

〈指定研究〉

「ヨーロッパ私法と日本民法の現代化の課題」

中田邦博・若林三奈・潮見佳男・松岡久和編
『ヨーロッパ私法・消費者法の現代化と日本私法の展開』
序文の翻訳

中田邦博*・アンナ・カタリーナ 鈴木クラースン**

I

This book “Modernisation of European Private and Consumer Law and Developments in Japanese Private Law” (Kunihiro Nakata, Mina Wakabayashi, Yoshio Shiomi, Hisakazu Matsuoka eds.) focuses on the results of the research activities conducted by the European Contract Law Study Group and also assembles the results obtained from the collaboration of that Association and the European Consumer Law Study Group.

This book is one part of the results of the research activities conducted at the Institute of Social Sciences of Ryukoku University (hereinafter referred to as “Ryukoku Social Institute”), which was supported by the designated research project “Modernization of European Private Law and Japanese Private Law (represented by Mina Wakabayashi)” and has been published as Vol 127 of the *Shaken sōsho* (Association Research Monographs).

A part of the results included in this book were funded by the following scientific research funds : JSPS 16H03571 (Representative: Naoko Kano), JSPS 17K03493 (Representative : Yoshikazu Kawasumi), JSPS 19K01383 (Representative: Kunihiro Nakata).

Our Research Group has already published four books in the *Shaken sōsho* series: 1. Yoshikazu Kawasumi and Kunihiro Nakata and Yoshio Shiomi and Hisakazu Matsuoka (eds.), “Trends and Issues of European Private Law” (Nihon Hyōron-sha, 2003; hereinafter “European Private Law I”) ; 2. Ibid. (eds.), “The Development and Issues of European Private Law” (Nihon Hyōron-sha, 2008; hereinafter “European Private Law II”) ; 3. Ibid. (eds.), “Current European Private Law and Issues of Japanese Law” (Nihon Hyōron-sha, 2011; hereinafter “European Private Law III”) ; 4. Ibid. (eds.), “Prospects of European Private Law and the Modernization of the Japanese Civil Code” (Nihon Hyōron-sha, 2016; hereinafter “European Private Law IV”).

This book makes the fifth volume of the European Private Law series. On the origins of our research group and our activities to date, see the introduction and foreword in each of the books in the European Private Law series. The origin of the research project on European private law was

* 龍谷大学法学部 教授

** ハーゲン通信大学法学部国際法律関係研究所 東アジア法講座・日本法研究所 助教

marked by the translation work of Hein Kötz' book "European Contract Law Vol I" by Yoshio Shiomi and Kunihiro Nakata and Hisakazu Matsuoka (Hōritsu Bunka-sha, 1999; for details, see the Translators' Foreword on page iii in European Private Law I).

The movement of the unification of European contract law in the form of the PECL (Ole Lando and Hugh Beale (eds.), Shiomi and Nakata and Matsuoka (supervising trans.), "Principles of European Contract Law Vols I, II" (Hōritsu Bunka-sha, 2006), Ole Lando and others (eds.), *ibid* (supervising trans.), "Principles of European Contract Law Vols III" (Hōritsu Bunka-sha, 2008)), the DCFR (Christian von Bar and others (eds.), Atsumi Kubota and others (trans.), "Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference" (Hōritsu Bunka-sha, 2013)), and, furthermore, the European Private Law series mentioned above, have exerted an influence on the debate over the reform of Japanese law. We hope that this book may also serve as a window for understanding these European trends.

II

The research results contained in this book are organized in the following manner. First, taking the development of a standardized and unified EU private law as a starting point, the response to this trend in the individual Member States in terms of reforms of the domestic laws is analyzed and its trends and characteristics explored. Secondly, while studying the elucidation of the principles of European law — in particular the possibility of establishing a European private law and a law of contracts — that underlie these movements, and considering the reception of particular rules in Japanese law, issues related to the amendment of the Japanese Civil Code are dealt with from an academic, a practical, and a comparative perspective. Thirdly, we aim to provide a "place for international exchange" by making use of our networks with foreign academics and research institutions.

It is up to the reader to decide whether or not the content of this book reflects the above-mentioned objectives, but as editors, we would like to state that our research activities addressed these issues earnestly.

