

Japan and Korea not to build a regional Community with China because to the community would weaken the U.S. presence in the East Asian region. The TPP is one of the multilateral economic partnership agreements involving East Asian countries. Brunei, Chile, New Zealand and Singapore are member states. Australia, Peru and Vietnam already began negotiations to join the Agreement. It seems fair to say that Japan and many other countries in the region are realizing the possibility of the formation of a regional community. As such, the legal landscape of the relevant countries including Japan has undergone transformation in anticipation of a regional community, in particular with respect to immigration law.

**[\*300] III. Recent Changes in Japanese Immigration Law**

Movement of persons is always a significant issue in regional integration, which also made recent changes in Japanese immigration law. Three particularly notable examples should be examined. First, Japan has changed its policy with regard to refugees from traditional unwillingness to accept them.<sup>35</sup> Japan has been passive, however, in recognizing people as refugees according to the Convention Relating to the Status of Refugees.<sup>36</sup>

As such, Japan accepted mere 301 refugees from 1982 to 2002.<sup>37</sup> Rather, Japan is accepting a substantial number of people by way of granting special permission to stay on humanitarian grounds. In 2009, Japan hosted more than 500 so-called refugees from 19 countries. 470 of them were granted special permission to stay, while only 30 from 8 countries were formally recognized as refugees. The number of people recognized as refugees is growing due to a 2005 amendment to the Japanese Immigration Control Act, which stipulates that the Ministry of Justice shall appoint about 20 refugee examination counselors who are to render an opinion when a claimant raises an objection to the denial of their refugee petition.<sup>38</sup> Another policy change, perhaps even more significant, is to accept refugees for resettlement. From 2010 to 2012, Japan plans for the first time to accommodate 90 people who have escaped from Myanmar and living in Thailand. As these displaced persons have come to attract much attention in Japan, the Japanese government seems to take further responsibilities for helping resettlement for refugees from East Asia.

Second, Japan has concluded economic partnership agreements with the Philippines and Indonesia to accept a number of workers from those countries for nurses or caregivers. Such workers will be allowed to stay in Japan for a period of three to four years. Upon passing the professional examination, which leads to the issuance of nurse or caregiver licenses for practicing in Japan, an applicant will be even eligible to apply for permanent resident status.<sup>39</sup> In accordance with the Economic Partnership [\*301] Agreement between Japan and the Philippines, 310 candidates were admitted to Japan in 2009 out of the maximum number of 500.<sup>40</sup>

A big policy change is that a nonimmigrant foreigner is generally permitted to stay and work in Japan in the following employment categories under the Immigration Control Act:

diplomats, government officials, professors, artists, religious workers, journalists, investors, business managers, legal and accounting professionals, medical service providers, researchers, instructors, engineers, specialists in the humanities/international services, intra-company transferees, entertainers, skilled laborers,<sup>41</sup> and designated activities under which the technical interns are permitted to work.<sup>42</sup>

In principle, Japan maintains a policy to accept only highly-skilled workers in one of the above categories. The Fourth Basic Program continues this policy and sketches out a plan for establishing a point-based system for highly skilled foreign workers in order to promote their immigration.<sup>43</sup> Since unlicensed foreign nurses and caregivers are classified as semi-skilled, they were not permitted to immigrate prior to the Economic Partnership Agreement between Japan and the Indonesia. These kinds of agreements are significant steps to liberalize Japan's labor market, to bring in semi-skilled workers, and to further facilitate the movement of such workers within East Asia.

Finally, Japan has reformed its Industrial Training and Technical Internship Program in order to prevent its misuse. Trainees and interns are expected to learn skills that are difficult to acquire in their home countries. On the contrary to the Japanese government's goal to crack down on employment of illegal immigrants in the latter half of the 1990's,<sup>44</sup> small or middle-sized companies turned to accept trainees and interns as [\*302] a substitute for illegal foreign labor workers. In other words, they utilized the Industrial Training and Internship Program as 'backdoor methods' of employing unskilled foreign workers.<sup>45</sup> The number of violations of relevant statutes and regulations by hosting companies increased from 92 to 452 between 2003 and 2008.<sup>46</sup> The examples of mistreating foreign workers are included as follows: (1) double contracts, including secret clauses which stipulate penalties on interns for certain acts which cause inconvenience to the employee's agent or host company; (2) lending of name; (3) lack of overtime pay; (4) negligence in training employees; (5) disguised applications or inspection reports; (6) breach of labor laws; (7) confiscation of travel documents, including passports, to limit the employee's movement; and (8) forced deposit of the employee's wages. These mistreatments were mainly due to the law requiring the employee to be tied to a particular employer. Additionally, the inherently temporary nature of internships makes it difficult for an intern to enforce his or her legal rights after returning home. As noted above, the Industrial Training and Internship Program was severely criticized for these abuses; some even accused of being a tool for human trafficking.<sup>47</sup>

The revised Immigration Control Act seeks to prevent the abuse by requiring intra-industrial associations, which is empowered to supervise host companies, to submit regular reports to the Ministry of Justice. Before the amendment, trainees were not covered by labor laws because they were not deemed 'employees.'<sup>48</sup> Since the new law has taken effect, interns should be recognized as employees from the beginning of the [\*303] practical training, called on the job training, and all labor laws, including the Labor Standard Law and the Minimum Wage Act, shall apply to interns. In other words, the Labor Standard Inspection Office will have all the powers necessary to investigate and sanction violations of the laws, although the problem of enforcement remains an issue due to a shortage of workers at the Immigration and Labor Standard Inspection Department.<sup>49</sup> Other measures for protecting interns are as follows:

- (1) providing lectures to interns about their legal rights;
- (2) inspection of contracts between the intern and agency and denying entry when the contract contains illegal clauses (e.g., penalty clauses);
- (3) monthly inspections of the host companies by the supervising association;
- (4) supervision by the supervising associations of the accepting companies once in three months;
- (5) providing advisors to interns; and
- (6) establishing and increasing penalties to host companies and supervising associations for violating the new regulations, e.g., suspending the ability to sponsor new interns for five years.<sup>50</sup>

