Berichte

Japanese and European Private International Law in Comparative Perspective

Symposium on March 1–2, 2007, in Hamburg*

Conflicts lawyers are living in very lively times given the great number of projects which have been launched during the last years that deal with codifying and modernizing private international law, both on the national and the supranational level. This development is particularly reflected by the recent initiatives taken by European and Japanese legislators. On January 1, 2007, the new Japanese "Act on General Rules for Application of Laws"[1] ("New Act") entered into force to replace the old statute dating from 1898 ("*Hôrei*").[2] This reform coincides with the current efforts of the European Union to create a modern and comprehensive private international law regime for its member states. In this respect, the Commission has presented several legislative proposals dealing with the law applicable to contractual obligations ("Rome I"),[3] to non-contractual obligations ("Rome II"),[4] to matrimonial matters ("Rome III"),[5] to matrimo-

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* A more comprehensive version of this report including a summary of the discussions is published in: ZJapanR 12 (2007) 271 ff.

[1] Hô no tekiyô ni kansuru tsûsoku-hô, Act no. 78 of 21. 6. 2006; for English translations see Asian-Pacific Law and Policy Journal 8 (2006) 138, available at <http://www.hawaii.edu/aplpj/>, ZJapanR 12 (2007) 227, and Yearbook of Private International Law 8 (2006) 427; for a German translation see ZJapanR 11 (2006) 269.

[2] Hôrei, Act no. 10 of 21. 6. 1898; a German translation is published in: Außereuropäische IPR-Gesetze, ed. by *Kropholler/Krüger/Riering/Samtleben/Siehr* (1999) 308.

[3] Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), COM(2005) 650 final of 15. 12. 2005; on possible amendments of future proposals see European Parliament, Committee on Legal Affairs, Compromise Amendments 2–44, Draft Report prepared by *Cristian Dumitrescu*, PE 393. 856v01–00 of 28. 8. 2007.

[4] Amended proposal for a European Parliament and Council Regulation on the law applicable to non-contractual obligations (Rome II), COM(2006) 83 final of 21. 2. 2006; revised by the Common Position (EC) No 22/2006 of 25 September 2006 adopted by the Council, acting in accordance with the procedure referred to in Art. 251 of the Treaty establishing the European Community, with a view to adopting Regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II), O.J. EC 2006 C 289E/68; meanwhile, the Rome II-Regulation has actually been adopted, cf. Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), O.J. EC 2007 L 199/40.

[5] Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters, COM(2006) 399 final of 17. 7. 2006.

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nial property regimes ("Rome IV"),[6] to succession ("Rome V")[7] and to maintenance obligations ("Rome VI").[8] Each of these proposals is subject to intense academic and political debate calling for a thorough scrutiny of the different options. Against this background, it appears to be particularly stimulating to undertake an intercontinental comparison of parallel developments in private international law and to contribute to the ongoing discussion. To this end, the Max Planck Institute for Comparative and International Private Law, in cooperation with the German-Japanese Association of Jurists, organized a symposium on "Japanese and European Private International Law in Comparative Perspective" which took place on March 1 and 2, 2007, in Hamburg.

I. General Introduction

1. After the welcoming addresses by *Jürgen Basedow* (Max Planck Institute for Comparative and International Private Law, Hamburg) and *Jan Grotheer* (German-Japanese Association of Jurists/Tax High Court of Hamburg), *Basedow* gave an introductory report on "Recent Developments of Private International Law in Comparative Perspective." He explained that, traditionally, conflict rules were drafted with a view to protecting the national substantive law. The implementation of a legislative competence for the European Community in Arts. 61(c), 65 EC, however, has paved the way for a change of paradigm: For the first time, choice-of-law instruments can be enacted by a legislator who is not responsible for the corresponding substantive law. In comparing modern conflict laws, *Basedow* identified three common features: a trend toward codification, a trend toward specification, and a trend toward liberalization. The first is reflected by the growing number of choice-of-law statutes – some of which have been enacted even in common law jurisdictions. These codifications contain a great number of specialized provisions that account for the various types of obligations and show a trend toward specification. The trend toward liberalization is mirrored by the increasing importance of party autonomy in many areas of law, particularly contracts but also torts and even family law. Finally, *Basedow* hinted at the antinomy of flexibility and certainty in private international law. In his opinion, the two principles are best balanced by a technique of presumption and rebuttal as approved by the new Japanese Act or the Rome Convention. This solution would be superior to the overly flexible approach taken by the American conflicts revolution or the rigid concept evidenced in Art. 4 of the Rome I Proposal.