This book is a collection of the research activities supported by the Ryukoku Social Institute, the information obtained from lectures and seminars sponsored, jointly sponsored, or supported by our Study Group, as well as research results presented by members of our Association outside and within this Group at academic conferences and seminars (although some results could not be published in this book due to several circumstances). We would also like to emphasize that this book contains research results from activities of the extensive network established by the members of this Study Group.

The research activities of this Association also encompass the consideration of a development of consumer law that intensifies its relationship with private law. This topic has been collaborated on with the European Consumer Law Study Group. By way of example, Kunihiro Nakata and Naoko Kano (eds.), "Trends in European Consumer Law and the Regulation of Advertisements and Japanese Law" (Nihon Hyōron-sha, 2011)), and *ibid* (eds.), "The Modernization of Consumer Law and the Collective Protection of Rights" (Nihon Hyōron-sha, 2016) have been published in the *Shaken sōsho* series with the support of the Ryukoku University Institute for International Culture.

III

This book is composed of the following five parts that contain contributions from the perspective of the issue of the modernization of European private and consumer law, and corresponding contributions considering the situation of Japanese private law: Part 1 “European Private Law and EU Consumer Law”, Part 2 “Trends in Private and Consumer Law in European Countries and in Canada”, Part 3 “Trends in Japanese Private and Consumer Law”, Part 4 “The Regulation of Advertisements and Private Law”, Part 5 “Dissemination of and Dialogues with Japanese Law”. The content of each section is briefly introduced below.

1. Part 1 “European Private Law and EU Consumer Law” contains contributions that discuss trends in contract and consumer law from a European perspective.

The first three contributions are: 1) Jürgen Basedow (Nakata supervising trans., Takayuki Furutani trans.), “European Contract Law and the Digital Agenda” ; 2) Gerhard Wagner (Nakata trans.), “Mandatory Contract Law” ; 3) Christian Twigg-Flesner (Shizuko Nakata trans.), “The Development of European Private Law as seen from the UK: From Door-to-Door Sales towards the Digital Society”. The fourth contribution, “The Impact of Standardized European Private Law and the *Acquis Communautaire* on the Law of EU Member States: The Harmonization of Continental and Common Law” by Luz M. Martinez Velencoso (Antonios Karaiskos trans.), relates to the development of European contract law. The first contribution is by a leading academic in the field, Professor Dr. Dr. h.c. mult. Jürgen Basedow, who comprehend the dynamics of the flow of European private law and the new developments in European contract law. His article relates to the particulars of the proposal for a directive on online trading and the proposal for a directive on certain aspects concerning contracts for the supply of digital content (both proposals have subsequently been adopted) through the medium of the “Proposal for a Common European Sales Law” in a compact manner, and can be regarded as a kind of general remarks of this book. Contributions related to Professor Basedow’s article are “The Incremental Creation of European Private Law” in *European Private Law II* p. 21 et seq., and “European Contract Law” in *European Private Law IV* p. 29 et seq. The analysis method developed in the second contribution is representative of Professor Wagner: Inspired by the development of the Consumer Rights Directive, the author uses the theoretical framework of “law and economics” to directly deal with the tension between contract law theory and the justification of the protection granted under European consumer law. Interestingly, he explains that there is no mandatory law but a predominance of content regulation. Such discussions have a certain effect on Japan (a postscript by Professor Wagner is also included in this book, see contribution number 13 below). Further contributions relating to mandatory law are “Mandatory Law, Basic Freedoms, European Contract Law” by Oliver Remien (Nakata trans.) in *European Private Law IV* p. 73 et seq., and “The Essence of the Freedom of Contract under Mandatory Contract Law” by Matteo Fornasier (ibid trans.) in *European Private Law IV* p. 277 et seq.

In the third contribution, the up-and-coming British academic Professor Twigg-Flessner traces the development of European private law and European contract law from the point of view of English law and provides an outlook on the recent legal responses to the digital economy. It will be interesting to see how English law responds to developments in EU law after Brexit. The fourth

contribution is written by a Spanish academic, Professor...[?] Based on the perspective of comparative law, important issues in contract law, especially the regulation of unfair terms, the demand for transparency, conformity of goods, breach of contract, legal remedy, the principle of *clausula rebus sic stantibus*, etc., are analysed under the aspect of the unification of European contract law by examining the influence of EU law and the basic tendency in developments in the law of the EU's Member States. These contributions are proof that the common trends in Europe are considered earnestly by European researchers.