Due to the escalation of aging population, the number of work force of Japan is decreasing fast. This process would be accelerated as a result of the declining birth rate. In 2006, there were 66,570,000 workers, and total labor population is estimated to go down to 61,800,000 by 2030.<sup>51</sup> On a way to solve this problem, there is a continuing controversy over immigration policies. Liberal Democratic Party recently suggested that the Industrial Training and Internship Program be abolished, as Korea had done. Instead, a 'guest worker' system, under which non-skilled foreign workers would be allowed to stay for three years, should be introduced.<sup>52</sup> The proponents for the 'guest worker' program are anxious that the social costs necessary for protecting and integrating migrant workers, especially for family reunification, would be too high.<sup>53</sup> In addition, they are concerned about the wage decline for Japanese workers.<sup>54</sup> The [\*304] Japanese Chamber of Commerce and Industry has not only proposed replacing the Industrial Training and Internship Program with a guest worker system, but also, in the long run, is considering a managed migration system under which Japan would be able to accept qualified non-skilled workers as permanent residents.<sup>55</sup> The proponents for opening Japan's borders point out the need to reform the Japanese industrial structure. However, increasing the number of unskilled foreign workers may help to preserve less productive sectors, i.e. labor-intensive and less competitive industries, while impeding the development of the industrial structure.<sup>56</sup>

Ultimately, human rights pressure and demographic realities will probably prevent Japan from taking this course.<sup>57</sup> It may be that Japan has little choice but to admit more permanent residents.<sup>58</sup> The Fourth Basic Plan does not set concrete measures and postpones the decision by saying that "discussion should be promoted regarding whether Japan should accept non-skilled migrant workers or not."<sup>59</sup>

As long as the Japanese government cannot decide the best course of action, the Industrial Training and Internship Program seems to be the only means to meet needs of both the Japanese economy and the developing countries in East Asia which have a strong push factor for migration, redundant workers in rural part of the countries. The redundant workers seek their jobs not only in the cities of their own countries, but also in neighboring countries which are prosperous and have availability.<sup>60</sup> The demand for cheap, flexible workers who are willing to do even so-called 'Three-D' (Dirty, Degrading and Dangerous) jobs is a crucial pull factor in Japan since most Japanese are reluctant to engage in such.

The Industrial Training and Internship Program would establish a transnational labor market in East Asia, in which member States shall mutually recognize technical qualifications such as the APEC engineer system, etc.<sup>61</sup> In fact, the NEAT Working [\*305] Group on an East Asian Cooperative Framework for Migrant Labor recommended that national laws of host countries be harmonized to ensure consistency throughout East Asia.<sup>62</sup> At the end of the first year, interns are obligated to take a certificate examination of basic grade 2 of the National Trade Skill Testing and Certification System. They may continue their internship only after passing the examination.<sup>63</sup> As of July 1, 2009, examinations for 120 operations in 64 fields are identified for interns.<sup>64</sup> If these certifications are accepted by the countries sending workers, the existing Certification System may be a basis for a system of mutual recognition of certifications. In the end, a regional system of skills certification would be established.

#### IV. Conclusion

It is hard to say when the idea of the East Asian Community would be materialized.<sup>65</sup> The amendment of Japanese immigration law, however, is trying to build an integrated labor market in East Asia through the Industrial Training and Technical Internship Program. This development is indicative. The movement of people is a most significant means for fermenting regional identity and integration that might lower the country barriers. It is of course true that the free movement in the global community causes a lot of complicated social, economic and political problems. However, as the process started by the Schengen Treaty shows,<sup>66</sup> these problems can be resolved effectively as long as member states are prepared to share the respective burdens. Already, potential member states of the East Asian Community have begun opening their borders gradually by changing their relevant domestic laws. Here, the author would suggest more researches to find ways of the interaction between municipal and international law towards regional integration.

#### Legal Topics:

For related research and practice materials, see the following legal topics:  
Contracts Law > Types of Contracts > Partnership Agreements 

Copyright Law > Foreign & International Protections > Protected Rights 

International Trade Law > Trade Agreements > Intellectual Property Provisions 

#### FOOTNOTES:

<sup>¶n1</sup> Available at <http://www.moj.go.jp/ENGLISH/information/lcr-01.html> (last visited on Oct. 4, 2010).

<sup>¶n2</sup> Available at <http://www.mlit.go.jp/kankocho/en/vision/plan.html> (last visited on Oct. 4, 2010).

<sup>¶n3</sup> This is the cabinet decision made on December 30, 2009, available at [http://www.kantei.go.jp/foreign/topics/2009/1230strategy\\_image\\_e.pdf](http://www.kantei.go.jp/foreign/topics/2009/1230strategy_image_e.pdf) (last visited on Oct. 4, 2010).

<sup>¶n4</sup> *Supra* note 2, at 5.

<sup>¶n5</sup> IMMIGRATION BUREAU, MINISTRY OF JUSTICE OF JAPAN, 2009 IMMIGRATION CONTROL 2 (2009).

<sup>¶n6</sup> Monbukagakusyo et al., *Ryugakusei 30 Man-Nin Keikaku, Kosshi* (July 29, 2008), <http://www.kantei.go.jp/jp/tyoukanpress/rireki/2008/07/29kossi.pdf> (last visited on Oct. 4, 2010; available only in Japanese). The 2009 reform of the Immigration Control Act created a resident status of 'student' consisted of the former 'college student' and 'pre-college student.'

<sup>¶n7</sup> *Supra* note 5, at 24.

<sup>¶n8</sup> G.A. Res. 55/25, annex II, U.N.GAOR 55th Sess., Supp. No. 49, at 60, U.N. Doc. A45/49 (vol. I) (2001), available at [http://www.unodc.org/pdf/crime/a\\_res\\_55/res5525e.pdf](http://www.unodc.org/pdf/crime/a_res_55/res5525e.pdf) (last visited on Oct. 1, 2010). Japan has not ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Dec. 18, 1990.

<sup>¶n9</sup> Other revisions concerning the prevention of trafficking in persons can be found in Article 5, paragraph 1, item 7-2 concerning the prevention of the trafficking in persons and Article 50, paragraph 1, item 3 concerning the special permission to stay for victims of trafficking in persons. Japan also revised its Penal Code, Law for Punishment of Organized Crimes, Control of Crime Proceeds and Other Matters. The National Police University started to give lectures on trafficking in persons. These measures were taken in accordance with Japan's Action Plan of Measures to Combat Trafficking in Persons, released on December 7, 2004, available at [http://www.mofa.go.jp/policy/\\_crime/people/action.pdf](http://www.mofa.go.jp/policy/_crime/people/action.pdf) (last visited on Oct. 5, 2010). It is pointed out that 'significant improvements' in the prosecution of trafficking offenders can be observed. See U.S. Department of States, *2007 Country Reports on Human Rights Practices*, available at <http://www.state.gov/g/drl/rls/hrrpt/2007/100522.htm> (last visited on Oct. 5, 2010). For details on human trafficking in Japan, see Yasuzo Kitamura, *Evolution of Antitrafficking in Persons Law and Practice in Japan: A Historical Perspective*, 14 TUL. J. INT'L & COMP. L. 331 (2006).

