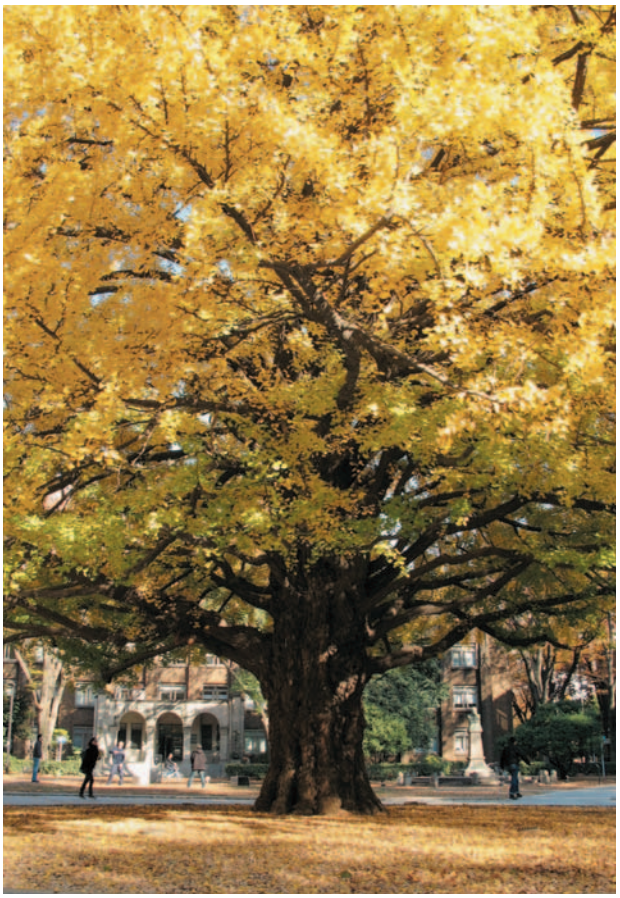
Newsletter

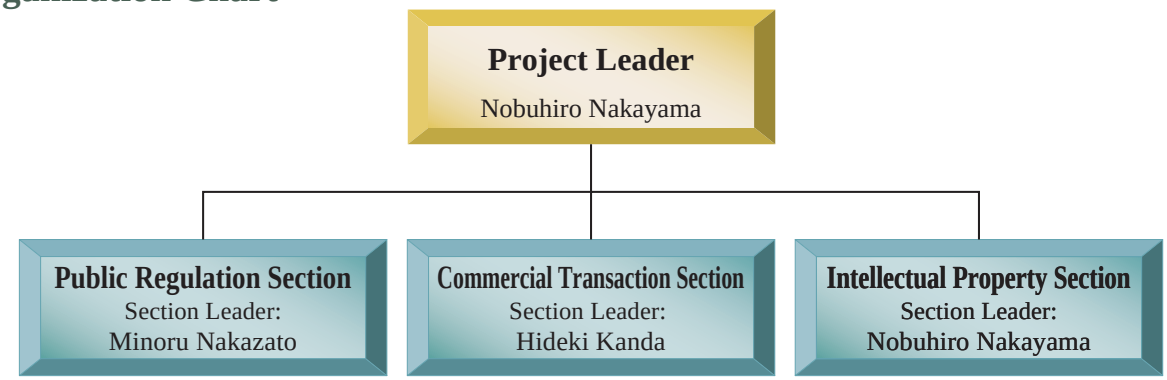
English Edition No.6 Autumn - Winter 2007-2008



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

1 Organization of Research and Education

Organization Chart



(Dated as of March 31, 2008)

Project Scholastic Member

Minoru Nakazato (Section Leader): Graduate Schools for Law and Policies ("GSLP")/Tax Law
Takeshi Igarashi: GSLP/American History of Politics and Diplomacy
Mitsuaki Usui: GSLP/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

Hideki Kanda (Section Leader):GSLP/Commercial Law
Yoshiaki Miyasako: GSLP/International Business Law
Shinsaku Iwahara: GSLP/Commercial Law
Tomonobu Yamashita: GSLP/Commercial 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

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

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 Reseacher
- Koichi Shirasaki: Trade Win Co., Ltd
- Rei Kawazoe: Graduate Schools for Law and Politics
- Julien Mouret: Universite Montesquieu Bordeaux 4
- Yoko Manzawa: Rikkyo University, Faculty of Law
- Tomoko Mise: Musashi University
- Kei Yoshinaga: Graduate Schools for Law and Politics
- 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
November 2
Alp Ercil (Investment Manager, Perry Capital Limited); Lecture:“Protection of Minority Shareholder Rights in Parent-Child Listings: A Requirement for Building a Global Financial Center in Japan,” at the Twentieth meeting of the Study Group on Market Transactions and Soft Law.

