

# JAPAN'S MARITIME LAW REFORM IN AN INTERNATIONAL AND REGIONAL CONTEXT

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## 1 Introduction

The reform of maritime and transport law has been on the legislative agenda in Japan since a few years. First codified in 1899 as part of the Commercial Code, the Japanese maritime and transport law is the oldest in Asia. However, it has remained as originally enacted with only minimal amendments for more than a century, and is now one of the most outdated maritime laws in the region.<sup>1</sup> During the last two decades, the People's Republic of China enacted its Maritime Law in 1993, Vietnam made a comprehensive reform of its maritime law in 2005, and more recently, the Republic of Korea amended its maritime law in 2008. It was no longer possible for Japan to neglect modernising its maritime and transport law.

Prior to the commencement of the reform on maritime and transport law, the Japanese government worked on the modernisation of contract law part ('law of obligations') of the Civil Code. The work started as a private study by the group of academics, then developed into an official examination by the Legislative Council of the Ministry of Justice. The Council's report formed a basis of the Bill to amend the Civil Code, which is now pending before the Diet. It took ten years to go through the whole of this process<sup>2</sup>. Though the time spent was much shorter, the reform process for the maritime and transport law has apparently followed that of the Civil Code very closely. In the case of the maritime and transport law reform, the process started by forming a private Research Group, which consisted mainly of academics, but was also joined by several officials of the Ministry of Justice. Their participation implied that its work was expected to be a preliminary study to prepare for the official deliberations. The Research Group was formed in 2011 and focused mainly on comparative study of other countries' laws. After its work was concluded with a Report in 2012, a Study Group was established. The Study Group was also a private body led by academics, but it was more obvious that its activity was part of the government's legislative process, since industry representatives and maritime lawyers were among members and observers. Relevant government officials (mainly those of the Ministry of Land, Infrastructure and Transport) also attended the meetings as observers. The Study Group published its Report in November 2013. In the meantime, a few of the academic members of the Study Group made a survey of the industry practice at the request of the Ministry of Justice, which was also made public in March 2013.<sup>3</sup>

Based on these preparatory works, the Legislative Council established a Committee on Commercial Law (transport and maritime law) in April 2014 and started deliberations to respond to the consultation by the Minister of Justice. The Report of the Study Group became the primary material for the Committee's work, and determined issues and scope of deliberations. The Committee published the Interim Report in March 2015, accompanied by the Explanatory Note by the Ministry of Justice.<sup>4</sup> After seeking for public comments on the Interim Report, the work of the Committee resumed, and was concluded in January 2016 with the publication of the Draft Outline of the Reform. The Legislative Council approved it as the Outline of the Reform and reported it to the Minister of Justice. The Outline of Reform is going to be drafted into a bill to amend the Commercial Code. It is anticipated that the bill will be submitted to the Diet probably in 2017.

The modernisation of the maritime and transport law forms a part of Japan's legislative efforts on overall reform of basic private laws. In early 1990's, the basic private law codes, namely the Civil Code, Commercial Code and Civil Procedure Code, as well as some important statutes, such as the Bankruptcy Act and Corporate Reorganisation Act, retained the structure of decades ago, updated by only piecemeal amendments and

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<sup>1</sup> For these backgrounds, see Tomotaka Fujita, Maritime Law Reform in Japan, *CMI Yearbook 2014*, p.413.

<sup>2</sup> For the reform process of the Civil Code that preceded the reform of maritime law, see Souichirou Kozuka & Luke Nottage, 'Policy and Politics in Contract Law Reform in Japan', in Maurice Adams and Dirk Heirbaut (eds) *The Method and Culture of Comparative Law* (Hart Publishing, 2014). The overview of the Civil Code reform is offered by Akira Kamo, 'Crystallization, Unification, or Differentiation?: The Japanese Civil Code (Law of Obligations) Reform Commission and Basic Reform Policy (Draft Proposals)' (2010) 24(1) *Columbia Journal of Asian Law* 171; Takashi Uchida, 'Contract Law Reform in Japan and the Unidroit Principles' [2011] *Uniform Law Review* 705; Hiroyasu Ishikawa, 'Codification, decodification, and recodification of the Japanese Civil Code', (2013) 10 *University of Tokyo Journal of Law and Politics* 61.

<sup>3</sup> For the details of the preparatory works, see Manami Sasaoka, 'Reform of Transport Law in Japan', (2013) 18 *Zeitschrift für Japanisches Recht (Journal of Japanese Law)* 39.

<sup>4</sup> The Interim Report is discussed in Manami Sasaoka and Gen Goto, 'Reform of Transport and maritime Law in Japan: An Analysis of the Interim Proposal' (2015) 50(4-5) *European Transport Law* 471.

supplemented by several statutes outside the Codes. They were also written in archaic language, which prevented non-lawyers from understanding the text accurately. Since 1990's, these laws were modernised one by one, both in substance and language. As far as the Commercial Code is concerned, the Companies Act of 2005 (later amended in 2014) and the Insurance Act of 2008 has taken out many provisions of the Code. Some of the provisions remaining in the Code were rewritten in modern language on the occasion of enacting the Companies Act in 2005.

