3. Law of Property and Obligations

The Act Amending of a Part of the Civil Code
Law No.147, December 1, 2004 (Effective on April 1, 2005).

Background:

This act aims at the modernisation of the wording of the Civil Code and the amendment of the provisions of guaranty. Each of these has a different background.

1. The modernisation of the Civil Code in the wording:

The section dealing with the law of property and obligation in the Civil Code was promulgated on 1896 as "Civil Code the first book, the second book and the third book." Their provisions are in old-fashioned literary style using the *katakana* syllabary. The Japanese language itself has seen many changes since the enforcement of the Code. Therefore, the wording of the code has been difficult for the citizens to read and understand. The Civil Code is however the general and fundamental law of civil society, and has an essential importance for civic life. The section concerning the family law was changed to the colloquial style using the *hiragana* syllabary at the great amendment after World War II, and thereafter specific acts. The Penal Code, which is as old as the Civil Cde, was changed to a modern wording style in 1995. So demand arose to modernise also the wording of the section concerning the law of property and obligation to make it more understandable to ordinary people.

The work for the modernisation started in 1993 with the Ministry of Justice's establishment of a society for the study of the modernisation of the woding of the Civil Code, whose leader was *Eiich Hoshino* (Professor Emeritus of the University of Tokyo). The society offered a draft to the chief of the civil affairs bureau in June 1996. The Ministry thereafter left it without making the draft public, and did not continue any concrete activity of the amendment. But, being stimulated by "The Three-Year Program for Promoting Regulatory Reform (Revised)," which was decided by the Cabinet as part of deregulation, the Ministry decided to modernize the wording of the Civil Code together with the amendment of the provisions of guaranty. In August 2004, the Ministry officially

announced a new draft which was based on the draft of the society, and took the Public-Comment step until September. Revised on the basis of opinions that were presented during the Public-Comment period, the draft was submitted to the 161st extraordinary session of the Diet, and was passed.

2. The amendment of the provisions of guaranty:

Those who became a guarantor formerly used to enter into a guaranty on the basis of friendship on the request of a principal, and to do so without understanding the contents of the guaranty contract, and so were not aware of the gravity of the liability until the pursuit of the liability. Further, in financing small and medium-sized enterprises, the manager personally guaranteed his company's debt, and this prevented him reconstructing the business. And at that time he often concluded a *ne-hosho*, which is a guaranty that covers a fixed, but unspecified debt, without the limit and/or term of guaranty. Accordingly many cases occurred were the guarantor was pursued with a graver liability than he expected.

Main Provisions:

1. The modernisation of the wording of the Civil Code:

In the first place, the expression of Civil Code in a literary style using the *katakana* syllabary was changed into a colloquial style using the *hiragana* syllabary. And difficult or old-fashioned terms or letters were updated.

Some articles have been adjusted minimally according to the well-established case law and commonly accepted theory. Here we shall look at several of these.

(1) The requirement of a commencement of possession by transaction is added to the provision of a *bona fide* purchase (the *Taishin-in* [the Supreme Court in prewar Japan], May 18, 1932, 11 MINSHU 1963).

(2) A payment to *jyun-senyusha* (quasi-possessor) of debt is treated as an effective payment, even when he is not a genuine creditor (Art. 478). If the one who paid is culpable, the exemption is not approved (the Supreme Court, August 21, 1962, 16 (9) MINSHU 1809).

(3) "Infringement of interest protected by the law" is added as a requisite of damages on tort (Art. 709). This amendment follow the rule of the *Taishin-in*, on November 28, 1925, 4 MINSHU 670 (*Daigaku-no-yu* case).

Provisions that have lost their effectiveness were deleted. For instance, there is Article 35 concerning commercial corporations, which duplicates with the Commercial Code Article 52, Paragraph 2.

A catchword and a clause number are added to each article. The draft that was submitted to the Public-Comment procedure had a definition of unintelligible concepts, but in the Public-Comment it was criticized that it was difficult to give the definition without objects. So except in a few case the part of definition has been excluded.

This amendment arranges the appearance that all five books of the Civil Code are one act. It was disputed between *Toshio Hironaka* (Professor Emeritus of the Tohoku University) and the Ministry of Justice, whether the former three books and the latter two of the Civil Code are different acts or one act, this amendment could be estimated that it integrates the two acts in order to solve this dispute legislatively.