2. *Masato Dogauchi* (Waseda University, Tokyo) illustrated the "Historical

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[6] Green Paper on conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition (SEC[2006]952), COM(2006) 400 final of 17. 7. 2006.

[7] Green Paper succession and wills, COM(2005) 65 final of 1. 3. 2005.

[8] Proposal for a Council Regulation on jurisdiction, applicable law, recognition, and enforcement of decisions and cooperation in matters relating to maintenance obligations, COM(2005) 649 final of 15. 12. 2005.

Development and Fundamental Principles of Japanese Private International Law." He indicated that during the second half of the 19th century Japan invited many European scholars who were supposed to advise the Japanese government on the introduction of a modern legal system. This initiative was meant to serve as a protection against the threatening European colonialism. The *Hôrei*, for instance, was based on intense comparative studies drawing particularly on German, French, Italian, and Belgian law. It was drafted as a fairly comprehensive and universal codification that acknowledged *Savigny*'s conflicts theory. The statute remained virtually unrevised for more than one hundred years, except for a reform of the international family law in 1989 aimed at the elimination of gender discrimination and the incorporation of the Hague Convention on Matrimonial Property Regimes. In 2002, it was finally decided to conform the *Hôrei* to the modern economic environment. However, the revision mainly dealt with the law applicable to contractual and non-contractual obligations, while the law governing family relations and succession law has been left untouched in substance. In his overall conclusion, *Dogauchi* argued that one cannot identify a clear and coherent policy underlying the New Act. Instead, it constitutes a hybrid model that evidences traces of both modern and conservative conflicts theories.

3. "The Reform of Japanese Private International Law in 2006" was set out by *Hironori Wanami* (Japanese Embassy, The Hague/formerly Japanese Ministry of Justice). He emphasized that the initiative was particularly induced by the global efforts to modernize private international law and that it was designed to ensure worldwide consistency of conflicts rules. Except for some minor issues (e.g., guardianship and disappearance, Arts. 5, 6, 35), the core of the reform concerned contractual and non-contractual obligations. Regarding contracts, party autonomy still is the primary connecting factor (Art. 7). Yet, the objective connecting factors have been fully revised in order to synchronize Japanese law with Art. 4 of the Rome Convention. Hence, a closest connection test (Art. 8[1]) combined with a rebuttable presumption in favor of the habitual residence of the party carrying out the characteristic performance (Art. 8[2]) have been introduced. The general rules are supplemented by special provisions dealing with consumer and employment contracts (Arts. 11–12). With regard to non-contractual obligations, a number of specific provisions have been adopted dealing with the objective connecting factors for general torts, product liability, defamation (Arts. 17–19), negotiorum gestio, and unjust enrichment (Art. 14). Each of these rules is subject to the possibility of subsequent choice of law (Arts. 16 and 21) as well as to an escape clause giving effect to a manifestly closer connected law (Arts. 15 and 20).

II. Contractual Obligations

1. *Yuko Nishitani* (Tohoku University, Sendai) gave an account of "Party Autonomy and Its Restrictions by Mandatory Rules in Japanese Private International Law." She showed that the *Hôrei* used to be an extraordinary progressive codification because it had already enshrined party autonomy in its Art. 7(1) as