2008
January 10 - February 9
Foreign Researcher: Teresa RODRÍGUEZ DE LAS HERAS BALLELL (Assistant Professor in Commercial Law, Private Law Department, Universidad Carlos III de Madrid)
See, page 5 - 7 for detail

January 10 - February 9
Foreign Researcher: Jorge FELIU REY (Researcher at Private Law Department of Universidad Carlos III de Madrid and Lawyer as member of the Legal Department)
See, page 8 - 10 for detail

＜The Project Members’ Overseas Research Activities＞

2008
February
Yoshihiro Masui (Professor, University of Tokyo)
Belgium/Brussels: Discussed current issues in the OECD Model Tax Convention on Income and on Capital at the Permanent Scientific Committee of the International Fiscal Association.

March
Tomotaka Fujita (Professor, University of Tokyo)
Austin/Texas: Participated in the“Symposium on UNCITRAL Convention on International Carriage of Goods by Sea” (University of Texas, Law School)

＜Profile＞

Teresa RODRÍGUEZ DE LAS HERAS BALLELL (Foreign Researcher)

1999: B.A. in Law (*Licenciada en Derecho*), and B.A. in Business Administration (*Licenciada en Dirección y Administración de Empresas*), Universidad Carlos III de Madrid (Spain). Award with Special Distinction (*Premio Extraordinario de Carrera*).

2001: M.A. in Private Law (*Diploma de Estudios Avanzados en Derecho Privado, Cursos de Doctorado en Derecho*), Universidad Carlos III de Madrid, 2001.

2005: Doctor in Law (*Doctora en Derecho*), Award with Special Distinction 2007, (*Premio Extraordinario de Doctorado*) Universidad Carlos III de Madrid. Doctoral Thesis: *El régimen jurídico de los Mercados Electrónicos Cerrados* (*e-Marketplaces*) (Highest Mark: *Sobresaliente cum laude por unanimidad*), 2005.

Current position: Assistant Professor in Commercial Law, Private Law Department, (Universidad Carlos III de Madrid).

Professional background: Collaborator at the Institute *Knight Frank* on Real State Law, (*Cátedra Knight Frank del Sector Inmobiliario y de la Edificación*), Universidad Carlos III de Madrid. Member of the Legal Department (*Estudio Jurídico*) of the Universidad Carlos III de Madrid from 1999.

Research and teaching in foreign universities and other research centres: *Marie Curie Fellow* at the Centre of European Law and Politics (ZERP) of the University of Bremen (Germany), January-March 2007. *Visiting Scholar, University College of London*, London, UK, September 2006. *Visiting Researcher*, UNIDROIT, Rome, Italy, April-June 2006. *Visiting Scholar*, Law Faculty, University of Oxford, UK, researching on Security interests in personal property under the supervision and sponsorship of Prof. Sir Roy Goode, January-April 2006. *Visiting Scholar*, Fordham University, School of Law, New York, USA, researching on Competition Law, October-December 2002. *Visiting Lecturer*, Universidad de Buenos Aires, Argentina, as lecturer and co-director of an Intensive Postgraduate Course on E-Commerce Law, 17th July-4th August 2006. *Visiting Lecturer, UFR d'Études Ibériques e Latino-Américaines, Université Paris Sorbonne - Paris IV* (France), lecturing on Financial Markets, November 2005. *Visiting Lecturer, Cattedra di Diritto della Navigazione, Università di Bologna* (Italy), lecturing on Transport Law, September 2005.

International consultancy: Member of the Expert Group on "New Technologies, Prevention and Insurance", SEAIDA - Spanish Section of the *Association Internationale de Droit des Assurances* (AIDA) - from June 2006. Short Term Expert status within the framework of the Twinning Project Spain-Turkey on maritime law, co-sponsored by Spanish Foreign Affairs Ministry - EU Commission.

