

“De-codification” of the Commercial Code in Japan

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This national report provides a brief picture of the current status of Japanese Commercial Code. Following a very basic introduction on Japanese legal system and private law legislation and the history of Japanese Commercial Code, the “de-codification” of Japanese Commercial Code is explained. It explores how “de-codification” happened, why it happened, and what the reactions of the lawyers and academics are.

1. Overview of the Japanese Legal System and Legislation on Private Law

Japanese law belongs to the civil law system although there have been great influx of the U.S. law after the World War II¹. It is a unitary, not federal, legal system². There are six basic “Code” in Japanese law: Constitution, Civil Code³, Criminal Code⁴, Commercial Code⁵, Civil Procedure Code⁶, and Criminal Procedure Code⁷.

The Civil Code consists of five books: Book I. General Provisions, Book II. Law of Property, Book III. Law of Obligations, Book IV. Law of Family and Book V. Law of Succession. Japanese Civil Code is a product of intensive comparative study. Although Japanese Civil Code has long been believed to be enacted under the overwhelming influence by the German law (Bürgerliches Gesetzbuch (BGB)), recent studies revealed that the influence from French law (Code Civil)⁸. We see great influence from Germany and France but there are some influences from other jurisdiction such as English law⁹.

¹ For instance, Securities Exchange Act (Law No.25, 1948) was legislated after Securities Act 1933 and Securities Exchanges Act 1934 of the United State. Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Law No.54, 1947) and Criminal Procedure Code (Law No.131, 1948) is heavily influenced by the U.S. law.

² Local government can make prefectural or municipal ordinance to the extent that the law authorize. any dispute on the ordinance, however, is decided in the ordinary court just like a dispute on national legislation.

³ Law No.89, 1896

⁴ Law No.45, 1907

⁵ Law No.48, 1899

⁶ Law No.109, 1996

⁷ Law No.131, 1948

⁸ For a brief explanation of the Japanese Civil Code, see, Oda (2009), p. 113-117. The influence of French law on Japanese Civil Code was first emphasized by Hoshino (1965).

⁹ A notable example of the influence from English law is Article 416 of the Civil Code, which codifies the well-know “foreseeability test” in Hadley v Baxendale [1854] EWHC J70.

2. History of the Commercial Code

Japan has a separate Commercial Code. The Code was enacted in 1899 but it has an interesting prehistory¹⁰. A draft of the Commercial Code was completed by German Professor Hermann Roesler in 1844. Based on Roesler's draft, the "Old Commercial Code" was enacted in 1890¹¹. The national dispute on the Civil Code also prolonged the implementation of the Commercial Code. A new draft was prepared by Kenjiro Ume, Keijiro Okano and Kaoru Tanabe under the influence of German law in 1893. Investigation Committee of Codes¹² continued the examination and Kenjiro Ume, Nobushige Hozumi and Masaakira Tomii finalized the Draft Commercial Code. The "New Commercial Code" was finally promulgated in March 1899 and came into force in June 1899. Old Commercial Code had a very short life¹³

The original contents of the Commercial Code which consisted of 689 articles had five books: Book I. General Provisions, Book II. Corporation, Book III. Commercial Act, Book IV Bills of Exchange and Promissory Notes¹⁴, Book V. Maritime. As the drafting history suggests, Japanese Commercial Code was enacted under the great influence of German law. The 1950 Revision of the Commercial Code introduced several important elements of the U.S. corporate law, such as the board system, the derivative action, and the authorized capital to Book II (Corporation) while the remaining parts have remained almost unchanged until recently.

3. The "De-codification" of Japanese Commercial Code Since 2005

3.1 The "De-codification" of Japanese Commercial Code

Japanese Commercial Code is experiencing a rapid "de-codification" process during the last decade. The number of the provisions in the Code is dramatically decreased and the Code becomes "hollow". Let us see how and why it happened.

¹⁰ For a brief explanation of the Japanese Commercial Code, see, Oda (2009), p. 117

¹¹ Law No.32, 1890

¹² The President of the Committee was Hirobumi Ito, the prime minister at the time.

¹³ The provisions on corporation, note, bill of exchange and check, and bankruptcy of the Old Code came into force in July 1893. The rest of the Code entered into force in July 1898. The Old Code was replaced by the New Code in June 1899.