<sup>¶n10</sup> Article 226-2, paragraph 5 of the Penal Code stipulated: "[a] person who sells or buys another for the purpose of transporting him/her from one country to another country shall be punished by imprisonment with work for not less than 2 years," available at [http://www.cas.go.jp/jp/seisaku/hourei/data/PC\\_2.pdf](http://www.cas.go.jp/jp/seisaku/hourei/data/PC_2.pdf) (last visited on Oct. 4, 2010).

<sup>¶n11</sup> *Id.*

<sup>¶n12</sup> Yoshiaki Sato, *The Industrial Training Program and the Technical Internship Program of Japan: A Means for Transferring Technology or a Disguised Guest Worker Program?*, 68-69 SEIKI HOGAKU 21, 28-36 (2008).

<sup>¶n13</sup> See e.g. JAPAN INTERNATIONAL TRAINING COOPERATION ORGANIZATION, INDUSTRIAL TRAINING AND TECHNICAL INTERNSHIP PROGRAM IMPLEMENTATION REPORT: JITCO WHITE PAPER FY 88, 128 (2009).

<sup>¶n14</sup> In 2008, 214,230 foreigners were eligible to work in Japan as highly skilled workers with permission of specified occupations, except diplomats and government officials. See *supra* note 5, at 24. If long-term residents, such as 'Nikkei-jin,' and permanent residents, such as spouses of Japanese nationals and former nationals were included, the figure would be 562,818 workers in 95,294 places of employment. See Masahiko Yamada, *The Current Issues on Foreign Workers in Japan*, 7-3 JAPAN LABOR REV. 5, 9 (2010).

<sup>¶n15</sup> *Supra* note 14, at 97 (this number stands for the number of accepting companies supported by the Japan International Training Cooperation Organization, "JITCO").

¶n16 *Id.* at 85, 114.

¶n17 Hiroaki Watanabe, *Concerning revisions in the Foreign Trainee and Technical Intern System*, 7-3 JAPAN LABOR REV. 43, 48 (2010).

¶n18 See *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee: Japan*, U.N. Doc. CCPR/C/JPN/CO/5, 7-8 (2008) (pointing out that these workers "are often exploited in unskilled labour without paid leave, receive training allowances below the legal minimum wage, are forced to work overtime without compensation and are often deprived of their passports by their employers.")

¶n19 *Id.*

¶n20 U.S. Department of State, *Trafficking in Persons Report 2010*, 189-90 (noting that "the government did not exhibit efforts to adequately monitor and regulate its foreign trainee program, and has never criminally investigated, prosecuted, or convicted offenders of labor trafficking in the program"). In the Human Rights Reports of 2002, the U.S. Department of State considered the Industrial Training and Technical Internship Program as an 'exploitative practice.' See U.S. Department of State, *2002 Human Rights Report: Japan*, available at <http://www.state.gov/g/drl/rls/hrmpt/2002/18246.htm> (last visited on Oct. 5, 2010). See also *infra* note 50.

¶n21 In 1990, Prime Minister Mahathir suggested this idea for the first time. See *Yong Deng, Headless Dragons: The Problem of Leadership in APEC*, 22 FLETCHER F. WORLD AFF. 65, 72 (1998).

¶n22 The summit was a top-level meeting of ten member states of the ASEAN, including: Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar (Burma), the Philippines, Singapore, Thailand, Vietnam, plus China, Japan and Korea,

¶n23 While a track-one process is a means for traditional international law-making, a track-two process might be evaluated as a way of cosmopolitan law-making. See Yoshiaki Sato, *Towards the Institutionalization of Cosmopolitan Lawmaking*, 46 ALBERTA L. REV. 1141, 1150-51 (2009).

¶n24 THE EAST ASIAN VISION GROUP ("EAVG"), REPORT: TOWARDS EAST ASIAN COMMUNITY (2001).

¶n25 *Final Report of the East Asian Study Group*, Nov. 4, 2002, available at <http://www.mofa.go.jp/region/asiapaci/asean/pm0211/report.pdf> (last visited on Oct. 1, 2010).

¶n26 *Supra* note 26, at 33-34. (recommending that the "comprehensive human resources development program" should focus on the improvement of ... skills training and capacity-building, including the establishment of a regional labor market information system).

¶n27 Besides NEAT, Korea took initiative to dispatch the East Asian Forum ("EAF"). While NEAT aims at promoting research, the EAF assembles representatives of various social sectors to have policy dialogues. A representative of ASEAN as a juridical person, usually the Deputy Secretary-General, also participates in the EAF.

¶n28 Another East Asian country which is known for sending a lot of migrants is the Philippines. The inward remittance to the Philippines was \$ 15,250,000,000 in 2006, which corresponds to 13% of the GDP. See *The World Bank, Migration and Remittances Factbook 2008: Philippines*, available at <http://siteresources.worldbank.org/INTPROSPECTS/Resources/334934-1199807908806/Philippines.pdf> (last visited on Oct. 5, 2010).

¶n29 Network of East Asia Think Tanks, *Regional Cooperation Framework for Migrant Labour*, (Aug. 22, 2007), available at [http://www.ceac.jp/e/pdf/neat\\_05wg05.pdf](http://www.ceac.jp/e/pdf/neat_05wg05.pdf) (last visited on Oct. 5, 2010). It is noted that much of the recommendations in the report were drawn from the

ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers, adopted on Jan. 13, 2007, available at <http://www.aseansec.org/19264.htm> (last visited on Oct. 5, 2010).

¶n30 TAMIO NAKAMURA (ED.), EAST ASIAN REGIONALISM FROM A LEGAL PERSPECTIVE 256 (2009). The author was one of the four drafters mainly working out the chapters on institutional structures.

¶n31 *Id.* at 263.

¶n32 ASEAN plus Three Summit, *Second Joint Statement on East Asia Cooperation Building on the Foundations of ASEAN Plus Three Cooperation*, Nov. 20, 2007, available at <http://www.aseansec.org/21099.htm> (last visited on Sept. 28, 2010).

¶n33 See *Chairman's Statement of the 4th East Asian Summit*, Oct. 25, 2009, para. 19. In November 2009, Cambodia, Japan, Laos, Myanmar, Thailand and Vietnam launched the Japan-Mekong Summit. The participating countries declared that they would contribute to the establishment of the East Asian Community, as a long-term vision. See Tokyo Declaration of the First Meeting between the Heads of the Governments of Japan and the Mekong Region Countries, Nov. 7, 2009, available at <http://www.mofa.go.jp/region/asia-paci/mekong/summit0911/declaration.html> (last visited on Oct. 5, 2010).