Participation in funded research projects: Member of several past and current research projects: "Forum on Technological Society" (*Foros de la Sociedad Tecnológica: reflexiones sobre el impacto de las nuevas tecnologías en la comunidad de Cantabria*); "Impact of New Technologies on Corporate Law (SOCITEC)", director: Prof. Dr. D. Rafael Illescas Ortiz; "SMEs and new technologies" (*Pymes and nuevas tecnologías*); "Exercise of voting rights by electronic means" (*Ejercicio de los derechos políticos del socio a través de medios telemáticos: voto electrónico y asistencia telemática a la junta general*); "Flexibilization of Company Law to promote business" (*La flexibilización del derecho de sociedades para el fomento de las iniciativas empresariales*); "New Technologies applied to quoted companies" (*El empleo de medios telemáticos en las sociedades cotizadas*); "Electronic Transport Documents: Legal Aspects" (*Análisis del fenómeno de la electronificación de los documentos de transporte desde una perspectiva jurídica*); "E-Commerce Law" (*Derecho del Comercio Electrónico*); "Protection from Unfair Suretyhips in the European Union" (*EU Research Project (Marie Curie Host Fellowship for the Transfer of Knowledge - ToK) - 6th European Framework Programme on Research and Development*).

I very much appreciate the possibility granted by COE Soft Law Program to spend a researching stay at the University of Tokyo.

NEW PLAYERS AND NEW VALUES IN THE MARKET FOR CORPORATE CONTROL

The market for corporate control is a recurrent topic in both legal studies and business and management reports. Its understanding as a control mechanism for public listed companies that operates by stimulating better management performance under the existing or latent threat of takeovers confers on corporate control the stunning aim of creating value in the market. The assumption that takeovers offer a number of benefits, at least in the long run, for companies, investors and ultimately for the economy as a whole by disciplining management, promoting competition and facilitating corporate restructuring definitively endorse the urgent implementation of an enabling strategy removing obstacles, improving regulatory framework and providing the market with efficient takeover mechanisms. Such reasoning may surely lead to the convincing premise that takeover-friendly laws and regulations would support an efficient and smooth market for corporate control. A comparison approach to the main jurisdictions does nevertheless reveal a more complex image thereon comprising other relevant elements affecting the functioning patterns of market for corporate control other than the regulatory framework. In addition, course of the market is switching to new appealing coordinates. New actors are participating in the playing field, arousing surprising concerns regarding corporate ownership structure and its implications in the control of economic activity. At the same time, new interests and demands are concurring in the market encouraging renovated strategies, conditioning business rivalry, redefining managers' duties and refocusing corporate value.

Against such a backdrop, recent evolution on corporate control rules and practice throughout the world suggests three comments. Firstly, unlike the mainstream belief, systems on corporate control competing in the worldwide market, far from being consolidated in a simplistic two-model scenario blurred by certain hybrid models, are evolving, converging and diverging, questioning, and reshaping. The use of models to explain the international scene is extremely clarifying. In practice, however, real models appear blurred and sometimes undefined more than pure or hybrid. Ascertaining that forces to take into consideration the own viability of the system of corporate control as conceived so far. This is the second comment is worth noting. It is reasonable to raise doubts over the lastingness of the existing model (or models) for corporate control under new surrounding economic, social and business circumstances. New forces concurring in the market may entail severe inconsistencies in the existing models or even the claiming of new ones. Accordingly, the third comment deserving of being pointed out refers to the unavoidable influence on the devising of corporate control, its understanding and the assigned functions, of external factors such as economic fluctuations, objectives of economic and social policy, new value perceptions or the behavioral layer settled by private ordering.

Most recent reforms deployed in Japan offer a very suggestive approach on the matter to be analyzed from a European vision in order to test the proposed hypothesis over the current situation on corporate control and corroborate the main predictions on future trends. Interest on Japanese system is endorsed by several reasons. Firstly, as far as corporate model is concerned, Japan has managed to devise an interesting mixed model that, on the one hand, offers an attractive alternative to the American model and the German one and, on the other, achieve a productive combination between traditional Japanese laws and transplanted foreign elements to shape a potent J-model, strongly based on extralegal norms arising from corporations' practice. Regardless of the debate over the definition of Japanese model, the convergence issue and the soundness of myths, fables or realities about Japanese corporate structure, the attained integrating model deserves attention and acknowledgement. Such an interest on Japanese system has been impelled by the successive reforming initiatives launched from 90's and, in particular, the last one. Japan has been experiencing a long process to modernize the overall corporate legislation in response to the changing environment, intending to stimulate the formation of new companies and allow more flexible corporate management. Among other outstanding reforms, those concerning corporate reorganization are particularly meaningful for our research. In a very synthetic manner, it may be summed up in a relaxation of the requirements for corporate restructuring by easing restrictions on mergers and acquisitions as well as providing new defense measures against hostile takeover. It has been interpreted as the culminating point of a process of remodeling of the Japanese model of the market for corporate control towards a