Some of these law reforms were motivated by the regulatory competition between jurisdictions. In the case of the Civil Code reform, the central figure of the reform project mentioned the aspiration that the Japanese Civil Code after reform “serve[s] as one model for future worldwide unification of contract law, given that the results [of the reform] stand at a crossroads of comparative law including French, German, and Anglo-American law.”<sup>5</sup> The idea obviously resembles the ambition of the German Ministry of Justice to lead the world’s law reform by “the law made in Germany.” In contrast, the corporate governance reform, most recently achieved by the 2014 amendments to the Companies Act as well as the adoption of the Corporate Governance Code, was advanced as part of the economic policy to enhance the competitiveness of the industry and to facilitate the growth of the economy by making Japanese companies more appealing to global investors.<sup>6</sup> Such a policy goal was symbolised as a slogan of “growth-oriented governance.”<sup>7</sup> No equivalent intention to fare the regulatory competition well is identified in the case of the maritime and transport law reform. In this sense, the motivation of the reform is principally a domestic one.

Still, such absence of international pressure does not mean that the deliberations are isolated from global or regional law. Rather, it is likely that the global or regional law has influence over the reform in one way or another, given that maritime law is the subject on which many efforts have been made for international unification. Thus, to what extent internationally unified law, whether global or regional, has affected the maritime law reform of Japan is an interesting question to ask. This is what this paper is going to address.

In the remaining part of this paper, analysis will be made as follows. First, the framework for analysis is advanced (2). It consists of a theoretical insight into how international instruments can affect domestic law reform and what other factors are conceivable to work in the reform process. Then a very brief overview of the current maritime and transport law of Japan follows (3). The structure of the Commercial Code, statutes and ratified treaties are described in this section. Based on these works, the Outline of Reform of reform is analysed (4). This section examines the scope of the reform and the sources of inspiration for each proposed amendments. The last section briefly concludes the analysis of this paper (5).

## 2 Theoretical Framework

### 2.1 How international instruments affect domestic law

An international instrument can affect domestic law making in several ways. The most direct way is through ratification of treaties. Many uniform law instruments in the field of maritime law take the form of treaties. Once a state ratifies a treaty, it is bound to implement the latter under the domestic law.

However, this takes place not often in the Asia-Pacific region. States in this region are not as positive in ratifying uniform law treaties as in other regions. The number of treaties to which Japan is a party is not large (see III below), but many other states have ratified even fewer treaties. For example, China, India and Korea, three of the major economies in the region, are not parties to any of the maritime transport treaties. They have ratified none of the Brussels Convention of 1924 (‘the Hague Rules’),<sup>8</sup> its Protocol of 1968 (‘the Visby Rules’),<sup>9</sup> its Protocol of 1979 (‘SDR Protocol’),<sup>10</sup> the United Nations Convention on Carriage of Goods by Sea of 1978 (‘the Hamburg Rules’)<sup>11</sup> or the United Nations Convention on Contracts of International Carriage of Goods Wholly or Partly by Sea (‘the Rotterdam Rules’). Further, there is no regional uniform law treaty on maritime and transport law in the

<sup>5</sup> Uchida, above n 2, 717.

<sup>6</sup> For the recent reform of corporate governance in Japan, see Gen Goto, Manabu Matsunaka and Souichirou Kozuka, ‘Japan’s Gradual Reception of Independent Directors: An Empirical and Political-Economic Analysis’ in Harald Baum et al. (eds) *Independent Directors in Asia*, forthcoming.

<sup>7</sup> The Council of Experts Concerning the Corporate Governance Code, *Japan’s Corporate Governance Code [Final Proposal]*, Background (2015), [7].

<sup>8</sup> The International Convention on Certain Rules Relating to Bills of Lading (Hague Rules) 1924, 120 LNTS 187.

<sup>9</sup> The Protocol to Amend the International Convention on Certain Rules Relating to Bills of Lading (Visby Rules) 1968, 1412 UNTS 127.

<sup>10</sup> The Protocol to Amend the International Convention on Certain Rules Relating to Bills of Lading as Modified by the amending Protocol of 23rd February 1968 (SDR Protocol) 1979, 1412 UNTS 146.

<sup>11</sup> United Nations Convention on the Carriage of Goods by Sea (Hamburg Rules) 1978, 1695 UNTS 3.

Asia-Pacific. Although most maritime law conventions are global and not regional, conventions on land and inland waterway transport do exist in other regions, such as the CMR<sup>12</sup> and COTIF<sup>13</sup> in Europe, as well as ATIT<sup>14</sup> and Paraguay-Paraná Hydroway Treaty<sup>15</sup> in Latin America. Asia has no equivalent to these.