The fifth contribution, "Towards a Regulatory Framework for Online Intermediary Platforms in Europe" by Christoph Busch (Karaiskos trans.), is about the responsibility of online platform operators, which has been drawing attention recently. Professor Busch is a leading expert in this field and is actively engaged in comparative research. Beside this matter, the content of the Model Rules on Online Platforms discussed and adopted by the European Law Institute (ELI) is also taken up in this article. A Japanese translation of the draft of these Model Rules has already been published as "Discussion of a Draft Directive on Online Intermediary Platforms" by Naoko Kawamura (trans., Vol. 57 No. 1 Kokugakuin Hogaku p. 39 et seq.). The final version that has been adopted by ELI will be published in 2020. A joint research project led by Professor Busch and Professor Nakata on the topic of online platforms is currently underway that is supported by the German Academic Exchange Association (DAAD).

The sixth and seventh contributions, "On the Demand for Transparency in Consumer Transactions: Focussing on the Development of EU Consumer Law" and "The Position of Ethical Consumption in EU Consumer Law", both by Karaiskos, are interrelated. The former is motivated by the issue of the indispensable premise of consumer transactions to guarantee the transparency both before contract conclusion and of the contract's content. On this basis, a cross-sectional study of the principle of transparency in materials on EU consumer law is made and the notion of transparency is explained. On the other hand, in such situations, a consumer education that cultivates the essential ability of self-determination must not be lacking. In response, the latter contribution examines the basic concepts of consumer society, consumption, ethical consumption, and of consumer. Both contributions are closely related to current issues of Japanese consumer law.

The eighth contribution, "The Secession of the United Kingdom (Brexit) and Business Law" is a valuable article by a noted researcher in this field, Professor Basedow (Karaiskos trans.), which identifies and analyzes the issue of Brexit and its great impact on the EU's internal market. It aids in the comprehension of how difficult the process of Brexit is. In the ninth contribution by Isabelle Rorive (Noriko Kawawa and Michiko Katsuyama and Takeshi Ogata supervising transl.), "Anti-Discrimination Law and Private Law from a Transnational Point of View", the influence of EU anti-discrimination law on private law is approached by considering human rights and concrete case examples. The development of anti-discrimination law is also important for Asian countries, so that a joint project between members of the Study Group and Professor Rorive is planned.

Contribution number 10 is a translation into Japanese by Nakata, Karaiskos, and Furutani of the Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council

(‘Unfair Commercial Practices Directive’). This Directive has been transposed into the domestic laws of each Member State and has considerably impacted domestic consumer laws. Furthermore, a proposal to amend the Directive has been adopted very recently. The Directive is indispensable for understanding EU contract and consumer law, while its regulatory approach also provides an important perspective for the amendment of Japanese private and consumer law. On this issue, see also the contributions in Part 4.

2. Part 2 “Trends in Private and Consumer Law in European Countries and in Canada” conveys trends in the fields of private and consumer law in each European country, that is, in Germany, France, the United Kingdom, etc. The contributions numbered 11, “The Significance of the Introduction of Compensation Claims by Bereaved Dependents in German Civil Liability Law (Art. 844 German Civil Code as amended)” by Mina Wakabayashi, 12, “Obliegenheit with Contributory Negligence (Obligation of the Victim) : The Example of Wearing a Helmet” by Wolfgang Wurmnest (Wakabayashi trans.), and 13, “Modern Issues of the Liability for Medicinal Products” by Gerhard Wagner (Fumihiro Nagano trans.), all convey trends in German tort law. In the eleventh contribution, the legislative background and significance of the 2017 enactment in Germany of the introductory law on the right for bereaved family members to claim consolation money is explained as seen from the perspective of the standardization of law in Europe. In the twelfth contribution, the need for a normative interpretation of the basis of the changing balance in the principle of civil liability in Art. 242 German Civil Code regarding the interpretation of Art. 254 German Civil Code (Contributory Negligence) is presented clearly by using precedent cases of wearing helmets when skiing or riding a bicycle. The thirteenth contribution presents the interpretation of the notion of strict liability in German medicinal products liability, illuminates the legislative purpose of the introduction of the presumption of a causal relationship and the claim for the disclosure of information under the 2002 amendment, and critically analyzes judicial precedents. In particular, the need for rational settlements in cases where the causation link is uncertain is explained.