¶n34 Juliana W. Chen, *Achieving Supreme Excellence: How China Is Using Agreements with ASEAN to Overcome Obstacles to Its Leadership in Asian Regional Integration*, 7 CHI. J. INT'L L. 655, 656 (2007). In 2009, the Liberal Democratic Party, which was in power for about half a century in Japan, abruptly stepped down and the Democratic Party took control of the government. The new Prime Minister Hatoyama declared that he would promote a policy of establishment of the East Asian Community. However, Prime Minister Hatoyama resigned in June 2010, and his 'initiative' vanished. The disorders and lack of political leadership in Japan might be one of the reasons for China to emasculate the EAS.

¶n35 Japan has funded the International Organization for Migration ("IOM") Voluntary Return and Reintegration Assistance Program which has been available since 2005. See U.N. Doc. A/Res/45/158 (Dec. 8, 1990).

¶n36 Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150.

¶n37 It is noted that, from 1978 to 2005, Japan received 11,319 people from Cambodia, Laos and Vietnam by special permission.

¶n38 Some points remain to be improved. For example, the panel has to rely on data that was collected by refugee inquirers in the first screening process. Otherwise each counselor needs to make a judgment based on his knowledge. See Hiroshi Honma, *Japan's Refugee Policy: From Post-World War II to Present Day*, 18 WOMEN'S ASIA 21: VOICE FROM JAPAN 22, 24-25 (2007).

¶n39 Although the Ministry of Justice retains discretion to deny the issuance of the permission, in normal case, the applicant would be granted permission. The Fourth Basic Program of Immigration Control, published in March of 2010, suggests the need to abolish the restriction for how long a nurse may stay. See Homusyo, *Dai Yoji Syutsunyukoku Kanri Kihon Keikaku* [The Fourth Basic Program of Immigration Control], Mar. 2010, at 18-19. The preceding Basic Plans were published in 1992, 2000 and 2005. The Fourth Basic Program is expected to be valid for five years. See *id.* at 2.

¶n40 According to the Economic Partnership Agreement between Japan and the Philippines, Japan would liberalize intra-corporate transferees and short-term business visitors. Besides the EPAs, the Japan-China Junior Training Association commences to accept 200 Chinese nurses per year for training to get licensed in Japan. This project utilizes the framework of the Industrial Training and Technical Internship Program. See Japan-China Junior Training Association, Heisei 22 Nendo Jigyo-Keikaku, available at <http://www.jpn-chn.or.jp/keikaku.html> (last visited on Oct. 5, 2010).

¶n41 For example, Thai cooks and artisans processing gems or fur are permitted to work under this category.

¶n42 See Ministry of Justice Ordinance No. 16 (May 24, 1990) (as amended in 2010), available at <http://www.cas.go.jp/jp/seisaku/hourei/data/mopcp.pdf> (last visited on Oct. 5, 2010).

¶n43 *Supra* note 39, at 17-18. Highly-skilled migrants had increased gradually from 2002 to 2007, but decreased in 2008.

¶n44 Undocumented migration is a criminal act in Japan. See Immigration Control and Refugee Recognition Act, art. 70. In 1993, it is estimated that 298,646 illegal foreigners were living in Japan. See *supra* note 5, at 37. The government has instituted tighter entertainer visa issuance for protecting migrant women from being forced to work in the sex industry. The government published the Action Plan for Achieving a Crime-Resistant Society in December 2003. See Ministerial Meeting Concerning Measures against Crime, *Action Plan for Achieving a Crime-Resistant Society*, available at [http://www.npa.go.jp/english/seisaku8/action\\_plan.pdf](http://www.npa.go.jp/english/seisaku8/action_plan.pdf) (last visited on Oct. 5, 2010). The law proceeded to strengthen the control of immigration. As a result, the number of illegal foreign workers decreased to about 113,072 in 2008, almost one third of that of 15 years ago. See *supra* note 5, at 37. As of January 1, 2009, 2,561 extralegals had overstayed and become "illegal" immigrants. See *supra* note 5, at 38. In addition, 1,627 interns have absconded from their host companies. See *supra* note 14, at 130.

¶n45 The Program is said to be one of the 'backdoor methods' in order to alleviate shortages of home helpers. See Kazutoshi Koshiro, *Does Japan Need Immigrants?*, in TEMPORARY WORKERS OR FUTURE CITIZENS? 151, 159 (MYRON WEINER & TADASHI HANAMI EDS., 1998).

¶n46 Nyukoku-Kanrikyoku, *Heisei 21 Nen No 'Fusel-Kou' Ninte Ni Tsuite* (available only in Japanese), March, 2010, available at <http://www.moj.go.jp/content/000033384.pdf> (last visited on Oct. 5, 2010). On January 29, 2010, the Kumamoto District Court delivered a judgment, which required the accepting association and the host company to pay 17,250,000 yen to four interns. See ASAHI SIMBUN 38 (Jan. 30, 2010) (available only in Japanese).

¶n47 U.S. Department of State, *2008 Human Rights Report: Japan* (pointing out that human trafficking in Japan remained a 'significant problem') available at <http://www.state.gov/g/drl/rls/hrmpt/2008/eap/119041.htm> (last visited on Oct. 5, 2010). See also Akira Hatate, *The Distortion of the Foreign Trainee Program*, 20 WOMEN'S ASIA 21: VOICES FROM JAPAN 11 (2008) (asserting that "[i]t is no longer an exaggeration to say that the program has failed.").

¶n48 A trainee could be recognized as a worker only when the trainee could succeed in proving that he or she had been working under the command of the host company. It is quite difficult to discharge the burden of proof.

¶n49 The Immigration Office had only 3,413 inspectors as of 2008. See Houshio, *Houmu-Nenkan Heisei 20 Nen 282* (2009). For details on the problem of enforcement, see Sumi Shin, *Global Migration: The Impact of 'Newcomers' on Japanese Immigration and Labor Systems*, 19 BERKELEY J. INT'L L. 265, 283-88 (2001).

¶n50 Houshio Nyukoku-Kanrikyoku, *Ginou Jisyusei No Nyukoku . Zairyu-Kanri Ni Kansuru Shishin* [Guideline on the Control of Entry and Stay of the Technical Interns], Dec. 2009, at 31-32, 37.

¶n51 NATIONAL INSTITUTE OF POPULATION AND SOCIAL SECURITY RESEARCH, POPULATION STATISTICS OF JAPAN 101 (2008).

¶n52 See *Jiyu-Minsyu-To Kokka-Senryaku Honbu Gaiokujin Roudousya Mondai PT, "Gaiokujin-Roudousya Tanki-Syurou-Seido" No Sousetsu No Teigen* [A Proposal for Establishing a Legal Framework to Accept Short-Term Foreign Workers], July 22, 2008, at 5-15.