¹⁴ Book IV was deleted in 1932 when Japan joined Convention Providing a Uniform Law For Bills of Exchange and Promissory Notes, Geneva, 1930 and Convention Providing a Uniform Law for Cheques, Geneva, 1931. Bills of Exchange and Promissory Notes Act (Law No. 20, 1932) and Check Act (Law No.57, 1933) was enacted at the same time.

3.2 Legislation of Companies Act 2005 and Insurance Act 2008

The most obvious reason why the Japanese Commercial Code has become hollow is that two important parts of the Commercial Code have been recently removed. These parts constitute an independent piece of legislation with an extensive modification in substance. Book II of the former Commercial Code contained provisions concerning the corporation. The provisions were deleted in the 2005 Revision. The Companies Act 2005¹⁵ now provides comprehensive regulation on corporation. The same applies to insurance law. The 2008 Revision of the Commercial Code deleted Chapter 10 of Book II¹⁶, which was devoted to insurance contracts. Now, we have Insurance Act 2008¹⁷. The number of provisions contained in the Commercial Code was dramatically decreased by these two Revisions¹⁸.

Why should the provisions on corporation and insurance be moved into other independent acts? The reason is that the traditional method used by the codification of the Commercial Code is ill-designed for deciding the proper scope of the application for the provisions. The Japanese Commercial Code, like its European predecessor, rests on two basic concepts: “merchant” and “commercial act¹⁹.” The legal area in question cannot be delineated properly by these concepts and it seems more logical to compile the relevant provisions based on a different system designed for the purpose.

For instance, the provisions on insurance contracts contained in Chapter 10 of Book III of the Commercial Code prior to the 2008 Revision should apply not only to the contract offered by an insurer as a merchant (i.e., those who repeatedly enter into insurance contract with the intent of profit-making) but also to the insurance contract offered by mutual insurance companies who are not merchants²⁰. It was also argued that the same rule should apply to the insurance-like scheme offered by benefit societies.

¹⁵ Law No.86, 2005

¹⁶ Before 2005 Revision, it was Book III of the Commercial Code.

¹⁷ Law No.56, 2008

¹⁸ At least two thirds of the provisions in the Commercial Code disappeared in the 2005 and 2008 Revisions.

¹⁹ The relationship between “merchant” and “commercial act” is complicated under the Japanese Commercial Code. A merchant is defined as a person who engages in commercial act as a business. (Art.4). Article 501 of the Commercial Code enumerates the “absolute commercial act” (transactions that are commercial acts *per se*) and Article 502 “business commercial act” (transactions that are commercial acts if effected as a business). A person who engages in transactions listed in Articles 501 and 502 is a merchant. In addition, any transaction that a merchant does for its business is regarded as a commercial act (Article 503(1)). Therefore, the concept of merchant is derived from commercial act in the former case while commercial act is derived from the concept merchant in the latter.

²⁰ Even prior to the 2008 Revision, Article 664 and 683(1) of the Commercial Code provided that the provisions in the Commercial Code applies *mutatis mutandis* to the insurance contracts with mutual companies.

Any contractual arrangement used for the distributing risk based on the “law of large numbers” should be governed by the same contractual rules, whether they are offered by merchants or are commercial acts. Basic concepts that provide the foundation of the Commercial Code (merchant and commercial act) are not useful to delineate the scope of the rules applicable to insurance and other similar contracts. Thus, the legislator of the 2008 Revision thought it was more logical to have an independent Insurance Act rather than to keep the provisions within the Commercial Code. It was also pointed out that the law on insurance contracts has been compiled as an independent act in some civil law countries²¹.

The same argument applies to corporations. A company should be subject to the regulation on stock-company as far as it is incorporated as such and even if it does not repeatedly engage in commercial act with the intent of profit-making. In fact, the provisions in Book II (Companies) in the Commercial Code before the 2005 Revision applied to companies that do not engage in commercial act²². The merchant and commercial act does not function as delineating the scope of rule that applies to corporations. It seems more logical to have an independent legislation for the rules on the corporate organizations. The increased number of provisions²³ on corporation added another motivation for an independent legislation.