Contributions number 14, “Subsequent Performance under German Sales Law after the 2018 Reform” by Mareike Schmidt (Nakata supervising trans., Furutani trans.), and 15, “Regulation of Standard Terms in Business-to-Business Transactions: The Current Legal Situation and Outlook on Law Reforms” by Matteo Fornasier (Yo Terakawa trans.) both treat developments of German contract law. The fourteenth contribution illustrates how decisions by the European Court of Justice with respect to claims of subsequent performance in cases of non-conformity with the contract have affected the reform of the German law of obligations and its debate. The fifteenth contribution examines the critical opinions of the regulation of standard terms in business-to-business transactions, investigates in detail the theoretical foundation of judicial intervention in business-to-business-transactions, and presents the usefulness of the assessment of general terms.

The Act against Unfair Competition is a law that plays an important role for the protection of consumers in Germany. The sixteenth contribution, “Modern Developments in German Unfair Competition Law: The 2015 Reform and the Liability of Middlemen” by Ansgar Ohly (Nakata and Karaikos trans.), reports on the developments since 2012 from the viewpoint of the influence of EU law. In particular, the reference to the liability of platform intermediaries in terms of strict liability is interesting. The content of this article is particularly related to contributions number 4, 5, 6, and 10 of

Part 1. In the seventeenth contribution, “The Regulation of Unwanted Solicitations in Germany: Focussing on Judicial Precedents and Practical Solutions”, Karaiskos deals with the regulatory content and the development of judicial precedents under the German Act against Unfair Competition.

In the eighteenth contribution, “Lessons from the English Consumer Rights Act 2015 for the Amendment of Consumer Law”, Christian Twigg-Flesner (Karaiskos trans.) conveys the content of English contract law and the Consumer Rights Act in a precise manner and points out that the rules on consumer transactions are separated from the general law. The nineteenth contribution by Elise Poillot (Keita Baba trans.), “The Re-enactment of the Civil Code: The Subject of French and Luxembourg Consumer Codes”, explains the significance and influence of the enactment of the Consumer Codes and suggests that the enactment of a consumer code be considered in Japan. The twentieth contribution, “Comparative Clinical Jurisprudence: Is There a Way Towards a European Clinical Culture? The Experience in Luxembourg” by the same author (Kawamura and Furutani trans.), is based on practical experience and deals with the matter of the how US culture of legal clinics is being received in Europe. The twenty-first contribution, Catherine Piché (Karaiskos trans.), “Class Actions in Quebec: Highlighting a Unique Procedure”, conveys the structure of the relatively moderate class actions in Canada and covers practices that must be referred to sufficiently as information to activate collective lawsuits in Japan, such as on the way in which judges are involved.

3. Part 3 “Trends in Japanese Private and Consumer Law” is a compilation of contributions dealing with the reform of the Japanese Civil Code, and, closely related to this, the development of consumer contract law. First, the contributions considering the modernization of the rules on the contract conclusion process (law on the declarations of intention) are numbers 22, “The Modernization of the Law on Declarations of Intention in Japan: Proposed Amendments to the Rules on Mistake and the Revision of the Consumer Contract Act and the Act on Specified Commercial Transactions and the Electronic Contracts Act” by Nakata, and 23, “The Reform of the Consumer Contract Act and the Rules on the Formation Process of Contracts: The Significance and Issues of the 2016 and 2019 Amendments” by Kano. The twenty-second contribution is based on a presentation given at the sixth East-Asian International Symposium on Civil Law and takes up the modernization of the rules on declarations of intention on the level of both the general law and special laws, which show a tendency of favouring the principle of self-determination. In the twenty-third contribution, the important revisions of the recent reform of the Consumer Contract Law (contracts of exceeding quantity, frequency, or duration, or overwhelming solicitations etc.) are introduced and the necessity of a general provision on the right to terminate solicitations that are unjust due to the consumer having been taken advantage of is explained. The way in which consumer law is shaped in terms of its legal structure is questioned.