¶n53 Jiro Nakamura, *Impacts of International Migration on the Labor Market in Japan*, 7-3 JAPAN LABOR REV. 68, 74 (2010).

¶n54 *Id.* (pointing out that, when 'Nikkei-jin,' foreign workers of Japanese ancestry, entered into a labor market, the wages of the Japanese male high school graduates working at the same place tend to decrease).

¶n55 Nihon Syoko-Kaigisyo, *Gaiokujin Roudousya No Ukeire No Arikata Ni Kansuru Yobo* [A Request Concerning the Reception of the Foreign Labor], June 19, 2008, at 2.

¶n56 *Supra* note 56, at 84.

¶n57 DEMETRIOS G. PAPADEMETRIOU & KIMBERLY A. HAMILTON, REINVENTING JAPAN: IMMIGRATION'S ROLE IN SHAPING JAPAN'S FUTURE 63 (2000).

¶n58 Camel A. Morgan, *Demographic Crisis in Japan: Why Japan Might Open Its Doors to Foreign Home Health-Care Aides*, 10 PAC. RIM L. & POLY J. 749, 779 (2001).

¶n59 *Supra* note 39, at 22-23.

¶n60 The applicant for the internship is required to show that he or she is expected to engage in services that require the skills obtained in Japan after returning to his or her home country. See Ordinance of the Ministry of Justice No. 16 (May 24, 1990), as amended by Ordinance of the Ministry of Justice No. 43 (June 18, 2008).

¶n61 APEC ENGINEER COORDINATING COMMITTEE, THE APEC ENGINEER MANUAL, July 2009. Japan has already recognized certain qualifications on information processing technology certified by East Asian countries. See Public Notice of the Ministry of Justice No. 579 of 2001, as amended by Public Notice of the Ministry of Justice No. 30 (Jan. 25, 2008). The Fourth Basic Plan suggested that Japan should promote the mutual recognition of the qualifications of engineers in not only the information processing technologies, but also other areas. See *supra* note 39, at 18.

¶n62 Network of East Asia Think Tanks, *supra* note 30, at 3.

¶n63 National Trade Skills Test system is based on the Human Resources Development Promotion Act. Most of the tests are classified into four grades, i.e. special, 1, 2, and 3, and others have a single grade. Basic Grade 1 and Basic Grade 2 are prepared specifically for foreign interns. See generally *Japan Vocational Ability Development Association, Vocational Ability Evaluation System and Development and Implementation of Tests: National Trade Skill Testing & Certification*, available at [http://www.javada.or.jp/english/pdf/e2\\_1.pdf](http://www.javada.or.jp/english/pdf/e2_1.pdf) (last visited on Oct. 5, 2010).

¶n64 *Supra* note 14, at 25-29.

¶n65 As an example of the pessimistic view, see Tom Ginsburg, *Eastphalia as the Perfection of Westphalia*, 17 IND. J. GLOBAL LEG. STUD. 27, 37-38 (2010) (arguing that such a dynamic as promoted the grand bargain between France and Germany to launch the community-building in Europe is, at present, unthinkable between China and Japan).

¶n66 Schengen Agreement 1990, 30 I.L.M. 68(1991).

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**Entertaining the idea of surrogate moms**

BY PHILIP BRASOR

ARTICLE HISTORY | FEB 1, 2004

Last week, the health ministry decided not to recommend revisions to current guidelines regarding fertility treatments. This disappointed the ruling Liberal Democratic Party, which has been advocating the legalization of such controversial procedures as the use of surrogate mothers because they say they don't believe the government can restrict people's "right" to reproduce.

Coincidentally, Fuji TV aired a two-hour documentary on its Feb. 23 "Friday Entertainment" program about the saga of Aki Mukai, who last November became the mother of twin boys thanks to a surrogate mother in the United States.

More than 100 Japanese couples have so far used surrogate mothers in the States, though almost none have come forward publicly. Mukai would have found it difficult to hide what happened because she is a TV personality. In fact, she has encouraged coverage, with press conferences, a Web diary and three books chronicling her three-year ordeal. And as the Fuji program showed, Mukai has allowed cameras into her home and hospital rooms over the past two years to record the most intimate details of her quest to become a mother.

"Dramatic" is the only word to describe this quest. The program, after all, is called "Friday Entertainment," and while it explained the procedure the show's priorities emphasized heartbreak, suspense and joy.

In 2000, Mukai learned that she was pregnant, but followup tests revealed she also had cancer of the uterus. At first, the doctors removed only part of her uterus, but soon discovered that the cancer had spread.

Mukai asked that the operation to remove the rest of her uterus be postponed until after the baby was born. The doctors said that would be risky and Mukai indicated she was willing to take that risk, but was talked out of it by her husband, the professional wrestler Nobuhiko Takada.

She lost her uterus and the baby, but kept her ovaries. Followup radiation treatment would have made her sterile, but she underwent a 10-hour operation to push her ovaries up into her chest cavity, where they could avoid radiation.

The program was clear about the difficulties of using surrogate mothers. Mukai and Takada had to fly back-and-forth between Tokyo and Reno, Nev., where Mukai went through the painful process of having her ova removed. In one long scene, she is shown downing liters of laxative because her system must be cleaned out prior to the procedure.

She suffers many disappointments: conception fails twice, then succeeds but the fertilized eggs don't take in the uterus of the surrogate mother, an American woman named Sandra Johnson. Meanwhile, Mukai continues to receive cancer treatments that weaken her system.

Last May, Mukai finally announced that a 31-year-old mother of four named Cindy Van Reed would give birth to twins for her and Takada. The babies were delivered by cesarean section in November with the Japanese parents in attendance.

Mukai has been careful to characterize her relations with Johnson and Van Reed as "partnerships," and the program played up how close she was to the two women. However, because of the program's dramatic priorities it glossed over issues that a real documentary would have addressed. In a recent interview with the women's weekly Josei Seven, Van Reed revealed that only women who had given birth to at least two children are considered as surrogates, since such women are judged less likely to want to keep the child they are carrying for someone else.

She also said that when she learned she was carrying twins, she became worried and asked the doctor if he could abort one of the fetuses. The doctor and Mukai, who said she already felt guilty about "aborting" a child (the fetus that was removed when she had her cancer operation), convinced her not to.

"Friday Entertainment" stressed that the \$20,000 Van Reed received was for "expenses" and that all surrogate mothers are essentially "volunteers." The Josei Seven article provided background that placed the money in perspective. Van Reed is a housewife with four kids (the oldest is her auto-mechanic husband's child from a previous marriage), and the money was used to pay off the loan on their \$55,000 house.

