

Is Japanese Law transparent for global users? An interim report on the “Transparency of Japanese Law Project”⁽¹⁾

Toshiyuki KONO

Kyushu University, Fukuoka/Japan

- 1 Introduction
- 2 Analysis of users' opinions
- 3 Website as a tool of the Project
- 4 Concluding summary

1 Introduction

The 1990s were a decade when Japan started to experience a troubled economy, which included deflation for the first time in its modern history. The decade is thus often described as the “lost decade”. However, when one changes the viewpoint from the economy to law, these 10 years have a different character. To cope with the unexpected situation in a troubled economy, important laws were amended or newly introduced⁽²⁾. From a legal point of view, therefore, the 1990s should be construed rather as a prosperous decade. With this development, not only new legal tools for business, but also materials for comparative legal analysis and international academic debate were created.

A fundamental question, however, was how to share information on these new laws with users outside of Japan. Even more fundamental is if Japanese Law is known to the other parts of the world. If it is not the case, Japan may look like a legal “black-box”. Hence something needed to be done from the Japanese side.

Against this background, the “Transparency of Japanese Law” project was launched with ca. 40 scholars in various fields related to international business law⁽³⁾. Two preparatory initiatives were taken by the Project Managing Group. The one was to analyze the opinions of users of Japanese law in order to clarify the goal setting and the other was to set up a project website as a tool to disseminate information on Japanese law. This article illustrates these two initiatives as the foundations of the project⁽⁴⁾.

2 Analysis of users’ opinions

The project was launched based on the general view that information on Japanese law is globally not well disseminated. In order to confirm that this general view is correct, and to set up more precise goals of the project, the Project Managing Group organized a symposium in 2005 to directly hear opinions from users of Japanese law⁽⁵⁾. The following are the main points raised by the panelists⁽⁶⁾ of the symposium discussed with other participants.

(1) Translation and systemic conversion

Japan has been transplanting foreign legal systems since the 7th century. Translation in this long process involved the continuous creation of new concepts and words in the Japanese language. These new concepts and words embody foreign concepts in foreign laws such as 法律行為 for *Rechtsgeschäft* in German private law. It was purely an in-bound flow of legal information. Such newly created words were gradually integrated into Japanese linguistic fields and became a crucial part of legal Japanese. Even if they were foreign to the Japanese linguistic tradition, time helped to facilitate this integration process.

The situation before us today is fundamentally different. What the project aimed at was to create an out-bound flow of information. Here new creation cannot be made from the Japanese side. Linguistically suitable, and for-users-easily-understandable, words must be found by the Japanese side⁽⁷⁾. Such efforts were never made until the 21st century.

If there were no suitable words, a mechanism needed to be developed to enable collaboration between native speakers of both languages. Almost at the same time as the start of this project in 2004, the Cabinet Office of Japan launched a project to translate selected Japanese legislation and edit an English-Japanese on-line dictionary for legal terms⁽⁸⁾. This is the first officially organized mechanism for such collaboration. Its main goal, however, was not overly ambitious. It merely aimed at unifying English translation among ministries and governmental agencies.

However, such word-to-word translation has limits in terms of the delivery of the correct meaning. Especially in Japan, since both civil law and common law as-

pects are amalgamated within its legal system, translation of concepts and principles, which stem from civil law systems, into English without commentary could easily mislead readers. Translation should rather be construed as system conversion from one legal system to another one in a different language. To enable such conversion, an academic perspective is indispensable. Since this perspective was not properly recognized in the past, the quality of translation had consequently suffered.

(2) Function of judgments

Japan is regarded as a civil law country. Thus codified rules have primary importance as legal source. However it would not be accurate to emphasize only this aspect. In the legislative process, it is not rare that, when opinions on particular issues are divided, drafters decide not to adopt black letter rules and leave it to the decisions of the courts. Thus it is crucial to recognize the “rule-making” functions of judgments in Japanese law.

In this regard, there are two problems. The first one is that Japanese courts are not always active in rule-making. Japanese courts should recognize this rule-making function as an important responsibility. The other is a lacuna of information on Japanese case law. For example, the website of the Supreme Court does not contain information on lower courts’ judgments. In addition, only judgments of lower courts selected by courts are published and the publication usually takes 6 months or more after the rendering of the judgment⁽⁹⁾. Japanese judgments, especially those of lower instances should be published more promptly and comprehensively.⁽¹⁰⁾

(3) Japan as a forum

The utility of Japanese law as a business tool is closely related to Japan’s possibility as a forum. In business practice, however, Japan is not a preferred choice as a forum. There are several reasons for this, but a significant issue is that a plaintiff’s access to evidence possessed by the defendant is excluded due to the lack of the discovery system, and thus the plaintiff has to litigate only with the evidence they possess. There are similar tools in Japanese law, such as one party’s inquiry to their opponent to disclose evidence (art. 163 of the Code of Civil Procedure) or a

court order to submit documents (art. 213 et al of the Code of Civil Procedure). But they are often unused, since these systems lack enforceability due to the lack of a system of contempt of court, and since the plaintiff’s attorney sometimes does not want to disclose evidence possessed by the plaintiff.