Under the law reform of 2017, provisions regulating the judicial review of standard terms were introduced into the Japanese Civil Code. In the twenty-fourth contribution, “On the Establishment of the Regulation of ‘Standard Terms’ and Various Issues”, Kano presents the significance of the regulation of standard terms and trends in the discussion of their interpretation while contrasting the rules of the Consumer Contract Act and identifies the issues in relation to both matters. The problem is how to understand the relationship with the Consumer Contract Act consistently.

In the twenty-fifth contribution, “The Necessity of Prohibitions under the Consumer Contract Act and the Unfair Premiums and Unfair Labelling Prevention Act: On the Chlorella Flyer Case” by Nakata, the interpretation by the matter of the interpretation by the courts being questioned is presented on the basis of recent judicial precedents, while the issue of what requirements and framework would be necessary to capitalise on the injunction lawsuit by consumer organisations is also considered.

The twenty-sixth contribution, “The Consumer Society from the Perspective of the Law” by Karaiskos investigates the concept of “consumer society” as used as a slogan in consumer education and points out that social support is necessary in order for consumers in need of special assistance to be accepted into the consumer society. On the specific development, see contributions number 6 and 7 above.

4. Part 4 “The Regulation of Advertisements and Private Law” deals with advertising as the intersection between contract and consumer law from a comparative law perspective and consists of presentations given at symposiums of the Japan Consumer Law Association. The twenty-seventh contribution, “An Outline of the Regulation of Advertisements in Japan: From the Perspective of Consumer Law” by Nakata is a general report of the symposium, which sketches the overall picture of the advertising regulation. In the twenty-eighth contribution by Kano, “Advertisements and the Principles of Contract Law, the Notion of Solicitation”, it is clarified that advertisements are subject to civil liability, the problem surrounding the requirement of “solicitation” under the Consumer Contract Act is taken up, and trends in EU law are conveyed. Contributions number 29 by Nakata, “The Regulation of Advertisements and Consumers in Germany: — Based on the 2015 Amendment of the UWG”, 30 by Baba, “The Basic Structure and Current State of the French Legal Regulation of Advertisements”, 31 by Keiko Tanimoto, “The Regulation of Advertisements and Consumers in Italy”, and 32 by Karaiskos, “The Regulation of Advertisements in Greece” are assembled as comparative legal investigations to support such discussions in Japan. With regard to online advertisements, an important problem is their appropriateness and it is necessary to promote comparative research on the regulation of advertisements and devise a regulation method suitable for the age of the global digital economy.

5. Part 5 “Dissemination of and Dialogues with Japanese Law” contains contributions that convey trends in the reform of the Civil Code in Japan to foreign countries and such contributions in which the content of this reform is discussed with Japanese and foreign researchers, namely numbers 32, “*Die Modernisierung des Rechts über die Willenserklärung in Japan*” [The Modernization of the Law on Declarations of Intention in Japan] by Nakata, and 33, “*Internationale Reformen des Verjährungsrechts und die japanische Neuregelung in den Artikeln 144 ff. Minpō 2020*” [International Reforms of the Prescription Rules in Articles 144 et seq. Japanese Civil Code 2020] by Oliver Remien. The thirty-second contribution is a German translation of the presentation given at the sixth East-Asian International Symposium on Civil Law (number 22 above). The thirty-third contribution is the manuscript of a presentation that Professor Remien gave at the European Contract Law Seminar that was conducted in Hamburg and is a response to the new Japanese prescription rules from a European perspective that constitutes a valuable German evaluation. Both are reprints of papers

published in the German Journal of Japanese Law (*Zeitschrift für Japanisches Recht*). The reprint was kindly assisted by Professor Dr. Harald Baum (Max Planck Institute for Comparative and International Private Law), who is co-supervising editor of the Journal. Professor Remien's article has been published in Japan (Taro Suizu trans., see *European Private Law* III, p. 243 et seq.).

IV

We are very pleased to be able to present, once again, an overall picture of our research activities and results through the collection in this book.