However, international treaties do exert influence on domestic maritime law in Asia. In particular, they serve as models or sources of inspiration.<sup>16</sup> For example, the 2008 amendment of maritime law in Korea takes many provisions from international treaties, such as the Hague-Visby Rules, *1976 Convention on Limitation of Liability for Maritime Claims* ('LLMC')<sup>17</sup> or *1989 Salvage Convention*.<sup>18</sup> It is despite the fact that Korea has ratified none of them. References to international treaties in a similar way are observed with the Chinese maritime Law of 1993 or Vietnamese Maritime Code of 2005. A similar example in Japan was the amendments to the Act on Civil Liability and Compensation for Oil Pollution in 2004. The amendments renamed the law as the Act on Ship's Civil Liability and Compensation for Oil Pollution ('LCOP') and required the vessels entering a Japanese port to insure the shipowner for the possible liability within the Japanese territory. While the introduced regulations were basically in line with the Bunkers Convention<sup>19</sup> and the then draft of the Nairobi Wreck Removal Convention,<sup>20</sup> Japan has not become a party to either of the two conventions.

It is also conceivable that a state, having ratified an international treaty, extends the rules beyond the original scope of application of the treaty. It is the case with Japan's International Carriage of Goods by Sea Act ('COGSA'), which not only implements the Hague-Visby Rules (the Hague Rules until 1992 amendments) but applies the same rules to any carriage of goods by sea whose port of loading or port of discharge is outside of Japan (see below 3.1). Where the subject is not covered by the international treaty (in this case, the Hague-Visby Rules), the domestic law can be seen as modelled after (or copied from) the international treaty's rules.

As regards the reason why national lawmakers make references to international treaties, there are two possibilities. One of the possibilities, which may be called as a "strong" reason, is that the international treaty adopts a policy that makes good sense. It is true that not all of the international treaties are drafted according to a coherent policy. More often than not, they are products of compromise.<sup>21</sup> Still, even when the policy is the product of compromise, there is a strong reason to adopt it if the practice has developed in accordance with the international treaty. The other possibility is that an international treaty is referred to just as other leading jurisdiction's laws, such as English, French and German law. In some cases, the lawmaker may find no definite reason to pick one of the individual jurisdictions' legislation as the model and choose the international treaty because it is a "neutral" solution. In fact, because existing jurisdiction's law is based on the entire legal system, accompanied by legal culture, there can be difficulties in borrowing or copying it.<sup>22</sup> An international treaty is, to the contrary, a stand-alone text without a context, and is easier to adopt as a model.<sup>23</sup> This may be the "weak" reason to follow an international treaty.

Some of the international instruments are not treaties. They are sometimes called "soft law" instruments, as they cannot bind states legally. These soft law instruments can also be source of inspiration for national lawmakers, either for "strong" or "weak" reason. The "strong" reason to refer to such non-treaty rules may exist when the practice is based on the international instrument. One of the best known examples is the York Antwerp Rules on General Average, which is universally complied with in practice through parties' agreement. The "weak" reason is that the instrument offers a conceivable set of rules on the subject, presumably good rules because of the expertise of the drafters. In some cases, the instrument aims to serve as such from the beginning and drafted as "model law" or "legislative guide", although this is not common in maritime law.<sup>24</sup>

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<sup>12</sup> The Convention on the Contract for the International Carriage of Goods by Road.

<sup>13</sup> The Convention concerning International Carriage by Rail.

<sup>14</sup> Acuerdo sobre Transporte Internacional Terrestre.

<sup>15</sup> Acuerdo de Transporte Fluvial por la Hydrovía Paraguay-Paraná.

<sup>16</sup> See Souichirou Kozuka, 'Carriage of Goods and Legal Uniformity in the Asia-Pacific Region' (2003) 1(2) *Uniform Law Review* 255.

<sup>17</sup> The Convention on Limitation of Liability for Maritime Claims, 1976, 1456 UNTS 221.

<sup>18</sup> The International Convention on Salvage, 1989, 1953 UNTS 194.

<sup>19</sup> International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001.

<sup>20</sup> Nairobi International Convention on the Removal of Wrecks, 2007.

<sup>21</sup> See Jeffrey Wool, 'The case for a commercial orientation to the proposed UNIDROIT Convention as applied to aircraft equipment' (1999) 2 *Uniform Law Review* 289.

<sup>22</sup> Whether the difficulty is so large that a legal transplant is hardly possible or such phenomena had occurred in the history notwithstanding is a highly controversial issue, which this article does not deal with.

<sup>23</sup> Ralf Michaels, "One Size Can Fit All" – On the Mass Production of Legal Transplants' in Günter Frankenberg (ed) *Order from Transfer: Comparative Constitutional Design and Legal Culture Law* (Edward Elgar, 2<sup>nd</sup> ed, 2013) 56.

<sup>24</sup> There was once an idea to draft the principles of transport law, following the success of the Unidroit Principles of International Commercial Contracts. See Jacques Putzeys, 'Des principes généraux pour le droit du transport?' in *Liber Amicorum Robert Wiffels*, (ETL, 2001) 305.

## 2.2 Other factors that can affect lawmaking

Other than references to international rules, domestic lawmaking can be affected both by political and juridical factors.