3.3 The Reform of the Civil Code

The large scale of reform for the Civil Code has been underway in the Legislative Council of the Ministry of Justice since 2009 (“Modernization of the Law of Obligations”). One can expect that the reform will give further impact to the Commercial Code. Many provisions currently contained in Chapter 1 of Book II (general rules of commercial act) are planned to be deleted and incorporated into the revised Civil Code. The provisions currently applicable only to merchant or commercial act will become a general rule. The phenomenon has been known as “commercialization

²¹ See, for example, the legislation in France (loi du 13 juillet 1930 sur les assurances des véhicules terrestres à moteur qui pose la première pierre de ce qui deviendra le code des assurances), in Germany (Versicherungsvertragsgesetz, 30 Mai 1908 (RGBl. S. 263)), and in Switzerland (Bundesgesetz vom 2. April 1908 über den Versicherungsvertrag (Versicherungsvertragsgesetz, VVG)).

²² The Article 52 of the Commercial Code prior to the 2005 Revision provided as follows:
“1. In this code, a "Company" means an association incorporated for the purpose of engaging in commercial acts as a business.
2. An association whose purpose is to make a profit and that is incorporated in accordance with the provisions of this Book shall be deemed to be a Company even in cases where it does not engage in any commercial acts as a business.”

²³ Companies Act 2005 has 979 articles.

of the Civil Code”.

There have been provisions on commercial instrument in the Commercial Code and on negotiable claims in the Civil Code. The provisions on commercial instrument will also be incorporated into the Civil Code. Since a negotiable instrument should be subject to the same rule regardless of who use it, the Civil Code, rather than the Commercial Code, is a better place for these provisions²⁴.

As a result, the “General Rules of the Commercial Act (Book II, Chapter 1)” will contain only a few provisions that offer fragmentary regulations after the reform of the Civil Code.

3.4 The Current Status

The structure of the current Commercial Code is as follows:

Book I General Provisions (Art.1-32)

Chapter 1 General Rules (Art.1-3)

Chapter 2 Merchant (Art.4-7)

Chapter 3 Commercial Registration (Art. 8-10)

Chapter 4 Trade Name (Art. 11-18)

Chapter 5 Commercial Books (Art. 19)

Chapter 6 Commercial Employees (Art. 20-26)

Chapter 7 Commercial Agent (Art. 27-31)

Chapter 8 Miscellaneous (Art. 32)

[Art.33-500 deleted]

Book II Commercial Act (Art.501-628)

Chapter 1 General Rules (Art.501-523)

Chapter 2 Sales (Art. 524-528)

Chapter 3 Open Account (Art. 529-534)

Chapter 4 Silent Partnership (Art. 535-542)

Chapter 5 Brokerage Business (Art. 543-550)

Chapter 6 Commission Agent (Art. 551-558)

Chapter 7 Forwarding Agency (Art. 559-568)

Chapter 8 Carriage Business (Art.569-592)

²⁴ This is not a case of “commercialization of the Civil Code”. Even at present, the provisions on commercial instruments apply regardless who use them (Article 501(4) provides that any transaction with respect to commercial instrument is deemed to be a commercial act (“absolute commercial act”). The issue is just a matter of the location of provisions and not a substantive change in the scope of application.

Chapter 9 Deposit Business (Art. 593-628)

[Art.629-683 deleted]

Book III Maritime

Chapter 1 Ship and Shipowner (Art.684-704)

[Art.691-692 deleted²⁵]

Chapter 2 Master (Art.705-721)

[Art.722-736 deleted²⁶]

Chapter 3 Carriage (Art.737-787)

Chapter 4 General Average (Art.788-799)

Chapter 5 Salvage (Art. 800-814)

Chapter 6 Insurance (Art. 815-841-2)

Chapter 7 Maritime Claimant (Art. 842-851)

One might be surprised to know how “hollow” the current Commercial Code is. After 32 general provisions, there is large vacancy (“missing provisions”) until Article 501, where provisions on corporation existed. We have another gap between Articles 628 and 684, where provisions on insurance were placed. General provisions contained in Book I of the Commercial Code do not apply to corporations²⁷. The scattered regulations in the general provisions of the Commercial Act (Book II, Chapter 1) will be diluted further by the next reform of the Civil Code.