Last week's issue of another women's weekly, Shukan Josei, carried an article that surveyed some prominent media people about Mukai. Though everyone admires her determination, some tend to question her willingness to lay her life open. Women's magazines tend to be catty with female celebrities, and Josei implies that Mukai wants too much by demanding satisfaction with her career, her husband, and now her babies.

It's an unfair implication, but one that Mukai inadvertently encourages. One tabloid said she is "commercializing" her ordeal, and considering that her latest book about it was published two days before the TV show, it's obvious that her PR machine is very well-coordinated.

Mukai brushes aside the criticism and says her purpose is to make people understand the use of surrogate mothers, but she never really discusses anything beyond her own wants. Her new book is titled "Aitakatta (I Wanted to See You)," which is addressed to her babies. Apparently, Mukai expects them someday to read it and understand just what she went through to bring them into the world. That's a pretty heavy burden to lay on anyone.

# Japanese couple not allowed to register twins born to US-based surrogate mother as their own

23.03.2007 09:09

Japan's Supreme Court on Friday rejected a lower bench's ruling that would have allowed a Japanese couple to register their twin sons - born in the United States to an American surrogate mother - as their own.

The nation's top court struck down a September 2006 Tokyo High Court decision ordering a local government to accept Aki Mukai, a television personality, and her husband Nobuhiko Takada's registration of their two boys, according to a copy of the ruling posted on the Supreme Court's Web page.

The Supreme Court cited in its decision a Japanese law that presumes the woman who gives birth to a child is its mother.

Surrogate births involve removing an egg for fertilization and implanting it in another woman who carries the baby to birth. Mukai can no longer have children of her own after undergoing a hysterectomy because of cancer.

Friday's ruling upheld a November 2005 Tokyo Family Court verdict that found in favor of the local government's decision to reject their registration request. Local authorities had refused to register the twins because the Justice Ministry said Mukai could not be recognized as the boys' mother.

In a message on her internet home page, Mukai said she had "expected the Supreme Court to hand down a conservative ruling," but added she wanted to reserve further comment until she had a chance to study it more closely.

Prime Minister Shinzo Abe said the case highlighted the need for discussion and debate.

"How we should think about the parent-child relationship is a fundamental problem for us as human beings," Abe told reporters Friday evening, reports AP.

Determining the citizenship of children born to foreign surrogate mothers has long been an issue in Japan, although Japanese parents have the right to legally adopt the children then apply for their citizenship through immigration authorities.

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Date of the decision 2007.03.23

Case number 2006 (Kyo) No. 47

Reporter Minshu Vol. 61, No. 2

Title Decision concerning a judicial decision rendered by a foreign court acknowledging the establishment of a natural parent-child relationship between persons who are not eligible for such relationship under the Civil Code, and public policy as prescribed in Article 118, item 3 of the Code of Civil Procedure

Case name Case of appeal with permission against the decision of the court of second instance to change the determination to dismiss the appeal against the deposition made by the municipal mayor

Result Decision of the Second Petty Bench, quashed and decided by the Supreme Court

Court of the Second Instance Tokyo High Court, Decision of September 29, 2006

Summary of the decision

1. A judicial decision rendered by a foreign court acknowledging the establishment of a natural parent-child relationship between persons who are not eligible for such relationship under the Civil Code is contrary to public policy as prescribed in Article 118, item 3 of the Code of Civil Procedure and therefore not effective in Japan.

2. In the case where a woman has conceived and delivered a child by way of assisted reproduction technology using another woman's egg, the mother of the child is the woman who has conceived and delivered the child, and a mother-child relationship cannot be established between the child and the woman who has not conceived and delivered the child, even where the child is born using the egg donated by that woman.  
(There are concurring opinions concerning 2).

References

(Concerning 1) Article 118, item 3 of the Code of Civil Procedure, Part IV, Chapter 3, Section 1 of the Civil Code (Natural Children); (Concerning 2) Article 772, para.1 of the Civil Code

Article 118, item 3 of the Code of Civil Procedure (Effect of Final and Binding Judgment by Foreign Court)  
A final and binding judgment rendered by a foreign court shall be effective only if it satisfies all of the following requirements:  
(iii) The contents of the judgment and the court proceedings in which it has been rendered are not contrary to public policy in Japan.

Article 772, para.1 of the Civil Code (Presumption of Child in Wedlock)  
A child conceived by a wife during marriage shall be presumed to be a child of her husband.

Main text of the decision The decision of prior instance is quashed, and the appeal filed by the appellees against the decision of the first instance is dismissed.

Reasons

The appellees shall bear the cost of the appeal to this court.

Concerning the reasons for the appeal argued by the appeal counsel, TSUZUKI Masanori, et al.

1. The appellees, a Japanese married couple, submitted to the appellant birth notifications of the twins conceived and delivered by a woman, who is a citizen of the United States and lives in the State of Nevada, by way of assisted reproduction technology (ART) using Appellee X1's sperm and Appellee X2's eggs (the twins shall hereinafter be referred to as the "Children"). The birth notifications indicated the appellees as the father and mother of the Children (these notifications shall hereinafter be referred to as the "Birth Notifications"). The appellant made a disposition to refuse to accept the Birth Notifications on the grounds that the fact of delivery of the Children by Appellee X2 cannot be found, and therefore a legitimate parent-child relationship cannot be found between the appellees and the Children. Against this disposition, the appellees filed an appeal for an order to accept the Birth Notifications pursuant to Article 118 of the Family Registration Act (this appeal shall hereinafter be referred to as the "Appeal").

2. According to the records, the history of this case is as follows:

(1) Appellee X1 and Appellee X2 are a couple who married in 1994.

(2) In 2000, Appellee X2 had a hysterectomy and pelvic lymphadenectomy to treat her cervical cancer. On this occasion, Appellee X2 had the ovaries moved outside the pelvis and preserved them so as to prevent them from being damaged by the radiation therapy to be performed after the operation. She did this because she thought that it might be possible, in the future, to have a child with the appellees' genes by having another woman conceive and deliver a child by way of ART using her own egg. This arrangement is generally called surrogate birth.

In 2002, the appellees concluded a surrogacy contract with a couple who lived in the United States, and attempted to arrange a surrogate birth on two occasions at a hospital in that country, but their attempts failed on both occasions.

(3) In 2003, the appellees decided to attempt a surrogate birth arrangement with the help of A, a woman living in the State of Nevada, the United States. At C Center, on a certain day in 2003, Appellee X2's eggs taken from her ovaries were artificially inseminated with Appellee X1's sperm, and on a later day in 2003, two of the fertilized eggs obtained through this procedure were transplanted into A's uterus.

