiting Professor, State University of New York); Lecture: “An analysis of the judicial confirmation process in the United States—In particular, the fact that the process for the Federal courts makes it most difficult for the brightest judges to be on the courts—” at the Twenty-first COE Soft Law Seminar.

July 13

Clayton P. Gillette (Professor, New York University); Lecture: “Reputation and Intermediaries in Electronic Commerce” at the Ninth Symposium.

See, page5-7 for detail

July 13

Robert B. Thompson (Professor, Vanderbilt University); Lecture: “Soft Law and the Governance of Global Corporations” at the Ninth Symposium.

See, page5-7 for detail

July 18

Clayton P. Gillette (Professor, New York University); Lecture: “Current Issues in Commercial Law” at the Twenty-second COE Soft Law Seminar.

July 26

J. Mark Ramseyer (Professor, Harvard Law School); Lecture: “Levels and Determinants of Attorney Incomes” at the Twenty-ninth Public Lecture of the COE.

COE “Soft Law” Seminars Series

No	Date	Topic	Speaker
19	April 9, 2007	Recent developments in European Corporate Governance	Dr. Christian Förster, Tübingen University
20	April 17, 2007	The UNCITRAL Legislative Guide on Security Interests	Harry C. Sigman, Attorney at Law, California Bar
21	May 15, 2007	An analysis of the judicial confirmation process in the United States In particular, the fact that the process for the Federal courts makes it most difficult for the brightest judges to be on the courts	John Lott, Visiting Professor, State University of New York
22	July 18, 2007	Current Issues in Commercial Law	Clayton P. Gillette, Professor, New York University



Symposium — “Soft Law and the State-Market Relationship”

No	Date	Topic	Speaker
9	July 13, 2007	Soft Law in Action: The Role of Private Ordering in Commercial Activities	See, page5-7 for detail

The Ninth Symposium

" Soft Law in Action: The Role of Private Ordering in Commercial Activities "

Date: July 13(Friday), 2007 13:00-17:00

Place: Hall D5, Tokyo International Forum

Chair: Hideki Kanda, Professor, University of Tokyo / COE Program Project Sub-leader

Opening Remarks: Hideki Kanda

Reputation and Intermediaries in Electronic Commerce

Speaker: Clayton P. Gillette, Professor, New York University

Comments: Tomotaka Fujita, Professor, The University of Tokyo

Soft Law and the Governance of Global Corporations

Speaker: Robert B. Thompson, Professor, Vanderbilt University

Comments: Souichirou Kozuka, Professor, Sophia Law School

Guaranty: where private ordering meets the legal system

Speaker: Hatsuru Morita, Associate Professor, Tohoku University

Comments: Wataru Tanaka, Associate Professor, Seikei University

Concluding Remarks: Hideki Kanda

Cooperation: Shoji-Homu Ltd.



Seminar Report

The ninth symposium held on July 13 (Friday), 2007

“Soft Law in Action: The Role of Private Ordering in Commercial Activities”

The ninth symposium for our project “Soft Law in Action: The Role of Private Ordering in Commercial Activities” was held on July 13 (Friday), 2007. This was the third time that we had organized an international symposium with invited overseas researchers, following the fifth (July 2005) and seventh (September and October 2006) meetings. The symposium was intended to display our presence as a center for international research and education by enhancing our global publicity operations in this fiscal year, which marks the end of the 21st Century COE (Center of Excellence) Program, in addition to publishing our study results. The symposium consisted of the following three sessions, hosted by Professor Hideki Kanda at the University of Tokyo, who acted as the project’s sub-leader.

Session 1: Reputation and Intermediaries in Electronic Commerce

In this session, Professor Clayton P. Gillette from the New York University School of Law presented his report “Reputation and Intermediaries in Electronic Commerce,” and Professor Tomotaka Fujita from the University of Tokyo Graduate Schools for Law and Politics (he was the project's promoter) commented on the presentation. Many participants in electronic commerce do not expect governments to enforce their commitment, and these deals are often facilitated in other informal ways. For example, “reputation” is a typical medium of facilitation. However, web-based transactions present a kind of puzzle because many online deals can be completed with just one touch of click and are not usually contracts in which concerned parties can enjoy the continuous effects of “reputation.” Now, can Internet deal intermediaries boost the credibility of business partners by appropriately controlling information on deals? Professor Gillette took a considerably pessimistic view of this based on several cases. Despite his pessimism, with regard to the fact that many online transactions are conducted, he presented his speculation that “reputation” plays just a small role in this context.