There are important areas of commercial transactions that are left outside of the Commercial Code. For instance, only a part of the transport law is covered by the Commercial Code. A contract for international air carriage is governed by the Montreal Convention²⁸ while provisions on a contract for domestic air carriage are missing. A contract for international sea carriage is regulated by the International Carriage of Goods by Sea Act.²⁹ The Railroad Business Act includes several important provisions applicable to the private law aspects of a contract for carriage by rail³⁰. International

²⁵ Provisions on abandonment of the ship were deleted in 1975 when Japan joined the International Convention Relating to the Limitation of the Liability of Owners of Sea-Going Ships, 10 October 1957 and enacted the Law on the Limitation of Liability for Shipowners (Law 94, 1975).

²⁶ Law No.79, 1937

²⁷ Companies Act 2005 provides the corresponding regulation for a corporation.

²⁸ Convention for the Unification of Certain Rules for International Carriage by Air - Montreal, 28 May 1999

²⁹ Law No. 172, 1957. The current Act is based on the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (“Hague Rules”), 25 August 1924 as amended by the Protocol of 23 February 1968 (“Visby Protocol”) and the Protocol of 21 December 1979 (“SDR Protocol”).

³⁰ Law No. 75,1900

Sales of goods, which are mostly commercial sales, are governed by the Vienna Sales Convention³¹ rather than the Commercial Code. Sales contracts with consumers are largely governed by special legislations, such as the Consumer Contract Act³², Installment Sales Act³³, and Act on Specified Commercial Transactions³⁴. While a trust is one of the commercial acts specified in the Commercial Code³⁵, there is no provision in the Commercial Code. Instead, the Trust Act³⁶ and Trust Business Act³⁷ offer the basis for commercial trust. Bills of exchange, promissory notes, and checks are covered by the Negotiable Instrument Act³⁸ and the Check Act³⁹.

In short, the Japanese Commercial Code does not function as a comprehensive rule that governs the private law aspects of the business activities.

4. Possible Future of the Japanese Commercial Code

If the Commercial Code is shrinking as explained above, what should the Japanese legislators do? There are four possible alternatives⁴⁰.

4.1 Traditional Conservatism

One possible alternative is to maintain the traditional Commercial Code based on the concepts “merchant” and “commercial act”. Although the Commercial Code is currently half-empty, we can restore it if we incorporate new commercial activities into the current framework of the Commercial Code. The view depends on the possibility on whether we can find commercial activities that are appropriate for the codification. One might think finance lease can be a candidate. However, finance lease is already planned to be regulated in the Civil Code, which will be amended in the near future⁴¹. We better not intervene with the area where private ordering functions well. For example, the “Uniform Customs and Practice for Documentary Credits (UCP)⁴²” by the International

³¹ United Nations Convention on Contracts for the International Sale of Goods, 1980 (CISG)

³² Law No. 61, 2000.

³³ Law No.159, 1961

³⁴ Law No. 57, 1976

³⁵ Article 502(13)

³⁶ Law No. 108, 2006

³⁷ Law No.154, 2004

³⁸ Law No. 20 of 1932

³⁹ Law No. 57 of 1933

⁴⁰ The following discussion is based on Fujita (2010).

⁴¹ See, “Interim Draft for the Reform of Civil Code (Provisions on Claims)” (Legislative Council of Justice, February 26, 2013), No.39 Lease Contract (15).

⁴² The current version is “The Uniform Customs and Practice for Documentary Credits, 2007 Revision, ICC Publication no. 600”.

Chamber of Commerce offers rules on letters of credit transactions and it is not advisable to have a chapter on letters of credit on this issue⁴³. There have been few, if any, specific proposals to include certain kinds of business into the Commercial Code.

4.2 Innovative Imperialism

The second alternative also supports the Commercial Code, but at the same time, it sees that the traditional Commercial Code based on the concepts “merchant” and “commercial act” is out of date. This is an attempt to broaden the territory of the “Commercial Code” introducing an innovative methodology for the codification. The French law reform in 2000⁴⁴ arguably embodies this view. The Reform created a new Commercial Code that provides a comprehensive regulation on business activities, including competition law and insolvency law. Although this is a fascinating challenge to the traditional concept of the Commercial Code, there has been no serious attempt towards this direction in Japan so far.