Political factors include pressures from lobbying by the industry, consumer groups and other interested parties. In the law reform of transport and maritime law, consumer groups naturally are concerned about passenger transport, but is less likely to have large interests in the rules on cargo transport. Except for courier services and moving companies' services, cargo transport is basically business to business transaction. On the other hand, the industry, whether carriers, cargo interests or insurers (including hull, cargo and P&I insurers), may exert pressures in one way or another when they have a serious interest at stake. Such a situation was reflected in the process of transport and maritime law reform in Japan. While the industry representatives have been present both at the Committee of the Legislative Council and the Study Group that preceded the Committee,<sup>25</sup> the consumer group representative was not among the official members of either of them. Only in the Sub-committee on passenger transport, established under the Committee, a representative of the consumer group participated as a "stakeholder" and an official of the Consumer Affairs Agency as an observer. Such a limited participation of consumer representative is unusual with the recent legislative reform.<sup>26</sup> The constitution of the Study Group and Committee has a large relevance in the law reform of Japan, because these bodies conclude negotiations by consensus as unwritten practice, which mean the representation gives an interest group a veto.<sup>27</sup> Further, the Council's conclusion is usually decisive and unlikely to be modified in the Diet afterwards.

Practitioners sometimes resist a reform proposal that could result in changes to their current practice, even when there is no strong reason to stick to the latter. It may be named as an institutional inertia. Once a practice or contract clause is established within the industry, a convincing reason is required to change it, and the established practice or contract clause will otherwise survive. Such an institutional inertia is more likely to affect the reform, in particular, if the lawmaker has an intent to respect the current practice rather than to facilitate new entrants and innovation in business. If a survey of practice is conducted in the course of the reform, it may imply that the legislator has such an intention. Thus, there appears to be a good likelihood that the transport and maritime law reform in Japan is affected by the institutional inertia to recognise the current practice.

The second type of a factor to affect the legislative process is a juridical one. Where no political interest is involved, lawyers are often concerned about the consistencies among relevant codes and statutes, or among provisions within a statute.<sup>28</sup> The juridical interest in ensuring consistencies is larger in a jurisdiction where there is no admiralty court and the maritime cases are governed by the general court procedure, as opposed to where the specialised admiralty court decides maritime cases according to the special procedure.<sup>29</sup> In a jurisdiction with no specialised admiralty court, including Japan, maritime law is theoretically recognised as an application of the general private law. Judges, and in some cases lawyers as well, may not be specialised in maritime cases and tend to approach the case just as they approach ordinary private law disputes. Japan is one of such jurisdictions. As a result, consistencies not only between transport law and maritime law (within the same Commercial Code as well as between the Commercial Code and special statutes), but also between the maritime law and the general private law codified in the Civil Code can also be considered relevant.

As part of juridical factors, the legislator may wish to restate the case law on such issues as are not apparent from the text of the Code or codify the prevailing academic theory in the absence of a case law. Such restatement has the advantage of enhancing the foreseeability of the court decisions. Where the provisions of the existing Code or

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<sup>25</sup> At the Study Group, 8 of 19 full members and 22 of 26 observers were industry representatives, besides 4 lawyers participating as observers. This makes up 34 out of 45 attendants are on behalf of the industry in the broad sense. (The remaining members were 8 academics, 3 Ministry of Justice officials, as well as official of the Ministry of Land, Transport, Infrastructure and Tourism, whose number is undisclosed.) At the Committee of the Legislative Council, 8 out of 19 members and 1 of 12 associate members are industry representatives, and 3 of members and 1 of associate members were lawyers. As a result, industry-related participants occupy 13 out of 31. (The remainder consist of 6 academic members (including 1 former business person), 5 academic associate members, 2 members from the Ministry of Justice, 4 judges and Ministry of Justice staffs as associate members, 1 representative of the seamen's union.

<sup>26</sup> The situation is in contrast to the members involved in the reform of the Civil Code, see Kozuka and Nottage, above n 2. See also the involvement of consumer groups in some copyright issues, described in Souichirou Kozuka, 'Copyright law as a new industrial policy?' in Nissim Otmazgin and Eyal Ben-Ari (eds) *Popular Culture and the State in East and Southeast Asia* (Routledge, 2012) 106.

<sup>27</sup> Souichirou Kozuka and Jiyeon Lee, 'The New Japanese Insurance Act: Comparisons with Europe and Korea' (2009) 28 *Zeitschrift für Japanisches Recht (Journal of Japanese Law)* 73, 77. See also Goto, Matsunaka & Kozuka, above n 6.

<sup>28</sup> To provide an answer only by reference to the text and logical consistencies, not considering the policy implications, is the feature of traditional, "juridical" private law. See Ralf Michaels, 'Of Islands and the Ocean: The Two Rationalities of European Private Law' in Roger Brownsword, Hans-W Micklitz, Leone Niglia et al (eds) *The Foundations of European Private Law* (Hart Publishing, 2011) 139.

<sup>29</sup> Sasaoka & Goto, above n 4, 527. For the maritime procedure of Japan, see Souichirou Kozuka, 'Maritime Procedures under the Japanese Law' (2005) 49 *The Report of the Japanese Maritime Law Association* 1 (though in some respects outdated).

statute accompanies significant amount of case law, this advantage is great, as it helps the public to understand the law easily. It was the case with the reform of the Japanese Civil Code. In fact, many of the provisions in the Bill to amend the Civil Code are this kind of restatement.<sup>30</sup> However, as the number of cases is much smaller in transport and maritime law than in the Civil Code, this factor is less likely to be influential in the transport and maritime law reform.