early as 1898. Though the objective connecting factor in Art. 7(2) of the *Hôrei* exclusively pointed to the lex loci actus, courts often approved an implicit or even hypothetical choice of law under Art. 7(1) which sometimes led to unpredictable results. In addition, the old act did not include a special regime for consumer or labor contracts. *Nishitani* indicated that Japanese legal theory sought to protect weaker parties by a fairly broad interpretation of internationally mandatory rules. The New Act still adheres to party autonomy as the prevailing connecting factor (Art. 7). *Nishitani* submitted that neither internationally recognized principles nor the lex mercatoria should be eligible as governing law according to Art. 7. As to consumer contracts, Art. 11(1) basically allows for party autonomy as well. However, the consumer can claim at any point in time that the mandatory provisions of the law of his habitual residence shall apply provided that the professional induced the consumer to conclude a cross-border contract, was aware of his counterparty's qualification as consumer, and knew the latter's habitual residence. Art. 12 stipulates a similar regime for employment contracts, giving effect to the mandatory provisions of the law of the place where the service is to be carried out. Finally, *Nishitani* pointed out that the application and interpretation of internationally mandatory rules was intentionally left to the practice for further development. Hence, there is no corresponding provision within the New Act.

2. The following presentation by *Catherine Kessedjian* (University Panthéon-Assas, Paris II) dealt with "Party Autonomy and Characteristic Performance in the Rome Convention and the Rome I Proposal." First of all, she addressed Art. 3(1) 3rd sentence of the Proposal creating a presumption that a choice of a particular forum encompasses the choice of that forum's law. *Kessedjian* assumed that this provision originated from English law where it is to be construed as a rebuttable presumption, while the Proposal appears to be absolute in this respect. She questioned the appropriateness of such a rule, since it undermines the fact that the parties actually did not agree on the applicable law. Secondly, *Kessedjian* examined Art. 3(2) of the Proposal enabling the parties to choose non-state law such as the Principles of European Contract Law. Basically, she endorsed this possibility but voiced concern that it might be difficult to draw a clear line between sufficiently recognized principles and non-eligible rules. *Kessedjian* clarified that this provision is likely to be deleted as some member states have cast doubts on the democratic legitimacy of non-state law. Finally, *Kessedjian* dealt with Art. 4 of the Proposal arguing that it constitutes a striking shift from the reasonable and balanced approach adopted in the Rome Convention toward a concept of excessively rigid rules with no means to account for special cases. *Kessedjian* therefore pleaded for the reintroduction of presumptions for the closest connection flanked by an escape clause.

3. Finally, *Fausto Pocar* (University of Milan) informed the audience on the "Protection of Weaker Parties in the Rome Convention and the Rome I Proposal." He started by summarizing the basic features and deficiencies of Art. 5 of the Rome Convention which favored weaker parties by shifting the objective connecting factor from the supplier's business establishment to the consumer's habitual residence and limiting the effects of an unfavorable choice of law. The latter was achieved by requiring the judge to compare the standard of protection

of the chosen law with that of the law of the consumer's habitual residence. *Pocar* explained that the provision was criticized for being too narrow in scope and for being unsuited to modern business practices. Additionally, it has been difficult to operate the mandatory comparative analysis in court practice. Against this background, *Pocar* described Art. 5 of the Rome I Proposal. He criticized that this provision protects only member state residents, an exclusiveness which appears to be contrary to the principle of universalism earmarked by the Commission as one of its main policies. He further disapproved of the total ban of party autonomy in the proposed Art. 5. In his opinion, the aim of avoiding problems resulting from the favor protectionis concept could have been achieved more appropriately by different means as evidenced by the New Japanese Act.

III. Assignment of Receivables

1. In the following session, *Aki Kitazawa* (Keio University, Tokyo) illustrated the "Law Applicable to the Assignment of Receivables in Japan." She began by distinguishing three different issues: (1) the law governing the validity and effects of the assignment as between the contracting parties, i.e., the assignor and the assignee; (2) the law governing the effects of the assignment on the debtor of the assigned claim; and (3) the law governing the effects of the assignment vis-à-vis third parties, i.e., the general creditors of the assignor or subsequent assignees in cases of multiple assignments. With regard to the first issue, neither Art. 12 of the *Hôrei* nor Art. 23 of the New Act provide a clear answer. Hence, the solution is under debate just as it is in the context of Art. 12 of the Rome Convention. *Kitazawa* supports the view that both the contractual and the proprietary effects of the assignment as between assignor and assignee should be governed by one single law, i.e., the law governing the assignment contract. As to the effects of the assignment on the debtor and on third parties, the *Hôrei* opted for the law of the debtor's domicile. By contrast, Art. 23 of the New Act designates the law governing the assigned receivable itself. According to *Kitazawa*, this basically constitutes a sound solution accounting for the competing interests involved in the triangular setting of assignment. She admitted that this rule might cause problems regarding bulk assignments which, however, appear to be less common in Japanese business practice for the time being.