His research was exceedingly significant in the sense that he spotlighted a long neglected question: Why do we deal with unfamiliar people in Internet commerce? He sounded persuasive and worthy of much attention when arguing that the role of “information intermediaries,” in his words, is rather limited, and that they do not expect much negative information to emerge, depending on systems. Meanwhile, there seemed to be much room to examine many possibilities about what forms the foundations for dealers’ games.

Session 2: Soft Law and the Governance of Global Corporations

In this session, Professor Robert B. Thompson from Vanderbilt University Law School presented his study “Soft Law and the Governance of Global Corporations.” (The commentator was Professor Souichirou Kozuka from Sophia Law School.) His report focused on soft law as a mechanism for controlling the activities of multinational corporations. The presentation strongly focused attention on cases in which the activities of transnational companies are incompatible with national interests, and offered insights into the limits of state control by hard law and the possibilities of soft law as the means to tackle this challenge.

Few discussants voiced objections to the behavioral patterns of multinational corporations or to the limits of control by hard law. Was it appropriate that he addressed the conflicts between national interests and multinational companies? Conceivably, international activities will be affected by conflicts of interests between nations. With respect to this point, the ultimate goal should be to maximize the global benefits, and this challenge cannot be handled by domestic laws of individual countries. In addition, treaties among countries are categorized as hard law, but they are completely different from domestic laws controlled by centralized legislative bodies, in the sense that they are not binding unless countries spontaneously join the treaty's framework. With much consideration of these aspects, the professor's presentation left room for critical thinking about the role of soft law. (Fundamentally speaking, it is worth deliberating on what sense it makes to strictly distinguish hard law from soft law in the realm of international legal issues.)

Session 3: Guaranty: Where Private Ordering Meets the Legal System

In this session, Associate Professor Haturu Morita from Tohoku University gave a presentation on his report "Guaranty: Where Private Ordering Meets the Legal System." (The commentator was Associate Professor Wataru Tanaka from Seikei University.) His study sought to explore requirements for the validity of imposing joint and several liability on guarantees and other forms of securities with regard to the economic justifiability of third-party guaranty systems for loans based on the microfinance method (loan program for the impoverished without requiring collateral, for which the Grameen Bank in Bangladesh is particularly famous), Japan's mutual financing associations (called *mujin* and *tanomoshiko*) and city trades in medieval Europe.

Following this report, some participating researchers agreed that guaranties theoretically involve social benefits and costs, but they questioned whether the third-party collateral surety system could produce more public benefits than costs in contemporary Japanese society. They also noticed why group lending, which is perfectly exemplified by microfinance, is less common in Japan today than elsewhere, and argued that if this is because our country does not have similar social and cultural backgrounds to facilitate the efficient implementation of group lending as in Bangladesh and Bolivia, this could be affecting the third-party guaranty system for financing. Researchers stressed the importance of demonstrative examinations with respect to this point.

As its title suggests, the symposium this time did not focus on particular issues, and instead explored many real cases where soft law works well in a wide variety of corporate activities. It induced active question-and-answer sessions among discussants. In this respect, the symposium was a success. On the other hand, however, the symposium lacked consistency in subject-setting because of its broad range of issues to be discussed. It was undeniable that the relationship between the three sessions and the core essence of the propositions was blurred. In other words, the symposium suggested how difficult it is to secure a proper balance between efforts to draw attention from a large audience and to clarify the themes' theoretical focal points. The reports and comments from this symposium are scheduled to be published in the 10th issue of *Soft Law Journal* (in November 2007).

Tomotaka Fujita (professor at the University of Tokyo Graduate Schools for Law and Politics, and the project's promoter)

Working with Tax Records

By J. Mark Ramseyer
Harvard Law School



As a little thought will make clear, many basic social science questions come in the form, “who is successful, in what form does success come, and why?” What enables some business executives to rise to the top of large corporations? Why are some physicians and lawyers more successful than others? What are the returns to innovation in different societies? The trick for the researcher is then to measure success in a way that will let him or her answer the questions.

For the past two years, Professors Minoru Nakazato and Eric Rasmusen and I have been using tax data to attack one small corner of this set of problems. Through 2004 (but no longer), the Japanese National Tax Administration published the names, addresses, and tax liabilities of all people paying more than 10 million yen in taxes. To owe 10 million in taxes, an individual would need to have made at least 40 million in income. In 2004, about 73,000 taxpayers appeared on the NTA’s list. With the support of the Harvard Law School, I obtained the 2004 version of the list.