### 3 Current maritime law in Japan

#### 3.1 The Commercial Code and Special Statutes<sup>31</sup>

The current Commercial Code of Japan provides for a set of rules on transport law in Book II (Commercial Transactions) and devotes the whole Book III to maritime law. The former provisions are applicable to transport on land and inland waters (lakes, rivers and port), while the latter includes provisions on maritime transport. However, there is no reason to distinguish these modes of transport completely and, in fact, the maritime transport section refers back to several provisions on (land and inland waterway) transport.

On the other hand, the scope of the Book on maritime law is not limited to maritime transport but covers the whole maritime activities, including ownership and co-ownership of a ship, charter by demise, general average, salvage on the sea, collision of vessels, marine insurance as well as maritime liens and mortgages. There is no equivalent provisions with regard to land transport. As a result, for example, lease of a vehicle is governed by the provisions on lease contract, and the collision of trains is subject to the general rules on torts. Both of these rules are codified in the Civil Code.

The Commercial Code was drafted by making references to various countries' laws at the end of the 19th Century.<sup>32</sup> Of particular influence was the German General Commercial Code of 1861 ('ADHGB'), codified prior to the construction of the Second German Empire. ADHGB itself borrowed many provisions from the French Commercial Code of 1807. As a result, the current Commercial Code of Japan includes many provisions from the days of sailing ships, and is not entirely adapted to the modern shipping. Further, as manned aircraft was not realised at the time of codification yet, the Commercial Code includes no provision applicable to air transport. There was an attempt to modernise the Commercial Code in the 1930s, which culminated in the Outline of Reform in 1935. However, only the part on corporate law and some general provisions were amended in 1938,<sup>33</sup> while the rest of the proposed reform was never undertaken, having been frustrated by the outbreak of the Second World War.

After the Second World War, special statutes were enacted on the occasions of ratifying some international instruments, instead of amending the Commercial Code itself. In 1957, Japan ratified the Brussels Convention of 1924, and enacted the International Carriage of Goods by Sea Act ('COGSA') to implement it. It was amended in 1992 when Japan ratified the SDR Protocol, which also applies the Visby Rules to Japan. The enactment of COGSA was intended to be a substitute of frustrated modernisation of the Commercial Code. It therefore covers larger scope of maritime transport than the Brussels Convention (as amended by the SDR Protocol) and is applicable to transport of goods by a ship when either the port of loading or port of discharge is outside of Japan. It also includes many provisions that do not derive from the Convention. COGSA is a relatively brief statute with only 23 articles, but by referring to several provisions of the Commercial Code, offers a comprehensive set of rules to apply to international maritime transport of goods. As a result, the Commercial Code is only applicable to the domestic transport of goods by sea, besides international and domestic passenger transport by sea. The latter have remained subject to different set of rules from international maritime transport, which are left without modernization.

There are two other important special statutes. One is the Act on Limitation of Liability of Shipowners ('ALLS') of 1975 to implement the Limitation of liability convention of 1957.<sup>34</sup> Japan ratified the 1957 Convention in 1975, effective 1 September 1976, which was only a few months before the adoption of the 1976 LLMC. Ratification of the latter took place in 1992, followed by the accession to 1996 Protocol to the 1976 LLMC in 2006. ALLS has

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<sup>30</sup> Souichirou Kozuka, 'The Impact of Japan's Contract Law Reform on Franchise Agreements', *IBA Newsletter of the International Franchising Committee*, forthcoming.

<sup>31</sup> See generally, Souichirou Kozuka, 'The Outline of the Japanese Maritime Law' (2003) 47 *The Report of the Japanese Maritime Law Association* 1 (though in some respects outdated).

<sup>32</sup> Harald Baum and Eiji Takahashi, 'Commercial and Corporate Law in Japan' in Wilhelm Röhl (ed) *History of Law in Japan since 1868* (Brill, 2005) 330.

<sup>33</sup> Baum & Takahashi, above n 32, 375.

<sup>34</sup> International Convention relating to the Limitation of the Liability of Owners of Sea-Going Ships, 1957, 1412 (UNTS) 80.

been amended accordingly in 1982 and 2005.<sup>35</sup> The other is the LCOP of 1975. It was enacted to implement the *1969 Civil Liability Convention* ('CLC')<sup>36</sup> and the *1971 Fund Convention* ('FC'),<sup>37</sup> to both of which Japan became a party in 1976. Now Japan is a Party to the *1992 Civil Liability Convention*<sup>38</sup> and *1992 Fund Convention*,<sup>39</sup> as well as the *2003 Supplementary Fund Protocol*,<sup>40</sup> and implements them by amending the LCOP from time to time.