4.3 Passive Opportunism

The third alternative is a passive reaction to the current situation. The view sees that the Commercial Code is shrinking with good reason and that it makes no sense to resist but that it is not necessary to abolish the Commercial Code at this stage. According to this view, there is nothing to do for the moment except for the possible minor revisions within the current framework of the Commercial Code. It looks at the prevailing tendency within the Japanese legal community.

4.4 Active Destructionism

Finally, there may be an extreme position in the argument that the Commercial Code in traditional sense can no longer survive and that it should be completely destroyed. The view does not say that the provisions contained in the current Commercial Code should be abolished. Instead, it says that the provisions may be incorporated into the Civil Code or into other existing or new legislations and that the rule will still exist, with necessary modification in substance, somewhere. The abolition

⁴³ Article 5 of the Uniform Commercial Code of the United States provides the rules on letters of credit. The provisions have caused confusion in this area, which finally led to the 1995 Revision. The primary purpose of the revision is to align the provisions in the Commercial Code with UCP.

⁴⁴ Ordonnance n°2000-912 du 18 September 2000 relative à la partie Législative du code de commerce

of the Commercial Code has always been supported by some commentators⁴⁵. Although they have always been minority, facing with shrunken Commercial Code, their argument may gain more support than before.

If the Commercial Code is to be abolished, we should examine where the existing provisions should be moved to. Book III (Maritime) will constitute another independent act. The provisions are characterized as a comprehensive set of rules related to maritime issues whether or not merchant or non-merchant is involved⁴⁶. These provisions are ready for independence. The provisions on “commercial registration” will be incorporated into the “Commercial Registration Act⁴⁷”, which currently provides the procedural aspects of the commercial registration. The provisions on trade mark can be moved into the Unfair Competition Prevention Act⁴⁸. The provisions on commercial sales may be incorporated into the Civil Code with an appropriate qualification.

5. Peaceful Death for the Commercial Code?

Although the current status of the Commercial Code might look a little bizarre (see 3.4 above), few serious complaints have been heard about it⁴⁹. Japan, unlike some countries⁵⁰, has no “merchant court” in its court system. Therefore, whether or not a certain provision is within the Commercial Code has no influence for the jurisdiction. The issue is merely the location of the relevant provisions in a statute book (whether within the Commercial Code, Civil Code, an independent legislation, and so forth). As long as adequate rules exist somewhere in the legal system and as long as they are easily accessible, there is no reason for Japanese lawyers (practitioners) to complain. The Companies Act and the Insurance Act do not seem to create any difficulty for the lawyers to find the relevant provisions when a dispute arises. The de-codification of the Commercial Code in itself⁵¹ by no means causes trouble for the practitioners.

⁴⁵ As the most notable example, see, Matsumoto (1925).

⁴⁶ In fact, the provisions in Book III of the Commercial Code are applicable to non-commercial ships (Article 35 of the Supplementary Provisions on Law on Ships (Law No.46, 1899)).

⁴⁷ Law No.125, 1963.

⁴⁸ Law No.47, 1993.

⁴⁹ This does not mean that we hear no complaint at all, like for example against the Companies Act 2005. Much complaint has been heard from practitioners against the Act as being too complex. The Act, which contains 979 articles that supplemented hundreds of regulations made by the Ministry of Justice, is one of the most complex structures in the Japanese legal system. However, it should be noted that the practitioners complain not because we have an independent act outside the Commercial Code but because the independent act is wrongly, from their perspective, legislated. The complaint has nothing to do with the “de-codification” of the Commercial Code.

⁵⁰ The French legal system has had the commercial court (*tribunal de commerce*) for many years.

⁵¹ Of course, it is problematic that many provisions in the current Commercial Code are out of date. However, this is a matter of substance of the Code rather than its form. “De-codification” has nothing to do with this problem.

The academics (especially the commercial law professors) also do not see the situation as problematic. Some of them might feel nostalgia for the traditional Commercial Code, but few argue for the reintroduction of the provisions of the Companies Act or Insurance Act into the Commercial Code. There seem to be at least two reasons for this.