hybrid Americanized version. Anglo-American model on corporate law may be stylized as an external more than internal governance mechanism of control; and shareholder-oriented rather than stakeholder-oriented system. Although this reform is expected to trigger a more intense takeover activity in Japanese market (last December experienced the most recent one), it is commonplace that takeovers, especially hostile takeover, have been less prevalent in Japan than in United States or in Europe (around 3% of GDP compared with 10%). Should the legal divergence be not yet wide, other variables must be included in the comparison equation. Perceiving that encourages considering the effect of other surrounding factors apart from regulatory framework on the definition of the market for corporate control. Although takeover regulations contribute to the devising of the market for corporate control, their impact appears to be partial and not decisive. That assumption leads to the second reason to pay attention on Japanese corporate law. Europe, secondly, observes with understanding the ability of Japanese model, unlike "shareholder primacy" model, to incorporate other priorities in the defining of corporate value. There are signs in the modern Japanese model appearing to prove that it is progressively veering to a more shareholder-oriented approach. Nevertheless, stakeholders' interests easily permeate corporate decision-making.

Japan is said to be experiencing a going hybrid process that will presumably eclipse the old myth of the internal-monitoring based "company community" by a vibrant content for corporate control. Factors explaining such an envisaged metamorphosis are several, cultural, structural, economic and political, besides legal ones. Japanese model on corporate law is then seen as a system in transition. From a European approach, this multifactor transformation evokes suggestive appeals for discussion. Corporate control in Europe is an open debate. After a long and eventful negotiation period, political agreement on Takeover Directive was finally reached in December 2003 but only with a controversial compromise making optional the most important provisions of the Directive. The aims of harmonizing European market for corporate control, ensuring a level playing field between Member States and protecting shareholders, including minorities, are indeed ultimately conditioned by the modalities of implementation in the Members States and the extent to which the exemption provided for in the Directive is used. The complex architecture of opt-in/opt-out provisions is likely to increase protectionism across European Union and dilute the objective of uniformity throughout the common market. Europe has also resorted to choice - a two-tier choice (at Member State's level and at company's one) in this case - as regulatory strategy. In this scenario, with one model in transition and another in question, worldwide market is revealing new challenges corporate control systems must face.

Such a hypothesis and its envisaged implications on the regulatory framework on corporate control and its practice are worth being corroborated and may inspire further promising researches. Merely observing current issues in capital markets at least two meaningful trends can be perceived: the involvement of new players and the emergence of new values. As far as market actors are concerned, capitalism is working and money flows from countries with excess savings to those that need it. Accordingly, new players are seeking to be accommodated in main companies, the so-called sovereign-wealth funds. Their coming on stage has aroused in Western governments, with certain dose of hypocrisy, several concerns backed by protectionist and nationalist discourses. At the same time, the process of transposition of the Takeover Directive is revealing a worrying revival of seemingly nationalist attitudes and a strong reluctance of a large number of Member States to lift takeover barriers menacing the emergence of a European market for corporate control. Furthermore, in a microeconomic level, participation of hedge funds and investment funds in companies as shareholders raises demanding issues about the extent and the essence of corporate value and the architecture of company decision-making. As regards new concurring interests, a more stakeholder-biased company is conquering markets throughout the world. Corporate social responsibility, being nothing more than a fashion or pointing the advent of a new era, is convincing evidence that new values matter. Corporate value will have to capture these new impulses of the society. It is good time for good business. And troubled times for corporate control.

＜Profile＞

Jorge FELIU REY (Foreign Researcher)

1998: B.A. in Law (*Licenciado en Derecho*), Universidad Carlos III de Madrid (Spain).

From 1999: Member of the Spanish Bar Association of Madrid.

2001: PhD courses in Law: General Programme (1999-2001), Universidad Carlos III de Madrid.

2007: M.A. in Private Law, Carlos III University of Madrid. Research thesis (*Tesina de Doctorado*) on "*La flexibilización de la Sociedad de Responsabilidad Limitada a través de sus causas de disolución*, with the highest mark *Sobresaliente por unanimidad*.

2001-2005: Teaching and researching activities at Universidad Carlos III de Madrid as *Profesor Asociado* in graduate and postgraduate courses.