### 3.2 International Conventions

Besides the already mentioned conventions, Japan has ratified two other maritime law conventions. They are the Salvage Convention and Collision Convention of 1910.<sup>41</sup> The latter two conventions are applied directly, with no implementing statute being enacted. As a result, when all of the ships involved in the salvage or collision belong to States Parties of these Conventions, the Japanese court will apply these Conventions instead of the rules in the Commercial Code unless all the ships are Japanese ships.

Other than maritime law conventions, Japan is a party to *1999 Montreal Convention* on air transport.<sup>42</sup> To regulate air transport with a state not yet a party to the Montreal Convention, Japan has remained a Party to *1929 Warsaw Convention*<sup>43</sup> and its *1955 Hague Protocol* as well as the Montreal Protocol No.4 of 1975. As mentioned, there is no international convention on road, rail or inland waterway transport to which Japan has become a party.

## 4 Analysis of the proposed reform

### 4.1 The structure remaining intact

As regards the scope of reform, the Outline of Reform proposes to streamline the structure of the law, but keeps the resulting changes to a minimum. Firstly, the distinction between the transport law in Book II (Commercial Transactions) of the Commercial Code and maritime law in its Book III will be maintained. In the Outline of Reform, it is proposed to apply the transport law provisions as amended to air and multimodal transport as well.<sup>44</sup> As a consequence, only those rules unique to maritime transport will remain in the Book on maritime law. It is a significant improvement to the complicated structure of the Commercial Code, but the difference in the coverage of transport law and maritime law will remain as it is now. While Book III (maritime law) will continue to govern maritime law issues other than transport, Book II (commercial transaction) will include only provisions on transport contract. Issues related to the transport industry, for example aircraft liens and mortgages, will not be added to Book II of the Commercial Code.

Secondly, the reform will not integrate special statutes into the Commercial Code, still less enact an independent act covering comprehensively transport of all the modes. After enacting the Companies Act in 2005 and Insurance Act in 2008, it was conceivable to remove the provisions on transport and maritime law from the Code and enact a single statute on transport law, which would have entirely decodified the Commercial Code.<sup>45</sup> Apparently, the legislator has not been bold enough to delete one of the major Codes. Conversely, if ICGSA, ALLS and the LCOP were codified into the Commercial Code, the structure would have become simpler, with a single Code covering all the aspects of transport and maritime law. Such a modest reform was not taken up by the Outline, either, and the three special statutes will continue to exist separately from the Code as before.

Thirdly, the issue of whether Japan should ratify any international convention that it has not yet become a Party has remained out of scope of the deliberations. It might be the outcome of bureaucratism, as new ratification requires cooperation of the Ministry of Foreign Affairs and go beyond the authority of the Legislative Council,

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<sup>35</sup> ALLS was further amended in 2015 to implement the amendments to the limitation amount adopted in 2012.

<sup>36</sup> International Convention on Civil Liability for Oil Pollution Damage, 1969, 973 UNTS 3.

<sup>37</sup> International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971, 1110 UNTS 57.

<sup>38</sup> International Convention on Civil Liability for Oil Pollution Damage, 1992. It is technically the CLC as amended by the 1992 Protocol to it.

<sup>39</sup> International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992. It is technically the FC as amended by the 1992 Protocol to it.

<sup>40</sup> Protocol of 2003 to amend the International Convention on Civil Liability for Oil Pollution Damage, 1992.

<sup>41</sup> International Convention for the Unification of Certain Rules relating to Collision between Vessels, 1910; International Convention for the Unification of Certain Rules relating to Assistance and Salvage at Sea, 1910.

<sup>42</sup> Convention for the Unification of Certain Rules for International Carriage by Air, 1999, 2242 UNTS 309.

<sup>43</sup> Convention for the Unification of Certain Rules Relating to International Carriage by Air, 1929.

<sup>44</sup> There is another technical change proposed in the Outline of Reform, which will make the provisions in Book II (transport law rules) directly applicable to maritime transport, instead of application by reference as in the current Commercial Code.

<sup>45</sup> For the decodification of the Commercial Code, see Tomotaka Fujita, 'The Commercial Code in Japan' in Wen-Yeu Wang (ed) *Codification in East Asia* (Springer, 2014) 121; Sasaoka, above n 3, 48-50.

which is a consultative organ of the Ministry of Justice. Whatever the reason may be, the reform has, as a result, fell short of pursuing the ideal law on the subject, but is limited to minimal.

Procedurally, these limits in the scope of reform were already defined by the mandate of the Legislative Council. The consultation by the Minister of Justice dated 7 February 2014 requested examination of the Commercial Code's provisions relating to "transport and maritime law," which implied that the basic structure of the current Commercial Code will be retained. Such a limitation in the scope of reform reflect the feature of law reform process commonly observed in Japan's recent private law reform. On the one hand, minimalism seems to be a (tacit) principle, and the basic structure of the current law tends to be left unchanged, unless there is a pressing need for a change. On the other hand, compartmentalised government agency structure, combined with the Council (*shingikai*) system to involve academics and industry representatives, affects the scope of reform and prevents a radical reform overriding the existing division of powers among the agencies.<sup>46</sup>

## 4.2 Sources of inspiration

The Outline includes 57 items of reform as counted by the headings, 16 of them on transport law, 39 on maritime law and 2 categorised as "Others." Applying the theoretical framework discussed above, among these items may be identified: (a) amendments to adapt rules to international conventions, (b) amendments to ensure consistencies between the Commercial Code and special statutes or provisions among the Code, (c) amendments to restate the established case law or prevailing academic theories, and (d) deleting the outdated rules that do not match the modern practice of the industry.