2. *Eva-Maria Kieninger* (University of Würzburg) outlined the "General Principles on the Law Applicable to the Assignment of Receivables in Europe." After a brief illustration of Art. 13(1) and (2) of the Rome I Proposal which deal with the relationship of the parties of the assignment vis-à-vis each other and as regards the debtor, *Kieninger* focused on the priority issue in relation to third parties. In this respect, four different solutions have been suggested: (1) the law applicable to the assignment contract (Art. 12[1] Rome Convention), (2) the law applicable to the assigned claim (Art. 12[2] Rome Convention), (3) the location of the assignor (Art. 13[3] Rome I Proposal), and (4) the location of the debtor (Art. 12 *Hôrei*). *Kieninger* demonstrated that solution (1), i.e., granting party autonomy to the assigning parties, is detrimental to the legitimate interests of third parties. As to solution (2), *Kieninger* argued that it is impractical with

regard to bulk assignments playing a major role in European market practice. Consequently, *Kieninger* advocated the third approach since the assignor's location is a readily ascertainable connecting factor safeguarding ex ante legal certainty without causing problems regarding securitizations and bulk assignments. According to *Kieninger*, this law should equally determine the proprietary effects as between assignor and assignee rather than vis-à-vis third parties only. She finished her talk by suggesting three minor improvements of the current draft, inter alia, the suspension of Art. 18(1) 2nd sentence in the context of assignments.

IV. International Company Law

1. *Dai Yokomizo* (Hokkaido University, Sapporo) gave an overview of the current state of the "International Company Law in Japan." Neither the former *Hôrei* nor the New Act contains provisions identifying the law applicable to companies, but Art. 36 of the Civil Code[9] provides that the juridical personality of foreign companies is generally recognized, and Art. 482 of the pre-revised Commercial Code[10] and Art. 821 of the new Company Code[11] deal with the issue of pseudo-foreign companies. Having reviewed the past developments, *Yokomizo* pointed out that in Japan, International Company Law distinguishes between conflict of law rules and alien law rules. Due to its unclear wording, a Supreme Court's decision dating from 1975 is open to interpretation as supporting either the seat doctrine or the incorporation doctrine. Nevertheless, the incorporation doctrine is almost unanimously accepted in Japan. Still, legislators found the discussion on this matter insufficient to justify introducing a rule. Art. 821 of the new Company Code has been criticized strongly for having an unclear scope, so further examination is highly desirable to enhance predictability. Further issues recently discussed include the law applicable to an international merger, the law applicable to piercing the corporate veil, and the existence of international mandatory rules within the Company Act.

2. Next, *Sylvaine Poillot-Peruzzetto* (University of Toulouse I) spoke on the "International Company Law in the ECJ Decisions." There are no uniform private international law rules in relation to companies in Europe, but the right of establishment provides an alternative method for an indirect coordination of the national laws, which are divided between the application of the real seat theory and the incorporation theory for foreign companies. Exemplifying the possible indirect effects of the ECJ case law on the connecting factor and the structure of the conflict of law rules and on private international law instruments, *Poillot-Peruzzetto* found that as the ECJ case law controls the result of the application of the governing law, the recognition principle becomes very important in Europe. She put forward that coordination, in addition to mobility,

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[9] Minpô, Law No. 89/1896, last amended by Law No. 50/2006, which changed Arts. 35 and 36.

[10] Kaisha-hô, Law No. 86/2005.