On May 6, 2003, the appellees concluded a surrogacy contract for value with A and her husband, B (hereinafter collectively referred to as "Couple A-B"). The contract provides as follows: A shall, through the procedures performed by a doctor designated by the appellees and recognized by A, take the fertilized eggs donated by the appellees in her own uterus, and if the transplantation of either of the fertilized eggs is successful, A shall carry the child until delivery; the appellees shall be the legal father and mother of the child to be born through the surrogate birth arrangement, and Couple A-B shall not have any legal rights

for the child, such as the right of custody or right of visit, nor shall they have any responsibilities for the child (this contract shall hereinafter be referred to as the "Surrogacy Contract").

(4) In November 2003, A gave birth to twins, the Children, at D Center located in the State of Nevada.

(5) Article 45 of Chapter 126 of the Nevada Revised Statutes (NRS) provides as follows: Two persons in marriage may enter into a surrogacy contract. Any such contract must contain provisions on (a) the parentage of the child; (b) custody of the child in the event of a change of circumstances; and (c) the respective responsibilities and liabilities of the contracting parties (para.1). A person identified as an intended parent in a contract that satisfies these requirements must be treated in law as a natural parent under all circumstances (para.2). It is unlawful to pay or offer to pay money or anything of value to the surrogate except for the medical and necessary living expenses related to the birth of the child as specified in the contract (para.3). The same Chapter of the NRS also provides for the court procedures for determining the parent-child relationship.

Article 161 of the same Chapter of the NRS further provides that a judgment or order determining the existence or nonexistence of the relationship of parent and child is determinative for all purposes (para.1), and that if such a judgment or order is at variance with the child's birth certificate, the judgment or order must direct that a new birth certificate be issued (para.2).

(6) In late November 2003, the appellees filed an application with the Family Division of the Second Judicial District Court, State of Nevada, Washoe County (hereinafter referred to as the "Nevada State Court"), for the determination of a parent-child relationship. The court confirmed that (i) the appellees and Couple A-B acknowledged that the matters stated in the written application for the determination of parent-child relationship were true, and that (ii) Couple A-B desired that the Children would be determined as the appellees' children, while closely examining the relevant documents including the document for the Surrogacy Contract. Subsequently, on December 1, 2003, the court issued a judicial decision (i) declaring the appellees to be the natural father and mother by blood and by law of the children who were to be delivered by A in or around January 2004 (the Children) (para.1 of the main text), (ii) ordering the hospital where the children were to be delivered as well as the relevant authorities responsible for preparing their birth certificates to prepare and issue birth certificates identifying the appellees as their father and mother (para.2), and (iii) ordering the relevant State and County registrars to accept birth certificates thus issued and retain relevant records in accordance with law (para.3)(hereinafter this judicial decision is referred to as the "Judicial Decision")

(7) The appellees started to take care of the Children immediately after their birth. The government of the State of Nevada issued birth certificates for the Children, as of December 31, 2003, identifying Appellee A1 as their father and Appellee X2 as their mother.

(8) In January 2004, the appellees came back to Japan with the Children, and on January 22, they submitted to the

appellant birth notifications of the Children, indicating Appellee X1 as their father and Appellee X2 as their mother (the Birth Notifications).

On May 28, 2004, the appellant notified the appellees of the disposition to refuse to accept the Birth Notifications on the grounds that the fact of delivery of the Children by Appellee X2 cannot be found, and therefore a legitimate parent-child relationship cannot be found between the appellees and the Children.

3. The court of the first instance dismissed the appeal against this disposition, whereas the court of second instance quashed the decision of the first instance and ordered the Birth Notifications to be accepted, on the following grounds.

(1) A final and binding judgment rendered by a foreign court prescribed in Article 118 of the Code of Civil Procedure can be construed to refer to a final judicial decision rendered by a foreign court, irrespective of the title, procedure or type of the decision, with regard to a legal relationship under private law, while guaranteeing due process for both parties (See 1994 (O) No. 1838, judgment of the Third Petty Bench of the Supreme Court of April 28, 1998, Minshu Vol. 52, No. 3, at 853). The Judicial decision rendered by the Nevada State Court, which declared that the appellees were to be legally regarded as the natural father and mother of the Children, determined a parent-child relationship, and in light of the categorization of judicial decisions in Japan, it is similar to a judgment on a suit of personal status or a determination set forth in Article 23 of the Act for Determination of Domestic Relations, and falls within the category of a final and binding judgment rendered by a foreign court.

(2) Concerning the requirement set forth in Article 118, item 3 of the Code of Civil Procedure If the effect of the Judicial Decision is to be denied under Article 118 of the Code of Civil Procedure, the governing law for deciding whether or not a legitimate parent-child relationship can be found between the appellees and the Children would be the law of Japan, which is the appellees' national law. Since the provisions of the Civil Code of Japan concerning a legal mother-child relationship can be construed to mean that a woman who has delivered a child shall be the mother of the child, the appellees cannot be legally regarded as the parents of the Children. On the other hand, with regard to a parent-child relationship between Couple A-B and the Children, the governing law shall be the Nevada Revised Statutes (NRS), which is Couple A-B's national law, and according to the NRS, the Surrogacy Contract is valid, and this means that the appellees, not Couple A-B, are to be legally regarded as the parents of the Children. As a result, trapped between the legal system of Japan and that of the United States, the Children would be forced to resign themselves to the state of having no legal parents.

The requirement set forth in Article 118, item 3 of the Code of Civil Procedure, "the contents of the judgment and the court proceedings in which it has been rendered are not contrary to public policy in Japan," means the absence of any confusion in public policy in Japan (fundamental value or order in Japan that cannot be relinquished even when taking



into account the international nature of the issue) that might arise from recognizing a judgment rendered by a foreign court as being also effective in Japan and integrating it in the rules of law of Japan. When determining whether or not this requirement is satisfied, we should, in light of the background circumstances described above, first examine the contents of the Judicial Decision individually and specifically, and then consider whether or not the recognition of the effect of the Judicial Decision substantially runs contrary to public policy in Japan. Having made such examination and consideration, we conclude that the recognition of the effect of the Judicial Decision does not substantially run contrary to public policy in Japan, on the following grounds.

(a) The Civil Code and the relevant legal systems in Japan were established in the age when ART had yet to be developed and conception occurred only naturally. As a result, the current legal system in Japan has not contemplated situations where conception or delivery of a child may be achieved also by way of artificial manipulation. However, this cannot be a reason to preclude any artificial conception or delivery of a child from the rules of law of Japan. Although it might be impossible under the Civil Code for a parent-child relationship to be determined based on a surrogacy contract, there is yet room to accept a judicial decision rendered by a foreign country determining the parentage for a child conceived or delivered by way of artificial manipulation in a foreign country, if it satisfies some rigid requirements.