In addition, although Japanese courts’ ability to manage the proceedings has often been highly praised, Japanese judges tend not to disclose their determinations. This discourages potential litigants from choosing Japan as a forum of litigation. It should be also pointed out that commercial contractual clauses are sometimes modified by judges through applying general clauses. However commercial contractual clauses should be distinguished from consumer contracts in the sense that both parties of a commercial contract should, in principle, be bound by the language of the contract. Modification by applying general clauses would hamper the predictability for the parties of commercial contracts⁽¹¹⁾.

If Japan is not a preferred forum for litigation, could Japan be attractive as a forum of arbitration? Foreign attorneys are allowed to serve as arbitrators since 1995⁽¹²⁾. Japan amended its Arbitration Act modeled after the UNCITRAL Model Law for International Commercial Arbitration (1985). The level of black letter rules thus reached international standards. The Japan Commercial Arbitration Association (JCAA) amended its rules to make them amongst the most advance⁽¹³⁾. However, in practice, Japan’s position lags behind other Asian countries in terms of the number of arbitration cases as this chart⁽¹⁴⁾ shows. If Japanese courts had been frequently used for litigation, this data should not be taken as a bad sign. However, as stated above, Japanese courts are not a preferred choice for parties. Hence it should be concluded that Japan as a whole is avoided as a forum for international dispute resolution.

	Hong Kong	China	Japan	Korea	Malaysia	Singapore
2008	602	1, 230	12	47	47	71
2007	448	1, 118	15	59	40	70
2006	394	981	11	47	133	65
2005	281	979	11	53	118	45
2004	280	850	21	46	19	48

Several reasons for Japan's low presence as an arbitration forum could be pointed out. Firstly, inaccurate information on arbitration in Japan was published in the 1980's, which included suggestions regarding the impartiality of Japanese arbitrators. Such a negative image created by an earlier generation of publications still exists. Secondly, there is article 72 of the Attorney Act, which prohibits any non-attorney from conducting legal services for remuneration. This provision provides for "arbitration" as one of the prohibited activities for non-attorneys. In order to attract qualified arbitrators from abroad, this provision is discouraging and must be amended to clarify that this prohibition does not apply to foreign arbitrators. Finally, the number of suitable candidates for qualified arbitrators residing in Japan is very limited, both in terms of Japanese arbitrators and as arbitrator from a third country. Nurturing arbitrators seems crucial⁽¹⁵⁾.

(4) Japanese law as a business tool

Irrespective of the location of the forum for dispute resolution, is Japanese law considered as a necessary tool for international business? As for out-bound business, it is the case for small- and medium-sized companies with no subsidiary. For these companies, it is very crucial if Japanese law is easy to use from the users' viewpoint. On the other hand, for large-sized companies the law of the destination of their business is more important, since most business activities occur between their subsidiaries and local companies. However even for large-sized companies, Japanese law as applicable law can be important, when they conclude subcontracts, for example. Information on Japanese law in a foreign language must be easily available for these Japanese users. In addition, foreign users who want to develop their business in the Japanese market need such information. In certain areas, especially in the financial sector, it is even inadequate to distinguish in-bound business from out-bound business, since foreign investors and the domestic market are so closely linked⁽¹⁶⁾. Thus, in general terms, to enhance the accountability of Japanese law is highly important. The responsibility to fulfill this duty should be borne not only by the government, but all stakeholders, i.e. legislators, regulatory authorities, attorneys, and scholars. Also, education should play a crucial role in this task.⁽¹⁷⁾

Through active exchanges of opinions among participants at the first symposium,

the adequacy of the original goal setting of the project was confirmed. To reach the desired goal, appropriate means had to be adopted. In this project, it was decided to do this through the creation of a project website.