Current position: Researcher at Private Law Department of Universidad Carlos III de Madrid and Lawyer as member of the Legal Department

Main fields of research: My experience as practitioner in several law firms, working on areas related to company law, made me face the question whether Company Law was being able to satisfy the current needs challenged by the market. Hence, my aims of research started to focus on the study of the flexibilitation strategies of Company law, both in Spain and in other jurisdictions. The idea of flexibilization is meant to evoke not only the removal of bureaucratic barriers and cumbersome requirements or the reduction of cost and time in procedures, but also the aim of entitling partners to reliably tailor the incorporating and operating documents related to the company to satisfy their interests.

As far as comparative law issues are concerned, I began my study on Common Law, firstly, attending to two courses thereon, *Introduction to US Law*, Washington, D.C., USA, (July-August 2002) and *Introduction to English Legal System, London School of Economics*, London, 3-22 July 2005; and, secondly, spending at the end of the summers of 2006 and 2007 two researching stays at University College of London aiming at approaching to the recent reform that has culminated in the enactment of Companies Act 2006. The possibility of researching in the mentioned university and having access to the premises and funds of the Institute of Advanced Legal Studies' Library allowed me to study on the goals and principal patterns marked by the reforms that were deploying other legal systems.

Furthermore, and concerning this line of research, I am member of three researching groups: the first one, on company law and new technologies titled "Impact of the new technologies in the mercantile companies (SOCITEC)", directed by Prof. Dr. D. Rafael Illescas Ortiz; the second one, on company law and the instruments to promote business initiatives, directed by Prof. Dr. D. Maria Jose Morillas Jarillo; and the third one, together with other professors of my University and in cooperation with the Universidad del Norte Santo Tomás de Aquino (Argentina), a project funded by the Agency of International Cooperation (*AECI, Agencia Española de Cooperación Internacional*, State Departments, Government of Spain) titled "The flexibilization of company law to stimulate business initiatives".

I would like to thank the University of Tokyo, and in particular the COE, for giving me the opportunity to approach to Japanese legal system, contributing new experiences to my field of research on the flexibilitation of company law.

Soft Law and Company Law: new challenges.

It is mainstream knowledge that commercial law was born as a consequence of and to give response to the needs of a concrete and dynamic group: merchants. Such a regulatory framework had his germ in the private ordering projected by the merchants over their daily commercial activity.

Just like Commercial law, company law, or more concretely, the evolution of the legal form for association, has being evolving in conformity with the needs that every moment was demanding. Evidence of such evolution reveal in Spain the *Sociedad de Responsabilidad Limitada*, the *Private Company* in England and the *Gesellschaft mit beschränkter Haftung* (G.m.B.H.), insofar as all they were devised mainly to satisfy a need that was eagerly claiming a response: the aspiration, deeply felt in the trade, to extend to small enterprises and familiar businesses the benefit of limited liability granted by law to joint-stock companies and other associative types.

In order to give response to the demands of commercial life, at the end of the 19th century big efforts started to be make to create a type of mercantile company that, on the one hand, it would enjoy the benefit of limited liability, but without the burden of cumbersome formal and bureaucratic requirements of incorporation, and free from the sophisticated administrative complexity of corporations; and, on the other hand, it could accommodate the personal cohesion inherent to partnerships, without entailing the risk of jeopardizing the whole patrimony by investing in a risky business.

Taking into consideration all these demands, an attractive solution starts to be shaped. Providing a limitation of liability to the extent of the investment in the business and ensuring that being involved in the management of the company does not entail the risking of the whole patrimony, market would be surely open to individuals and entities with large patrimonies who, on the one hand, did not resign themselves to the fact of being passive partners in the Limited Partnerships (*sociedades comanditarias*) and, on the other, did not be willing to assume the risk of losing all fortune in a sole business.

During the 20th century, this model has been evolving, increasingly losing its aptitude to satisfy such changing interests of the latter century, and being relegated, in my opinion, to be treated as a small stock-joint corporation (*sociedad anónima*). Under Spanish legal system, a company form that had born with no more rules that those of general nature embodied in the Commercial Code and under the auspices of the Notary practice, has veered nowadays from its open configuration into a well-defined form where autonomy of will is restrained from being exercised beyond that scope allowed by statute.