Known colloquially as the “Choja banzuke,” the list strikes most Americans as odd, if not a bit bizarre. Why did the NTA publish the list, they ask. When I explain that it did so to encourage people to report tax cheats, they usually note that the reason does not fit their stereotypes of Japan. Americans do find the publication of tax liabilities a bit offensive, and are not surprised when I tell them that the government no longer publishes the list.

To the researcher, however, the ceasing of the publication is a major loss. The list enabled the researcher to explore a wide range of problems. Here are a few that we have been addressing:

1. Executive compensation. The most straightforward problem to attack was executive compensation: what do CEOs of major corporations make, and on what does it depend? To explore this question, we first matched the NTA list with the list of CEOs of the TSE-listed firms. We added data on firm financials, and then used the resulting data set to explore the levels and determinants of executive compensation in Japan.

Scholars have produced hundreds of studies of executive compensation in the U.S., but the reason is straightforward. U.S. securities law requires firms to publish the amounts they pay their senior officers, and another firm (through the University of Pennsylvania) makes the data widely available. As a result, anyone wanting to study the compensation of U.S. executives can simply go to the website and download the compensation of thousands of corporate executives in a matter of minutes.

Japanese securities law requires firms to publish only the aggregate amounts paid to the board of directors. Given that boards are very large, and typically include a mix of full- and part-time officers, this is not very helpful. The result, however, is that studies of executive compensation patterns in Japan to date have been based either on this aggregate compensation data, or on small and non-random surveys by consulting firms.

2. Private firms. Relatedly, we compared the compensation levels of private and public firms. Ever since Berle & Means’ famous 1930s study, scholars have attributed high executive pay to the inability of dispersed shareholders to monitor their executives closely. Because each shareholder owns only a miniscule fraction of stock, each has only a small incentive to watch senior management. Because shareholders do not watch, managers pay themselves high salaries.

If Berle and Means are right, then private (closely held) firms should pay their officers less than public firms. In private firms, a small number of shareholders hold all the stock of the firm. As a result, each has a large incentive to monitor his or her executives. Closely watched, the executives will be unable to pay themselves excessive amounts.

Few scholars have studied this question in the U.S. -- for a simple reason: the data is not available in easily

downloadable form. U.S. securities law requires only firms with public markets for their shares to disclose executive compensation patterns. If a firm instead keeps its shares private, it need not disclose the amounts it pays its executives.

Our tax data, however, we can as readily match to private as to public firms. We do so, and obtain a comparison of public and private firm executive compensation patterns.

3. Attorneys. We also use the NTA data to explore the levels and determinants of attorney incomes. To do so, we take all attorneys on the list, and obtain information on their backgrounds from the bar association directory. In addition, we randomly sample attorneys not on the list, and create a dataset of high- and low-income attorneys.

Do attorneys from high-end schools earn more than those at less prestigious schools? Does the return to a high-end education vary across the country? Do attorneys who pass the bar exam quickly do better than those who take more years? Do attorneys earn monopoly rents? And if they do, does the amount of the rents vary across the country? Do the tax agents and judicial scriveners add competitive pressure to the bar? And do attorneys do better in rich or in poor prefectures?

Adding prefecture-level data to our attorney database, we explore these various questions.

4. Sports. Japanese baseball teams do not pay their players as well U.S. teams, but they do pay them well enough to place a large number of them on the NTA list. To study the determinants of player success in this market, we match the NTA data against the roster of baseball players, and add the performance data that statistics-obsessed baseball fans so avidly covet.

Because baseball teams in Japan publish the pay of their players, this exercise also lets us explore the accuracy of the NTA data. The reliability of the NTA data is an obvious question, and in our executive compensation and attorney studies we explore the question of reliability by looking at the correlation between land prices in a taxpayer's residence and his or her reported income. With baseball players, we can directly compare team compensation and reported income (though the fact that the compensation is published obviously limits a taxpayer's incentive to hide that income from the NTA).

Note that the introduction of free-agency adds a contract law aspect to this study. Do employers pay their workers their marginal value? Obviously, if workers can freely move elsewhere they do. But what if workers cannot move for many years, and if their pay is only incompletely specified in their contract? Will employers then pay them their marginal value anyway? Or will workers earn their marginal value even under incompletely specified long-term contracts? By comparing the pay of players under free-agency and long-term contracts, we explore these questions as well.