[11] Shôhô, Law No. 48/1899, last amended by Law No. 87/2005.

becomes a European value through European conflict of law rules on the basis of the incorporation theory. She emphasized that this debate is connected to the issue of the identity of Europe, either merely as a space for mobility and competition between various systems or as the possibility to build a model of society. This being a European situation, in her opinion, the ECJ case law sketches the European private international law rules in relation to international situations on the basis of the real seat theory.

3. Rounding out the picture, *Daniel Zimmer* (University of Bonn) analyzed "The Proposal of the *Deutscher Rat für Internationales Privatrecht*" (German Council for Private International Law). Two mostly identical proposals have been drawn up,[12] one that is aimed at the Community level and one that provides for a set of rules to complement the existing German private international law in case the proposed Community legislation should not succeed. *Zimmer*, concentrating on the first, reported that according to Art. 2, in principle, the proposal follows the incorporation theory. European and third-country companies are treated alike. Article 3 determines the scope of application by a non-exhaustive enumeration, and Art. 4 deals with the formal requirements for legal acts relating to a company's constitution. The following three articles relate to important structural changes in companies, e.g., cross-border mergers, international company division, and asset transfer. *Zimmer* came to the conclusion that the proposal is in line with the trends identified by *Basedow* in his introductory speech: it is an attempt to codify this important branch of private international law in a more specific and detailed way, giving private parties more freedom than previously offered by private international law and thus confirming a trend toward liberalization.

V. Non-Contractual Obligations

1. *Toshiyuki Kono* (Kyushu University, Fukuoka) spoke on the "Lex Loci Delicti and Its Exceptions in Japanese Private International Law." He found that the conflict of law rules on tort should serve the purpose of reducing the number of torts by leading all possible parties to behave appropriately within appropriate costs. Comparing them to the Rome II provisions, *Kono* gave an overview of the provisions on tort in the New Act. In principle, the law of the place of tortuous results is applicable under Art. 17, 1st sentence, unless, according to Art. 17, 2nd sentence, the occurrence of the results there would usually be unforeseeable, in which case the law of the place of tortuous acts is applied. Product liability is dealt with in Art. 18, and Art. 19 determines that, in case of defamation, the law of the injured person's habitual residence is applied. Article 21 acknowledges party autonomy ex post without prejudicing third parties' rights, and Art. 22 gives room for public policy in tort. *Kono* suggested that party autonomy ex post might affect people's behavior ex ante negatively insofar as with the possibility

[12] For the German text of the proposal including comments see *Sonnenberger/Bauer*, Vorschlag des Deutschen Rates für Internationales Privatrecht für eine Regelung des Internationalen Gesellschaftsrechts auf europäischer/nationaler Ebene: RIW 2006, Beilage 1, 1 ff.

to change the applicable law at a later stage, they might be less concerned about acting contrary to the law.

2. *Thomas Kadner Graziano* (University of Geneva) then laid out the "General Principles in International Tort Law in Europe." As conflict of law rules of the EU are still extremely rare in this area, and as national rules differ considerably, in any specific case the outcome may mainly depend on the Europe forum state where the claim has been filed. Therefore, initiatives to unify tort conflicts rules have been taken, first by the Hague Conference on private international law, then by the EC/EU. *Kadner Graziano* first dealt with some relatively uncontroversial issues such as the general principle of application of the lex loci delicti. He then focused on more disputed issues, stating that, should Rome II be realized, the freedom of choice, ex post and ex ante, will certainly count among the cardinal principles. Concerning the delicate issues of public policy of the forum, the very cautious application of ordre public clauses may be a strong characteristic of private international law on tort in Europe. As for complex torts, *Kadner Graziano* found that the introduction of specific rules for specific multilocal torts is at least another common feature in Europe. For the future, the question of the law applicable to transnational violations of privacy, personality rights, and defamation, and the issue of a limitation period in personal-injury cases need to be solved.