3 Website as a tool of the Project

(1) Basic structure

In order to provide global users with sufficient and appropriate information on Japanese law, a project website was created as a primary tool of dissemination. The website includes pages on private international law, corporate law, the law of finance, law of goods and service transactions, intellectual property, insolvency law and international dispute resolution⁽¹⁸⁾. Each webpage has a uniform design, which contains three main items, i.e. “Overview”, “Legislation and Regulations” and “Court Cases”. This basic design was adopted from the following perspective. First, as stated above, although the Japanese legal system is understood as a civil law system, judgments of courts play crucial role in practice. Lack of information about Japanese court judgments would result in an incomplete understanding of Japanese law. Although the Supreme Court has been offering English translations of its judgments on its website⁽¹⁹⁾, when the project was launched, not all Supreme Court’s judgments were available. As stated above no information on lower courts’ judgments was available. Thus information has been patchy and obtaining a bigger picture of Japanese case law has thus been rendered difficult. Second, the Cabinet Office launched a project to translate selected Japanese legislation into English⁽²⁰⁾. Thus our project put emphasis on judgments. Third, it would practically be impossible to expect users of the project website to read all translated legislations and judgments. Rather, a not too detailed explanation on specific issues might be useful to increase the utility of the project website. Hence the project website provides explanations on fundamental issues in each field. These explanations are collected and uploaded in the “Overview” sections. When more detailed articles were considered as useful by some research groups, such research groups added articles on their website. Thus some pages in the project website contain some additional materials.⁽²¹⁾ Fourth, the overviews and judgments are hyperlinked on our website for the convenience of users.⁽²²⁾ Another important feature of the project website is the data base of Japanese

judgments. Translated judgments are accumulated in a data base of the project, which appears as the webpage of “Court Case Search”⁽²³⁾ on the project website. As it stands on December 2009, more than 1,000 cases are uploaded.

(2) Some data on the project website

The project website has been increasingly accessed. The following charts show some data obtained with software installed in the project server.

Year	2005	2006	2007	2008	2009
Number of visitors	2,015	3,278	9,100	17,081	33,988
Unique visitors	1,614	2,670	5,392	9,740	22,367
Pages	6,291	10,092	18,775	31,549	97,579
Number of hits	82,226	101,130	162,912	228,833	351,473
Bandwidth	193.66 MB	265.04 MB	532.92 MB	1,21 GB	4.64 GB

This chart shows that the number of visitors has doubled every year and that the number of pages visited and the volume of downloaded data from the project website have proportionally increased.

	2005	2006	2007	2008	2009
Visitors' Domain	Japan	Japan	Japan	Japan	Japan
Pages	2,644	5,981	7,145	11,107	49,212
Number of hits	31,165	66,054	87,373	121,540	179,541
	Network	Network	Network	Network	Commercial
	407	718	1,937	2,748	7,929
	3,170	4,493	16,503	20,597	16,746

	Commercial	Commercial	Commercial	Commercial	Network
	176	385	1,452	2,026	6,205
	806	2,802	8,113	9,311	30,738
	USA educational	Netherlands	China	Germany	Germany
	46	92	1,101	684	2,708
	311	560	1,351	2,858	7,429
	China	Australia	Germany	USA educational	USA educational
	45	30	338	383	750
	45	154	2,640	3,554	5,991
	Hong Kong	USA educational	France	UK	Australia
	22	27	129	275	692
	22	347	979	663	2,857
	Australia	UK	USA educational	Russian Federation	UK
	20	24	119	188	456
	162	209	1,194	389	1,726
	UK	Canada	Australia	China	Italy
	14	19	105	119	423
	201	36	1,198	226	938

This second chart contains data on domain/ countries of the website visitors. This shows the following points: first, throughout five years, the number of hits from Japan has been the biggest figure. Since the project aims at disseminating information on Japanese law, a question may be raised if the original aim has been achieved. However, dissemination can be made not only through direct access from abroad, but also through Japanese users such as trading companies, law firms, translators. In fact, inquiries from such users have been sent to the project's e-mail address. Therefore this phenomenon should be taken rather positively.

Second, access through commercial links such as Google or Yahoo and various

networks has been rapidly increasing, especially since 2007. This is the year when the website started to get a comprehensive shape with a sufficient amount of data on judgments, legislations and overviews. We assume that global users have started to realize the usefulness of the project's website.

Third, access from educational institutions especially from the Germany and USA is increasing. This is another positive sign, since young users will be well informed of Japanese law and will continue to be visitors of the website, as long as the information is updated.

Fourth, in order to make the project website more accessible to global users, the webpage of each research group in the project was linked to the website of AsianLII⁽²⁴⁾ in 2009, which is organized by Australian universities, under the section of "Japan" with keywords such as "Banking & Finance", "Intellectual Property Law", "Companies" and "Insolvency and Bankruptcy"⁽²⁵⁾. In 2009, the number of access from Australia drastically increased. It can be assumed that this link led to the increase of access. More access is thus expected.

4 Concluding summary

This paper has briefly illustrated two fundamental aspects of this particular project. The first aspect has been to prove the appropriateness of the overall goal of the project. Through discussions with "users" of Japanese law, it was proven and confirmed that more information in Japanese law should be available in good translated English. However, the quality of translation based on an appropriate understanding of the nature of translation as systemic conversion has been neglected so far. This project, therefore, aimed at producing a large quantity of high quality translations.