First, Japanese commercial law scholarship does not seem to appreciate the traditional commercial code that rests on the concepts “merchant” and “commercial act” very much. As indicated in connection with the legislation of the Companies Act 2005 and Insurance Act 2008, the concepts “merchant” and “commercial act” could not have properly delineated the scope of application for the provisions on corporations and insurance contracts (see, 3.2 above). The Commercial Code have fixed a gap by expanding its scope to non-commercial companies or to insurance contracts offered by non-merchants. Should we maintain the Commercial Code by continuing tiresome repair?

One of the most eminent commercial law scholars once observed as follows: “Do we really need a magnificent commercial code that is systematically constructed by the concept of the merchant and commercial act? We see the open seams in many places (*e.g.*, fictional merchant and non-commercial companies). I think it is time to consider whether or not we should maintain our important cultural heritage of the Meiji-era⁵², renewing the concept of the commercial act in order to keep up with times or reform it.”

“If we rebuilt it, there is no need to stick to one building...It would be more user-friendly to separate it into several parts according to the areas they cover. For example, there is no advantage to combining corporate and transport law together. It is sufficient that the scope of application is clearly defined for each law.⁵³”

Today, the skepticism on the Commercial Code seems to be shared by many academics. The more the functional analysis of legal rules prevails in the field of commercial law⁵⁴, the less people become interested in the form of the rules. Very few scholars express their enthusiasm to have a “magnificent Commercial Code”.

Second, Japanese commercial law scholars seem to recognize that their research agenda is not affected by the location of the provisions. Whether they are within or without the Commercial Code, researchers of the “commercial law” will seek

⁵² [Author’s note] The Meiji-era corresponds with the period from January 25, 1868 to July 30, 1912. The Commercial Code was promulgated in 1899.

⁵³ Tatsuta (1989), p. 103 (1989). (The excerpt is translated by the author).

⁵⁴ Compared with other areas of law, the functional approach is most prevalent in commercial and corporate law scholarships in Japan.

their own theory for the rules on modern business activities⁵⁵. Although such theory might rest on a consistent and systematic viewpoint, it does not require that all provisions should be contained in one big “Code”.

Most, if not all, Japanese lawyers, both practitioners and academics, have been and still are indifferent to the de-codification of the Commercial Code⁵⁶. They no longer see the Code as a cultural achievement that proves the development of the nation⁵⁷. They seem to leave the Code as is for the moment (“Passive Opportunism”⁵⁸). Do they care if the Commercial Code becomes even more “hollow”? Perhaps, some might even argue for the abolition of the Code saying that “our Commercial Code wishes a death with dignity rather than staying alive as an ugly remnant”.

In any event, it is unlikely that the Japanese Commercial Code will be restored in the future. It may even disappear sooner than we expect. However, the substantive rules on commercial activities and the academic works on such rules will make continuing progress for the future even without the Commercial Code.

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⁵⁵ There was academic debate among Japanese scholars as to what should be the subject of commercial law scholarship in the middle of the 20th century. One sees the commercial law as the body of law concerning the issues with “commercial color” while others see it as the “law of enterprise”. It should be noted that the debate was concerned with how we systematically understand the commercial law as an academic subject. The debate has little to do with how the actual legislation on commercial matters should look like.

⁵⁶ The Japan Association of the Private Law devoted a whole day for a symposium on “the Amendment of the Commercial Code” in 2010. As one of the speakers of the symposium, I reluctantly have to report that the subject did not seem to draw much attention from the audience. See, Kanda *et.al.* (2011). Although several questions were raised during the debate, none expressly stated whether or not the Commercial Code should remain. No specific proposal was also made as to how the future of the Commercial Code should be.

⁵⁷ It was the most important motivation for the legislators when several codes (including the Commercial Code) were first promulgated in the Meiji-era. The existence of a respectable code in all important areas of law was regarded as a symbol for the modern Japanese society, which has been fully westernized. They are necessary for the negotiation to abolish the disadvantageous and unfair treaties concluded in the preceding era with western countries.

⁵⁸ See, 4.3 above.

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