Working paper versions of three of these studies are available:

1. Executive compensation:

http://www.law.harvard.edu/programs/olin_center/papers/567_Ramseyer_et%20al.php

2. Attorney incomes:

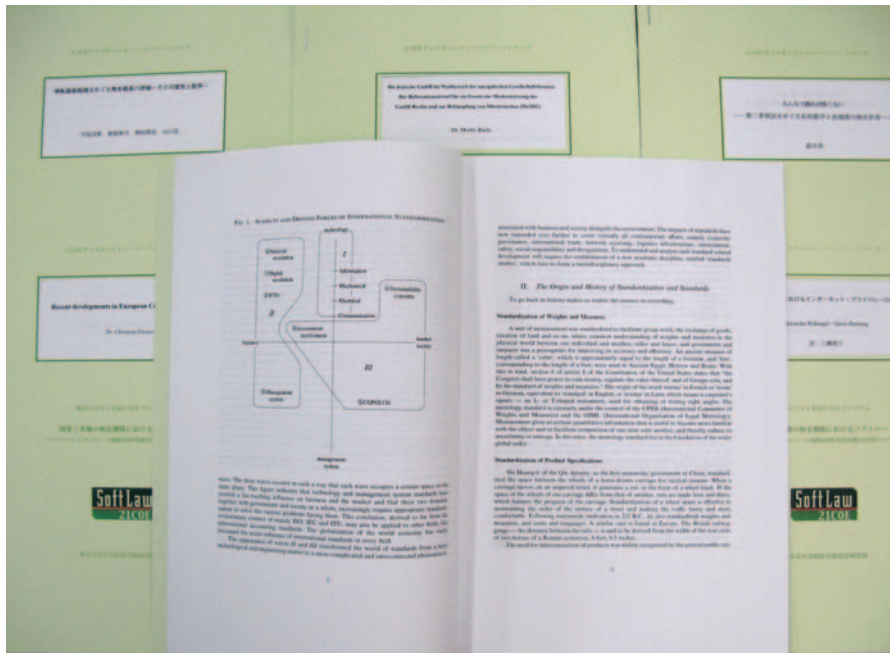
http://www.law.harvard.edu/programs/olin_center/papers/559_Ramseyer.php

3. Sports:

http://www.law.harvard.edu/programs/olin_center/papers/589.php

COE Soft Law Discussion Paper Series

This center distributes each research paper as a “Discussion Paper,” written either by each project member or each researcher outside our university. The “Discussion Paper” is available in hardcopy form and for download from our web site (<http://www.j.u-tokyo.ac.jp/coelaw/outcome.html>).



No	Author	Title
COESOFTLAW 2007-3	Hiroaki Ugaki Mayumi Okabe Hiroshi Kanda Takashi Yamaguchi	Valuation of intangibles in Japan’s transfer pricing taxation: possibilities and limits of cost contribution arrangements
COESOFTLAW 2007-4	Moritz Bälz	Die deutsche GmbH im Wettbewerb der europäischen Gesellschaftsformen: Der Referententwurf für ein Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen (MoMiG)
COESOFTLAW 2007-5	Hatsuru Morita	Guaranty: where private ordering meets the legal system
COESOFTLAW 2007-6	Shiro Kurihara	THE GENERAL FRAMEWORK AND SCOPE OF STANDARDS STUDIES
COESOFTLAW 2007-7	Christian Förster	Recent developments in European Corporate Governance
COESOFTLAW 2007-8	Alexander Roßnagel Gerrit Hornung Tomoko Mise	Self-Regulation of Internet Privacy in Germany and the European Union

Soft Law Journal

In January 2005, the first Soft Law Journal was issued in order to report the results of the research at the Center of the project and to demonstrate our achievements for the next generation of researchers. Three volumes will be issued annually.

No.9 2007

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“Formation of De Facto Standards and Interaction between De Facto Standards and Hard Law in the Business Law Area”

Hiroshi MITOMA

“Formation of De Facto Standards and Interaction between De Facto Standards and Hard Law in the Business Law Area: Comment on Mitoma”

Tomotaka FUJITA

“Development of Accounting Standards as De Facto Standard”

Atsushi KOGASAKA

“Development of Accounting Standards as De Facto Standard: Comment on Kogasaka”

Hideki KANDA

“Interaction between Hard Law and De Facto Standards in the Area of International Taxation
--Norm and Quasi-Norm of foreign Jurisdictions Affecting Hard Law Creation in Japan”

Yuko MIYAZAKI

“Interaction between Hard Law and De Facto Standards in the Area of International Taxation: Comment on Miyazaki”

Yoshihiro MASUI

Concluding Remarks

Hideki KANDA

<Article>

“Guaranty: Where Private Ordering Meets the Legal System”

Hatsuru MORITA

<Lecture>

“Soft Law im internationalen Handelsverkehr: Die Bankgarantie auf erstes Anfordern”

Dr. Christian FÖRSTER / Hiroyuki KANSAKU



August 31, 2007

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