The movements in Europe remain dynamic. Beside this, there are things beyond our imagination, as seen in the recent Brexit developments. Will the wisdom of those people seeking peace as embodied in the EU be tossed about by the new rise of nationalism?

Under these circumstances, the trends of the development of EU law cannot easily be predicted; however, the globalization of law is advancing, and it is not impossible to discern common elements on a global level. EU law does not seem to be based on the special circumstances of the EU's internal market, but rather appears to be produced in many ways from the global development of the digital economic system. The movements in EU law are, irrespective of whether they are followed or not, something that ought not to be overlooked when considering the path that Japanese law should take. The significance of this book may also be found in the fact that attention is paid to these aspects.

We have received support from various sides in completing this book. In particular, the Ryukoku Social Institute has, beside the carrying out of this research, provided assistance in the publishing of this book. We would like to take this opportunity to express our sincere gratitude for the high appreciation and generous material and human support of our Research Group by the Ryukoku Social Institute and its staff, and we ask for your continued support in the future.

Prof. Dr. Dr. h.c. mult. Jürgen Basedow has not only contributed to this book, but has given us the opportunity to benefit from his personal instruction at seminars in Japan and Hamburg, Germany, and, furthermore, warmly supported our activities in several ways, such as enabling the stay of the members of this Research Group in Hamburg and providing materials from time to time. Although he has retired several years ago, he continues his research activities energetically. Similar support and collaboration has been given by Prof. Dr. Dr. h.c. mult. Reinhard Zimmermann. We thank both Professors sincerely. We have also received support of our research in various ways from the staff of the Max Planck Institute for Comparative and International Private Law (Max-Planck-Institut für Ausländisches und Internationales Privatrecht), which is the place where both Professors conduct their research.

Professor Dr. Hans-Jürgen Ahrens not only gives us the opportunity for academic exchange in Germany, but occasionally provides us with recent and important information on EU law by e-mail and gives precise comments. Professor Dr. Oliver Remien has been of assistance not only through academic exchanges at seminars but also through personal exchanges. We express our gratitude here for their support.

The academic and personal exchanges with foreign researchers have been valuable experiences for us. Going forward, we would like to continue international exchange without merely considering domestic issues.

Lastly, we, the editors, would like to express our heartfelt gratitude to the members of this Research Association, to the authors of the valuable contributions, and to the attendants of the occasional academic events. We believe that without the mutual trust that supports long-term research collaborations, results like this book could not be born. It is delightful that the change of generation in the researchers driving European private law is occurring and that this new generation is emerging. We hope that our research work will become an impetus and expand this network, and that research of European private law continues and is developed further.

Mr. Hiroshi Kushizaki, president of Nihon Hyōron-sha, and Mr. Kuniaki Ono, who was in charge of the editing, spared no effort in publishing this book. Last but not least, we would like to express our heartfelt gratitude to them.

Finally, we hope that this book, like our other research results to date, will be of practical use as a window to European private law, and, further, to affirm the trends in Japanese law.

Kyoto, February 2020

The Editors

Kunihiro Nakata

Mina Wakabayashi

Yoshio Shiomi

Hisakazu Matsuoka

付記

本稿は、中田邦博・若林三奈・潮見佳男・松岡久和編『ヨーロッパ私法・消費者法の現代化と日本私法の展開』の「はしがき」を翻訳したものである。この「はしがき」は、同書の内容を紹介すると同時に、これまで私たちの研究グループが行ってきた研究の道程も明らかにしている。私たちの研究は、ヨーロッパでの展開に大きな影響を受けており、その分析は、外国の研究者との交流によっても支えられている。彼らとの交流がなければ、こうしたレベルの成果を生み出すことは難しかったであろう。そこで、感謝の意味も込めて、私たちの研究に協力してくれた外国人研究者に向けて私たちの成果の概要を発信したいと思うに至った。こうした理由から、今回、「はしがき」を英語に翻訳し、発表することにした。共訳者の鈴木クラーセン氏には大変お世話になったことを記して感謝する。

昨年、共編者の一人であり、これまで共にヨーロッパ私法の研究作業を行ってきた潮見佳男元京都大学教授が逝去された。それは、私たちに大きな喪失感と悲しみをもたらした。故人の冥福を心から祈っている。

2023年4月5日 京都にて

中田邦博