3. *Marc Fallon* (Catholic University of Louvain, Louvain-la-Neuve) closed the session with a thorough analysis of the "Law Applicable to Specific Torts in Europe." He laid out that statutory provisions are rare and most solutions result from a case law interpretation of a global rule referring to the place of the wrong or to the place of the damage or to both factors. The specific rules of Rome II identify more precisely the place of the damage, which has the first place in the scale of the general rule. The place of the habitual residence is used only to protect a party, e.g., in product liability cases or in privacy cases to protect the defendant. This does not prejudice the extension of the freedom of choice, except for unfair competition cases and for the infringement of intellectual property rights. Furthermore, the application of the escape clause is extended to products liability only. Apart from international treaties, provisions outside the Regulation itself consist of Community law provisions of a diverse nature such as a general "mutual recognition" concept and overriding mandatory provisions. In *Fallon*'s opinion, it is uncertain whether the same rules on conflicts of laws should prevail for intra-Community as well as external situations, so Europe should accept and think about the possibility of two parallel sets of conflicts of law rules.

VI. International Family Law

1. *Yasuhiro Okuda* (Chuo University, Tokyo) provided a survey on "Divorce, the Protection of Minors, and Child Abduction in Japanese Private International Law." Pursuant to the 1989 revisions, Art. 27 of the New Act stipulates that the law applicable to the effect of marriage also applies to divorce. Where one of the spouses is a Japanese national with habitual residence in Japan, how-

ever, the divorce is always governed by Japanese law. Article 32 provides that parental authority is governed by the child's national law where that is the same as the national law of a parent, or else by the law of the child's habitual residence. As there is no express statutory provision on the conflict of jurisdiction, the question is left to the courts. There being no Supreme Court decision as to the international jurisdiction for parental authority, the inferior courts have held in many cases that the court with jurisdiction over divorce also has jurisdiction over parental authority. The provision on guardianship was altered slightly in 2006 by Art. 35 of the New Act. *Okuda* regretted that the 1980 Convention on the Civil Aspects of International Child Abduction has not been ratified by Japan. He inferred that despite the reasonable efforts of Japanese courts to establish rules for legal proceedings in international family law, in the absence of statutory provisions the situation remains unclear.

2. *Maarti Jänterä-Jareborg*'s (Uppsala University) outlook on "Jurisdiction and Applicable Law in Cross-Border Divorce Cases in Europe" treated the Brussels II*bis* Regulation[13] and the Commission's proposal on the law applicable to divorce (and legal separation) which also includes amendments to the rules on jurisdiction in the Brussels II*bis* by proposing a right for the spouse to agree on jurisdiction of a member state's court (Rome III). *Jänterä-Jareborg* reported that the Brussels II*bis* consists of rules on jurisdiction and on the recognition/enforcement of other member states' judgments. A major innovation is the direct rules on jurisdiction which must be respected by the courts of the member states. Once proceedings are initiated in more than one member state, the court second seized shall decline jurisdiction in favor of the first seized competent court. Also, divorce judgments rendered in a member state are recognized automatically in the other member states. The starting point of the Rome III Proposal, which will also cover the laws of any third state, is that the spouses have the right to choose (within limitations) the law applicable to their divorce. *Jänterä-Jareborg* expressed serious doubts regarding this provision, e.g., regarding the lack of solutions for procedural problems related to the application of foreign law.

3. *Alegría Borrás* (Barcelona University) offered a survey of the "Protection of Minors and Child Abduction under the Hague Conventions and the Brussels II bis Regulation," resuming the topics dealt with by the previous speaker. *Borrás* outlined the history of the Hague Conventions, compared them with the European instrument, and then analyzed the Rome III Proposal. *Borrás* defined the basic terms and concepts such as "parental responsibility" and "wrongful" removal, and laid out the main rules, e.g., the child-centered approach, for both the Conventions and the Regulation. She came to the conclusion that although there is a need for regulation, there have been too many amendments in the past which have led to legal uncertainty. She criticized the fact that the material scope of the application for marriage and parental responsibility have remained

[13] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, O.J. EC 2003 L 338/1.

together. In her opinion, this causes even more amendments, as the one cannot be changed without the other, and thus separating the two issues would enhance legal certainty. As for the future, she suggested that it would be reasonable if all the member states of the European Union ratified the Hague Conventions.