Changes in social and political thinking, favoring the participation and active intervention of the State in the social and economic life of citizens, aiming at safeguarding certain interests deemed as superior, have culminated in a regulatory framework for corporations, and as far as we are concerned, for private company (in sense of *sociedad de responsabilidad limitada*) that gives a limited leeway to the partners' autonomy of will with the ultimate objective of prevent those interests deserving protection from being threatened by private ordering.

The institutionalization of this company model, whose structure and functioning has been rigidly established by statute tailoring it with a clear corporate profile; has opened a deep gap between the function that it should perform and the reality.

Such a legal inflexibility has encouraged partners to manage to personalize their interests by means of "*extrasocietarios*" instruments. In this regard, shareholders' agreements signed among all or some of company's members are becoming more and more frequent intending to alter or complement the rules governing their internal relationships as provided by statute and bylaws. This practice of resorting to "*extrasocietarios*" instruments reveals the shortcomings of a Company

Law that proves to be strongly institutionalized and to barely rely on the autonomy of will.

Such a situation, to our way of thinking, is nevertheless changing. Globalization, use of the new technologies and delocalization, among other factors, are stimulating a great rivalry among markets. Furthermore, governments are aware of the fact that to promote business and accordingly the domestic economy and the country's employment attention must be focused on the needs of small and medium-sized enterprises, to stimulate their creation and growth.

Hence, certain regulators, both at national and supranational level, such as the European Union, being aware of this new scenario, have embarked on a promising task of review and consequent transformation of their legislations, with the ultimate aim of gaining competitiveness and stimulating the economy and the employment. Such reforms are to consist, inexorably, in modernizing the company law insofar as it is deemed an efficient instrument to promote the economy of a country. A company law able to give response to the needs of our days, and match the current economic and social reality. Reforming initiatives launched in United Kingdom and Japan, among other, are good examples of this trend.

The most suggestive pattern of such reforms is the course of the adopted strategies. They are not only addressed to remove barriers and useless bureaucratic requirements, but also to devise new vehicles for channelizing investment and economic activity. As mentioned above, the laws and regulations currently in force within Western legal systems fail to satisfy needs and demands of business, especially, those of the small and medium-sized enterprises. A modernizing strategy on Company Law does then require not only an improvement of the regulatory framework but also the provision of more flexible new vehicles to run business.

Therefore, reforming strategies have adopted two possible solutions. The first one, backed by an institutional approach, is content to implement successive and incremental changes on the existing laws and regulations by enacting innumerable new laws modifying some of the existing elements without really veering the course of the law towards the modernization. The second one nevertheless entails the creating of new organizational models for companies. In other words, the legislator is facing the dilemma of opting to adapt old forms of companies to fit new circumstances, or daring to create new models founded on two pillars: the limitation of liability and the entitlement of the company's members to widely personalize the organizational vehicle to better satisfy their interests and to intervene in the management of the common business.

To my way of thinking, members of closed corporations are claiming two main demands: limitation of liability and full freedom to organize their business in conformity with their interests. These claims are already trying to be fulfilled by some countries such as Japan by creating the new *Godo Kaisha*.

To conclude, it appears reasonable to affirm that the change that took place at the end of the 19th century, when the market was demanding new associative vehicles, is being experienced again in our days, since market players are seeking to find new business models to fulfill their needs. And it can be discerned that the future efforts to modernize company law must courageously defy a tricky dichotomy between companies (*sociedades personalistas*) with unlimited liability of the members and a contract-based structure, and corporations (*sociedades capitalistas*) with limited liability and a corporate structure.

Symposium - "Soft Law and the State-Market Relationship"

The Tenth Symposium

The Mechanism of Creating Private Ordering: Creator, Process and Contents

Date: March 3(Monday), 2008 14:00-18:30

Place: Academyhills 49

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

Opening Remarks: Nobuhiro Nakayama, Professor, University of Tokyo / COE Program Project Leader

Spontaneous norms in Social Law

Speaker: Masahiko Iwamura, Professor, The University of Tokyo / COE Program Project Scholastic Member

Comments: Sayaka Dake, Associate Professor, Tohoku University

Norm creation by guidelines for the Act on restrictions on the liability of service providers

Speaker: Hiroki Morita, Professor, The University of Tokyo / COE Program Project Scholastic Member

Comments: Souichirou Kozuka, Professor, Sophia Law School

Norm Creation in International Commercial Transactions

Speaker: Tomotaka Fujita, Professor, The University of Tokyo / COE Program Project Scholastic Member

Comments: Hiroo Sono, Counsellor, Civil Affairs Bureau, Ministry of Justice; Visiting Professor, Hokkaido University

Concluding Remarks: Hideki Kanda

Cooperation: Shoji-Homu Ltd.