The project website was designed to make more and better legal information available. From this viewpoint, the fact that the number of people accessing to the website has been increasing is promising. Further analysis of the data may highlight new features of the project. Based on these foundations, each research group in this project has conducted their research activities in their specialized area of law. Through this research, each group tried to extract, if any, specificities of Japanese law. If there are negative specificities, such specificities should be removed in order to make Japanese law more understandable. Proposals as

lege ferenda would be then needed. If certain specificities of Japanese law can be justified, then it is not necessary to remove them, but greater emphasis would then need to be placed on explaining them to foreign users would become important. To find out if there are such specificities of Japanese law and how to cope with these specificities, three more symposia were organized after the first symposium. A report on the findings of these three additional symposia will be published by this author soon.

- (1) The official English title of the project is “The Transparency and Enrichment of Japanese Laws Concerning International Transactions in the 21st Century----Doing Cross-Border Business with/in Japan”.
- (2) For example, Civil Rehabilitation Law, Act No. 225 of December 22, 1999. See at [http://www.japaneselawtranslation.go.jp/law/detail/?re=02&x=42&y=16&co=01&al\]=C&ky=financial+instrument&page=4](http://www.japaneselawtranslation.go.jp/law/detail/?re=02&x=42&y=16&co=01&al]=C&ky=financial+instrument&page=4) (last visited, January 1, 2010).
- (3) It includes private international law, corporate law, law of finance, law of goods and service transactions, intellectual property, insolvency law and international dispute resolution.
- (4) This author plans to write another article on this project's academic achievements from a more comprehensive perspective.
- (5) Toshiyuki KONO, “Soto kara Nihonho wa doumiete iruka” (How does Japanese law look like from outside world?), *Jurist*, No.1312 (2006), pp. 30-36, at 31. This report is based mainly on opinions of the panelists at the symposium, although it was published with my name. Therefore the citation of this report should not be understood as self-reference. It reflects the opinions of all of the panelists.
- (6) As panelists of the symposium, foreign and Japanese attorneys, foreign scholars, legal counsel from a foreign investment bank and an ex-director of a Japanese trading company were invited. This author's comments in this chapter are based on the voices of these panelists as users of Japanese law.
- (7) According to Prof. Mark Levin, “mitomeru” in Administrative Procedure Act could be translated, depending upon the context, as “request”, “demand”, “solicit”, “seek”, or “require”.
- (8) <http://www.japaneselawtranslation.go.jp/dict/?re=02> (last visited on January 1, 2010)

(9) Supra note, at 33.

(10) Supra note, at 32-33.

(11) Supra note, at 34-35.

(12) JCA Newsletter No.2 (1997), see

<http://www.jcaa.or.jp/e/arbitration/newsletter/news2.html> (last visited on January 1, 2010).

(13) JCA Newsletter No.3 (1998), see

<http://www.jcaa.or.jp/e/arbitration/newsletter/news3.html> (last visited on January 1, 2010). The most recent version is available at

http://www.jcaa.or.jp/e/arbitration-e/kisoku-e/pdf/e_shouji.pdf (last visited on January 1, 2010).

(14) This chart is taken from the website of the Hong Kong International Arbitration Center.

http://www.hkiac.org/show_content.php?article_id=9 (last visited on January 1, 2010).

(15) Supra note, at 34.

(16) Supra note, at 35.

(17) Supra note, at 36.

(18) <http://www.tomeika.jur.kyushu-u.ac.jp/> (last visited on January 1, 2010).

Toshiyuki KONO, "Global Users no tameno Nihonho Sogo Portal - Nihonho Joho no Kaigai Hasshin no Hitsuyousei to Yuyousei" (A Portal of Japanese Law for Global Users - necessity and utility to disseminate information on Japanese law) *Jurist* No.1284 (2005), pp. 37-41.

(19) <http://www.courts.go.jp/english/judgments/index.html> (last visited on January 1, 2010).

(20) This project was taken over by the Ministry of Justice in April 2009. See its website at <http://www.japaneselawtranslation.go.jp/?re=02> (last visited, January 1, 2010).

(21) See for example the website of the corporate law group at

<http://www.tomeika.jur.kyushu-u.ac.jp/corporate/index.html> (last visited, January 1, 2010).

(22) See for example the website of the corporate law group. Supra note.

(23) <http://tomeika.jp/search/search.php> (last visited, January 1, 2010).

(24) <http://www.asianlii.org/> (last visited, January 1, 2010). This is the project to pro-

vide free legal information in English, which is coordinated by AustLII, a joint facility of the University of Technology Sydney and University of New South Wales Faculties of Law.

(25) <http://www.asianlii.org/resources/232.html> (last visited, January 1, 2010).