VII. International Civil Procedure Law

1. The next session started with *Yoshihisa Hayakawa*'s (Rikkyo University, Tokyo) overview on "Jurisdiction and the Recognition and Enforcement of Foreign Judgments in Japan." Scrutinizing Art. 118 *Civil Procedure Code* as the statutory rule for the recognition of foreign judgment in Japan, *Hayakawa* addressed matters such as service abroad directly by postal channels and the awarding of punitive damages. He then went into depth on international adjudicative jurisdiction. Until today, there have been no clear statutory provisions in Japan, and Japanese lawyers rely on case law. Lower court cases in most jurisdictional areas showed no reliable rule, leading to unpredictability, until in 1981 the Supreme Court used the rules for domestic cases as substitute rules for international jurisdiction. The problem was that according to those rules a plaintiff could easily bring a suit against a foreign defendant to a Japanese court, which may pose serious difficulties for the foreign defendant in a cross-border situation. Accordingly, lower courts have gradually modified the 1981 rule, granting exceptions where there are exceptional circumstances from the viewpoint of equal treatment of parties and a proper and prompt course of justice. This ruling was acknowledged by the Supreme Court in 1996. The Ministry of Justice has started a project to establish statutory rules for international jurisdiction, so in the future these questions will remain an ongoing issue.

2. *Dieter Martiny* (European University Viadrina, Frankfurt/Oder) then analyzed the "Recognition and Enforcement of Foreign Judgments in Germany and Europe." The rules on the recognition of judgments still are divided into one body of intra-Community rules enacted by the European Community and another body of rules for third-state relations adopted by the member states. Mutual recognition being the only way to overcome difficulties created by the still-existing differences between national judicial systems, the Brussels I Regulation[14] and the Brussels II*bis* Regulation have basically ensured the free movement of judgments within the internal market. *Martiny* then turned to the numerous other regulations that have entered into force since 2000, and the European Judicial Network in civil and commercial matters. He proceeded with an analysis of the German national law (§ 328 and §§ 722 and 723 of the German Code of Civil Procedure), which has basically remained unchanged. In conclusion, he stated that there is a need to enhance free movement of judgments even more, and stressed the importance of European efforts to make international cooperation more effective, as the efforts towards the facilitation of recognition

[14] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, O.J. EC 2001 L 12/1.

and enforcement are limited to the European integration and do not extend to third countries.

3. Finally, *Trevor Hartley* (London School of Economics) reported on "The Brussels Regulation and Non-Community States." He explained that the Brussels instruments provide for an almost automatic recognition of Community judgments and prohibit any second-guessing of the jurisdiction of the court of origin. This basic feature is made possible through a comprehensive regulation of the so-called direct jurisdiction of the first court. *Hartley* indicated that this system was designed with intra-Community cases in mind which leads to a discrimination against non-Community defendants: In relation to third states, member state courts can take jurisdiction on their autonomous (exorbitant) grounds. The resulting judgment must be recognized in other member states even though it is not rendered according to the defendant-protective provisions of the Brussels Regulation. Further discrimination derives from the fact that the provisions concerning exclusive jurisdiction (Art. 22), choice-of-court agreements (Art. 23), and lis pendens (Art. 27) explicitly only give priority to member state courts; they do not apply explicitly to similar situations involving third states. *Hartley* showed that the Brussels Regulation does not provide clear answers regarding these types of cases, i.e., whether a member state court would have to take jurisdiction, may take jurisdiction, or would even have to stay its proceedings. In his conclusion, *Hartley* criticized the discriminatory European approach and hinted at the American practice of treating domestic and foreign citizens equally.

The conference was attended by almost one hundred participants from various countries and professions, indicating the growing interest in and importance of comparative private international law[15].

Hamburg SIMON SCHWARZ/EVA SCHWITTEK

[15] We look forward to the collection of papers which will be published in English by Mohr Siebeck (Tübingen) under the editorship of *Jürgen Basedow, Harald Baum*, and *Yuko Nishitani* in the Max Planck Institute's series "Materialien zum ausländischen und internationalen Privatrecht."