Review of Activities During the Past Five Years

Project leader: Nobuhiro Nakayama

“Soft Law and the State-Market Relationship - Forming a Base for Strategic Research and Education in Business Law,” which was selected as the 21st century Centre of Excellence (COE) program in 2003, will end in March 2008. Now, after five years, I would like to share my personal opinions as the summary of our project.

When we applied for the COE program, we had an intensive discussion within the Faculty of Law at the University of Tokyo, concerning which research theme to choose. We considered various alternatives that were theoretically and practically critical, yet sufficient research had not been conducted (here in Japan or internationally) which could benefit not only one particular law field but also the development of junior researchers and practitioners; in the end, we decided to choose soft law. Due to the fact that systematic and institutional research on soft law had not been conducted in Japan, and that such research was rarely done even in the world, at the beginning, we were not confident enough to proceed with this research successfully and form a base of knowledge. However, as we continued we were convinced that this was a good choice.

The term “soft law” was already being used in the field of international law, in which an integrated enforcement did not yet exist; various discussions about the term were found to have been done in this particular field. However, this term was not well known in other fields. Therefore, we defined soft law as “norms that are not enforced by courts or other authorities and that affect the behavior of individuals (civilians and legal personnel) and nations” to start the research. There are several types of soft law, including those created independently in the marketplace and business fields, those provided by the government and those created as an international rule, to name a few. For our project, we divided these soft laws into the fields of “Public Regulation,”“Commercial Transaction” and “Information Assets (Intellectual Property)” and conducted research that suits the cases in each field. In addition, we organized cross-field study groups to handle the basic theory and methodology of soft law (“The Study Group on Theories of Soft Law,” “The Study Group on Culture and Law” and so on) and to reinforce the research on the establishment, modification and extinction of soft law and its enforcement as well as to share problem awareness.

In current law fields--especially business law--a tremendous amount of soft law exists. Businesses are based on these soft laws as well as hard laws, which makes soft law a critical factor in understanding the current business situation. However, most of the traditional research and education addressed in law schools focuses on hard law, mainly on those which can be executed by the courts. We have to admit that accumulated research on soft law rarely existed previously and therefore research and education of this legal science in business law was neglected. Although we had to initiate our research on soft law from the basics, we were at a loss in terms of the tremendous amount of soft law data. In the first symposium, we presented the Japan Economic Federation’s Charter of Corporate Behavior and OECD Guidelines for Multinational Enterprises, and added some theories. Along with the formulation of the database described below, the research gradually stabilized.

With the above issues in mind, we started research in each field; simultaneously, we began to establish a database of soft law. A sizeable amount of materials related to soft law were scattered, and it was unclear what to choose as specific research targets. We then first decided to establish a highly accurate and practical database and use it to clarify analysis

targets. We asked junior researchers, lawyers, patent agencies, corporate legal personnel and students (graduate students of law schools, graduate school students and undergraduate students) to help us to collect, sort, and organize various data. Although it took much labor and time to establish the database, it is now almost complete and became open to the public as "the integrated soft law database" on the academic research database repository of the National Institute of Informatics. Soft laws from over 15 fields including banking, securities, intellectual property, taxes, social security and health care were collected and organized, and approximately 5,000 articles of data were accumulated (as of the end of March 2007). There is no other database similar to this. It is my wish that this database will be widely used in Japan or even internationally not only for this research base but also for future research and education on soft law.

Along with the database generation, the above mentioned research in each field progressed: The newsletter to report the results of the research, the "Soft Law Journal" went through eleven issues, and the public relations magazine "COE Newsletter" went through 14 issues. As well there were ten "Soft Law and the State-Market Relationship" Symposiums, 35 COE public lectures and 22 COE soft law seminars, not to mention the study groups for each field which incorporated 193 sessions. Many issues of "COE Soft Law Discussion Papers," which were submitted to each study group or seminar, were published. These documents and the database can be found on this project's website (http://www.j.u-tokyo.ac.jp/coelaw/). I believe that we raised the level of understanding of soft law of the public at large. More recently the term soft law has become a standard among legal professionals.