The reform of type (a) should be found only in the form of reference to international instruments as the model, because Japan has adequately implemented the treaties that it has ratified and no new ratification has been envisaged in the reform of this time. In some cases (a) and (b) can overlap, because ICOGSA implements the Hague-Visby Rules and, therefore, an amendment to make the Commercial Code to be in line with ICOGSA may (but not necessarily) lead to adopting the Hague-Visby Rules beyond the scope of application of the Brussels Convention. If a reform item includes two or more sub-items, each of which can be different in nature, each sub-item must be identified with different categories by indicating the proportion of the sub-item in the item (such as "0.5 item under type (a) and 0.5 item under type (b)").

Among the total of 57 reform items, 14.8 are type (a) reform. This is an underestimation, because there is no international convention on transport of modes other than maritime that are relevant to Japan. If focused on maritime law part of the Outline, 12.8 out of 39 reform items are type (a) reform. The figure indicates that international conventions have had significant influence on the Outline. A closer look reveals that 2.5 out of 3 items on general average adopt York Antwerp Rules, that all of the three items on collision of vessels adopt rules in 1910 Collision Convention, and that 5 out of 7 items on salvage at sea have adopted rules in 1989 Salvage Convention. It is interesting to see that the 1989 Salvage Convention has affected the Outline significantly, though Japan has not ratified it or has no plan to do so in the near future.

On the other hand, transport law part of the Outline is not influenced by international conventions. The Hague-Visby Rules, although Japan is a Party to it, has had little impact on the Outline. Limitation of liability per package and per kilogram is not extended to domestic maritime transport beyond the scope of application of ICOGSA on the understanding that parties are free to agree on such limitation.<sup>47</sup> Neither was the exemption of the carrier's liability for nautical fault or fire adopted by the Commercial Code. Interestingly, the standard contracts currently used by the domestic shipping industry exempt the carrier from liability for damages due to the nautical fault, which appears to be null and void in the face of a provision that prohibits exemption of the carrier's liability due to the negligence of the shipowner or intentional act or gross negligence of the ship's crew or other employees.<sup>48</sup> The Outline proposes to delete this prohibition of exemption clauses, which will enable the carriers to continue

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<sup>46</sup> The same problem is observed with the reform on other subjects. In the case of corporate governance reform, as the focus is recently on public companies, the securities regulation and rules of securities exchanges play an important role besides the traditional corporate law (Companies Act). Although efforts have been made to realise coordination as much as possible, the process is divided between the Ministry of Justice (for Companies Act) and the Financial Services Agency (for securities regulation). See Goto, Matsunaka and Kozuka, above n 5. The restructuring of consumer credit regulation also involved both the Financial Services Agency (in charge of regulation over moneylenders) and Ministry of Economy, Trade and Industry (in charge of credit card regulation). Again, reform of both regulations took place in parallel, but distinctively and not as a comprehensive package. See Souichirou Kozuka & Luke Nottage, 'Re-regulating Unsecured Consumer Credit in Japan: Over-indebted Borrowers, the Supreme Court and New Legislation' in Deborah Parry, Annette Nordhausen, Geraint Howells et al (eds) *The Yearbook of Consumer Law 2009* (Ashgate, 2008) 197

<sup>47</sup> The provisions of the Commercial Code are not mandatory except a few of them, and will remain as such after the amendments. (See Sasaoka & Goto, above n 3, 482.) Note also that ICOGSA itself has a larger scope of application than the Brussels Convention.

<sup>48</sup> Article 739 of the Commercial Code.

using the current standard contract with no problem with the validity. Similarly, although the Outline proposes to introduce rules on sea waybills, they are not modelled after the Uniform Rules for Sea waybill of the CMI. The Committee noted that parties are free to incorporate the CMI Rules by reference, but considered that there is no need to codify them, even as non-mandatory (default) rules.

An interpretation for such differences in the extent to which international conventions affect the Outline is that an international convention becomes more influential when combined with the industry practice. The York Antwerp Rules and the 1989 Salvage Convention are not merely uniform law instruments but form basis of industry practice. On the other hand, domestic maritime transport has developed its practice under the Commercial Code's rules, which has remained different from the Hague-Visby Rules under the ICOGSA. The failure to introduce the CMI Rules for sea waybills may also be interpreted as lack of support by the universal practice. In Japan, where the practice is diverse, international rules are unlikely to be adopted.