2. The amendment of the provisions of guaranty:

This amendment makes a document necessary in a conclusion of guaranty. A contract which is concluded without a document is null and void (Art. 446 [2]).

Formerly the civil code had provisions about *ne-hosho*. This amendment put a body of provisions about *ne-hosho* into the Civil Code. What the Civil Code regulates is a *ne-hosyo* contract that covers a principal which includes monetary debt, whose guarantor is individual.

The contract does not take effect if a limit to the guaranty is not fixed (Art. 465-2 [2]). This provision aims to ensure the possibility of forecast by a guarantor by marking the limits of a guarantor's liability in a monetary respect.

A settlement of the capital of *ne-hosho* plays the role of ensuring a possibility of forecast by a guarantor in the respect of passage of time. If the date of settlement of the capital is fixed, the date can not be over five years since the day when the contract was concluded. If the party agrees to a term over five years, the law treats the term as being not agreed. In

the case of no agreement, the date of the settlement is the day that is three years after the day when the contract was concluded. The capital of *ne-hosho* becomes fixed in the following case, even before the agreed day of settlement: petition of the compulsory execution, etc., a decision of bankruptcy, death of either principal or guarantor.

Editorial Note:

1. The modernisation of the Civil Code in wording:

The modernisation of the civil code in wording has been well received in general. But some point out the following:
(1) Was the purpose of this amendment archived? Did the Civil Code become more understandable? Certainly it has become more readable in the sense that it has been changed to a modern style from an old-fashioned style unfamiliar to ordinary people. But the Civil Code originally has few provisions defining and principled, so it can not be said that the Civil Code has become more understandable, although it can be said that the Code itself has become more readable. And it is difficult to say that the style itself this time is readable for ordinary people. Some scholars point out that the participation of Japanese linguists was necessary.
(2) It has been pointed out that the legislative procedures for this amendment were opaque. Though it has a long prehistory, the period from the publication of the draft by the Ministry of Justice to taking the Public-Comment step was only a month. Considering the importance of the Civil Code in civic life, this is astonishingly short.
(3) This amendment is explained not changing the contents of the provisions. Even before its enforcement, however, it was pointed out that the amendment of Artticle 709 had the possibility that it would influence arguments on tort law. Conversely the provisions for which a legislative solution is necessary were left because of opposition between theories.

As we saw, to solve the problems fundamentally, a full-scale amendment of the Civil Code would be necessary.

2. The amendment of the provisions of guaranty:

This act makes a guaranty a form-need contract. The Japanese civil code takes excessive consensualism, and this amendment revalues the significance of a form-need contract. The provisions on *ne-hosho* are

useful to give some stability to the position of *ne-hosho* guarantor.

However, some uncertain points occur in the new provisions. In the first, a document is necessary for the formation of a guarantee, but the content of the document is uncertain. What matters in the document are necessary? And how does it relate to the coexistent undertaking of a debt similar to a guaranty, for which a document seems to be not necessary?

Further, in this amendment the restatement of usual case law is insufficient; many problems for the protection of a guarantor are left to case law still. And some insist on the need for a cancellation of guaranty from the point of view of the protection of a guarantor, but it is not provided in this amendment. In consideration of the idea that provisions from the point of view of consumer protection are unsuitable for the civil code, the coming enactment of a special law is expected; but until then the continuative formation of law by case law and theory will play an important role. It can be said that this amendment is not thorough from the point of view of the protection of a guarantor.

4. Family Law

Law Concerning Special Cases in Dealing with the Sex of an Individual with Gender Identity Disorder
Law No.111, July 16, 2003 (Effective on July 16, 2004).

Background:

Gender identity disorder (hereinafter referred to "GID") also known as "gender dysphoria" among psychiatrists, is generally defined as a condition where an individual identifies with the opposite sex from the one assigned at birth, in other words, it is a conflict between gender identity and biological sex, a cross-gender identity. Individuals with GID often feel discomfort in playing socially expected roles based on their biological sex. GID is classified as a medical disease under WHO's ICD-10, International Classification of Diseases. In Japan, it is said that the number of individuals with GID is approximately 2,200 through 7,000,