Another important goal of this project has been to nurture junior researchers and junior legal professionals. Soft law education not only helps to nurture the legal profession appropriate to the current business situation, but also allows us to nurture junior researchers who involve themselves in theoretical study to make it evolve to the normative research as the social science based on empirical evidence, and also helps to nurture international personnel. For this purpose, we assigned many young staff members to the role of special appointment researcher or base formation assistant, and had them actively involved with the seminars and the database development. I believe that this research and these activities helped them to better understand soft law. Also, we asked many researchers from other universities to join this project as special-appointment professors or assistant professors, and I believe that they helped to distribute the soft law concept to other junior researchers of many universities.

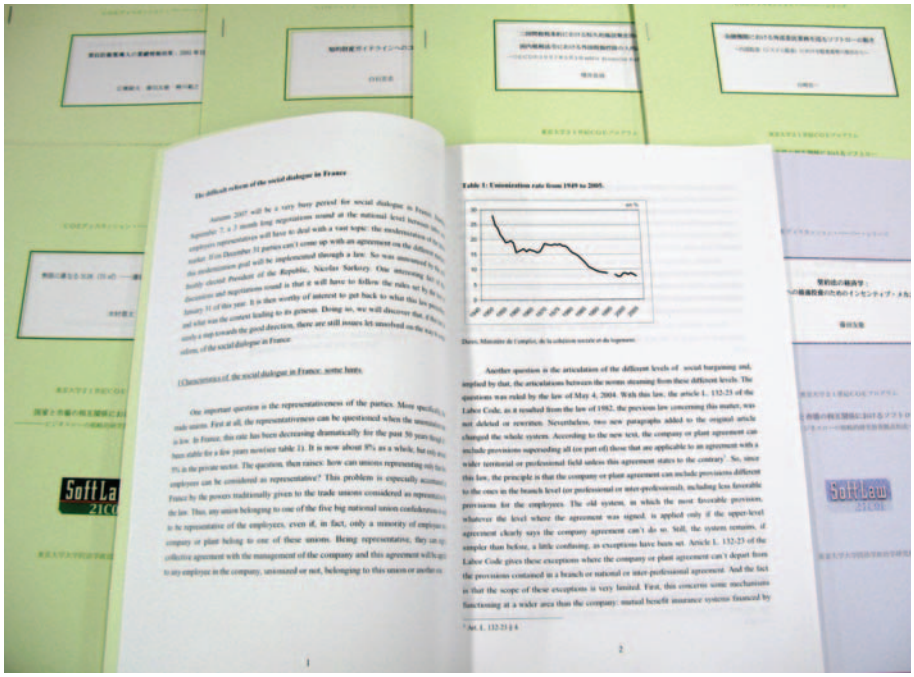
Although this five-year 21st Century COE program ends shortly, the importance of the research and education on soft law may increase but not become devalued in the future. I regret to see all the knowledge, the networks and databases that we established over the five years disassembled, and it will also be a huge loss to our Faculty of Law as a whole. I sincerely hope that this base will be preserved in some form.

This program could not be realized only with the assistance of the staff members of this program. It is also the result of support from many people from various fields outside the law. Although it is difficult to identify all those people here to thank them, on behalf of this program, I would like to take this opportunity to express our appreciation. Also, I hope that this project leads to more active research on soft law in Japan.

3 Outcome

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 (ihttp://www.j.u-tokyo.ac.jp/coelaw/outcome.html).



No	Author	Title
COESOFTLAW 2007-9	Sumio Hirose Tomotaka Fujita Noriyuki Yanagawa	Information Revealing Effects of Anti-takeover Amendments: A case of Japan in 2005
COESOFTLAW 2007-10	Julien Mouret	The difficult reform of the social dialogue in France
COESOFTLAW 2007-11	Koichi Shirasaki	Trend of Soft Law in Financial Services Outsourcing Business
COESOFTLAW 2007-12	Tadashi Shiraishi	Comments on the JFTC Intellectual Property Guidelines of 2007
COESOFTLAW 2007-13	Yoshihiro Masui	PE Non-discrimination and Japan's Foreign Tax Credit: Impact of May 2007 Discussion Draft regarding OECD MTC Article 24
COESOFTLAW 2007-14	Sota Kimura	An Infinite Range of 3LDK(75m²) ——Two Models of Softlaw
COESOFTLAW 2008-1	Tomotaka Fujita	Economics of Contract: Incentive Mechanisms for Optimal Investment to the Contract Relationships
COESOFTLAW 2008-2	Takashi Araki	Corporate Social Responsibility, Socially Responsible Investing and Labor Law: The Role of Hard-Law and Soft-Law in Labor Policy

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.

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