The second largest category of reform items is type (d) (removing out of date provisions) proposals, to which 8 out of total 57 and 7 out of 39 items in the maritime law part belong. However, if one looks only at the transport law part, the largest group (even larger than type (a)) is reform of type (b). The reason may be explained as follows. The difference between rules for land transport and maritime transport is mainly historical, deriving from the origin of the French Commercial Code. Therefore, as efforts to modernise the law on the subject, it is reasonable to reshuffle the provisions and extract the transport law rules commonly applicable to transport of any mode, distinguishing them from regulations specific to maritime transport. Once such a decision is made, it is not surprising that the consistency among the transport law provisions in Book II of the Commercial Code, maritime transport law rules in Book III of the Commercial Code and partly modernised maritime transport law rules in the ICOGSA have become a significant focus of reform. As a result, reform items of type (b) became important especially in the transport law part, which will also cover maritime transport contracts once the proposed reform is realised.<sup>49</sup>

As compared with other types of reform, type (c) is very limited in number. Restatement of case law is proposed as regards the effectiveness of general liens under the Civil Code vis-à-vis shipowner. The Supreme Court held in its decision of 5 February 2002<sup>50</sup> that a general lien, just as maritime liens under the Commercial Code, is effective against the shipowner when the debt secured by the lien is due to one of the co-owners of the ship. The Outline proposes to codify this case law. On the other hand, the rules on time charter, which will be codified for the first time in the Japanese Civil Code, are not restatement of the case law. This may be because the case law was not sufficiently clear: while the Great Court of Judicature held in its decision of 28 June 1928<sup>51</sup> that time charter was a combination of charter by demise (lease of the ship) and supply of crew's labour, a more recent decision by the Supreme Court<sup>52</sup> rejected to determine the nature of time charter in abstract and held that the question of who is liable as carrier under the time charter against the holder of the bill of lading (so-called "identity of carrier" question) shall be determined by the conditions of carriage to the extent incorporated in the bill of lading.<sup>53</sup> The rules proposed in the Outline follow neither of them but based on the standard industry practice.

## 5 Conclusion

International instruments have influenced the transport and maritime law reform in Japan. On not a few of the items in the Outline, the Legislative Council proposes to introduce the rules in international instruments. This is in particular the case with the rules on general average, collision of ships and salvage at sea. To the extent that the *1910 Collision Convention* and *1910 Salvage Convention* are referred to, the proposals to follow these treaties mean employing the rules in them beyond their scope of application as models for domestic law making. In the case of the *1989 Salvage Convention*, its rules are going to be introduced, but there is no plan of ratifying it. Thus, the influence of international instruments are, as often seen with Asian maritime law, rather as models for domestic law making than as binding instruments.

The reference to international instruments, however, is made not always made. The Hague-Visby Rules implemented through ICOGSA will be extended beyond the scope of the Brussels Convention, but only selectively and not in its entirety. Although there will be codified some provisions on sea waybills, the CMI Rules for Sea

<sup>49</sup> Implicitly, the maritime law part will "lose" provisions governing maritime transport contracts (agreements on carriage of goods and passengers by sea), as a result of extending the transport law part to maritime transport contracts. However, it does not appear as items of reform and, therefore, not counted as any category.

<sup>50</sup> *Hanrei Jihō* no.1787, 157.

<sup>51</sup> *Minshū* Vol.7, 519.

<sup>52</sup> Supreme Court, 27 March 1998, *Minshū* vol.52, no.2, 527.

<sup>53</sup> It does not mean, though, that the proposed amendments will override the 1998 decision of the Supreme Court (Sasaoka & Goto, above n 4, 508), because the Supreme Court's decision was vague enough to survive new provisions codifying the standard practice.



Waybills are not used as the model. It appears that international instruments are used as the model for law making only where supported by the prevailing practice; otherwise the legislator leaves to the parties whether to incorporate the rules by themselves or not. Then, the reason for making reference to an international instrument is the “strong” one, namely because the policy adopted by it is supported, and not due to its feature of being international.

The relevance of the industry practice in the extent of influence that international instruments can have is curious, given the fact that the motivation for reform of transport and maritime law is not to enhance the competitiveness of the industry, as in the case of corporate governance reform. It may possibly reflect the nature of the maritime law treaties. Most of the maritime law treaties are policy oriented, as opposed to uniform law treaties crystallising key concepts of the subject.<sup>54</sup> Or, it might indicate the absence of active commitment to unification of law in Japan. After all, Japan appears to turn to international instruments only when there is a compelling reason to do so.<sup>55</sup> Which of these possibilities is true shall be tested by comparison: on the one hand, comparison with the maritime law reform in other jurisdictions, and on the other hand, comparison with the law reform on other subjects in Japan.

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<sup>54</sup> For the distinction of these two types of uniform law instruments, see Souichirou Kozuka, ‘The bifurcated world of uniform law: the uniform law of “islands” and of “the ocean”’ in Unidroit (ed) *Eppur si muove: The age of Uniform Law – Festschrift for Michael Joachim Bonell, to celebrate his 70th birthday*, forthcoming.

<sup>55</sup> This observation may be supported by the apparent reluctance (“wait and see” attitude) of Japan towards the Rotterdam Rules, despite the fact that it was one of those countries that most actively participated in the negotiation. See Tomotaka Fujita, ‘The Rotterdam Rules in Japan’ in Tomotaka Fujita (ed) *The Rotterdam Rules in the Asia-Pacific Region* (Shojihomu, 2014) 231.