(b) The Children were born using Appellee X2's eggs and Appellee X1's sperm, and therefore the appellees and the Children have relationships by blood.

(c) The Surrogacy Contract was concluded because, since Appellee X2 became incapable of conceiving a child due to receiving hysterectomy, etc. to treat her cervical cancer, the appellees had no option but to arrange a surrogate birth in order to have a child with their genes.

(d) As well, A offered to be a surrogate mother out of her spirit of volunteerism, and we cannot find any unjust aspect in her motive or intention. The Surrogacy Contract is a contract for value whereby the appellees shall pay a charge for A. However, the charge payable thereunder is the minimum payment for the labor provided by A and expenses incurred therefor (as allowed under the NRS), and it is not consideration for the Children. Nothing in the contents of the Surrogacy Contract can be prejudicial to A's dignity; the contract gives top priority to A's safety and life in all stages of the process of her conception and delivery, and guarantees A's right to abort or not to abort an embryo, denying the binding force of any contradictory promise.

(e) In this case, Couple A-B do not hope to be the parents of the Children, nor do they hope to take care of them. Further, the appellees have been taking care of the Children since immediately after their birth, and strongly desire to continue to take care of them in the future. The Children's welfare would not be harmed by identifying the appellees as their legal parents; rather, for their welfare, it would be best for them to be taken care of by the appellees.

(f) In discussions in the Committee on Assisted Reproductive Technology Treatment of the Health Science Council of the Ministry of Health, Labour and Welfare, it has

been concluded that a surrogate birth arrangement should generally be prohibited. The surrogate birth arrangement disputed in this case, however, is not contrary to the six basic principles advocated by the committee as the reasons for prohibition: (1) Priority shall be given to the welfare of the children to be born; (2) The human body shall not be treated merely as the means of reproduction; (3) Careful consideration shall be given to safety; (4) The concept of eugenics shall be eliminated; (5) Commercialism in reproduction shall be eliminated; (6) Human dignity shall be respected. Currently, there is no legal provision that expressly prohibits a surrogacy contract, and therefore we cannot go so far as to say that any reasoning sufficient for precluding a surrogate birth arrangement has been established and accepted in Japanese society to date.

(g) In the discussions at the Committee on Legislation for Parent-Child Relationship Relating to Assisted Reproductive Technology Treatment of the Legislative Council, there was no objection to the idea that where a surrogate birth arrangement was performed in a foreign country and a decision was made to identify the clients as the natural parents of the child born through such arrangement, the surrogacy contract would run contrary to public policy in Japan and therefore the effect of that decision should not be recognized in Japan. The Judicial Decision, however, did not determine the parent-child relationship only based on the Surrogacy Contract, but rather determined it by also taking into consideration the fact that the Children had a parent-child relationship with the appellees by blood as well as the circumstances where Couple A-B hoped that the Children would be determined as the appellees' children and there was no dispute among the parties concerned over the parentage for the Children. Consequently, the Judicial Decision does not run contrary to public policy in Japan.

(h) With regard to the issue in bioethics as disputed in this case, we cannot deny that it seems somewhat odd that although the appellees can never be identified as the legal parents of the Children under the Civil Code of Japan, they could be the legal parents of the Children in Japan as a result of the recognition of the effect of the judicial decision rendered by the foreign court. However, according to many lower court judgments rendered to date as well as the practices in family registration (See the Directive Min-Ni No. 280 of January 14, 1976, issued by the Director-General of the Civil Affairs Bureau of the Ministry of Justice), a foreign judgment concerning personal status does not need to satisfy the requirements under the governing law but it should be recognized as being effective if it only satisfies the requirements set forth in Article 118 of the Code of Civil Procedure. This theory is conducive to stable international rules of justice, and we cannot find any reason to go against this theory only in this case.

(3) Consequently, the Judicial Decision is effective through application or analogical application of Article 118 of the Code of Civil Procedure, and the Children are the appellee's children in wedlock. Therefore, the Birth Notifications should be accepted.

4. However, the determination of the court of second instance mentioned in (2) and (3) above cannot be affirmed, on the following grounds.

(1) In order for a judgment rendered by a foreign court to be recognized as being effective in Japan, the contents of the judgment must not be contrary to public policy in Japan. Although it is inappropriate to deny the satisfaction of this requirement only because the judgment rendered by a foreign court involves a foreign system that is not adopted in Japan, if such foreign system is found to be incompatible with the fundamental principle or fundamental philosophy of the rules of law of Japan, the foreign judgment should be deemed to be contrary to public policy as prescribed in the said Article (See 1993 (O) No. 1762, judgment of the Second Petty Bench of the Supreme Court of July 11, 1997, Minshu Vol. 51, No. 6, at 2573).

A natural parent-child relationship is the most fundamental relationship concerning a person's status. It is the foundation for various relationships in social life, and in this respect, it does not only concern matters between private persons but is also deeply involved in the public interest, and it has a material impact on child welfare. The eligibility for a natural parent-child relationship is an issue concerning the fundamental principle or fundamental philosophy that serves as the basis of the rules of law on personal status in each country. Therefore, the criteria for the eligibility for a natural parent-child relationship should be definite and clear, and the existence or nonexistence of a natural parent-child relationship should be determined uniformly according to such criteria. Consequently, it should be construed that the Civil Code, which forms the rules of law on personal statuses in Japan, will acknowledge a natural parent-child relationship only in the cases set forth therein, while denying the establishment of a natural parent-child relationship in other cases. In conclusion, a judgment rendered by a foreign court acknowledging the establishment of a natural parent-child relationship between the persons who are not eligible for such relationship under the Civil Code, is incompatible with the fundamental principle or fundamental philosophy of the rules of law in Japan, and therefore it should be deemed to be contrary to public policy as prescribed in Article 118, item 3 of the Code of Civil Procedure. This conclusion would not be affected even if there is room, as a matter of legislative policy, to acknowledge the establishment of a natural parent-child relationship in cases other than those prescribed in the Civil Code.

(2) Although there is no provision in the Civil Code of Japan that directly stipulates the establishment of a mother-child relationship between a woman and her child born in wedlock, the Civil Code has a provision that seems to presuppose that the mother of a child is the woman who has conceived and delivered the child, and that a mother-child relationship shall be established immediately by the objective fact of conception and delivery of the child (see Article 772, para.1 of the Civil Code). It is also regarded that a mother-child relationship between a woman and her child born out of wedlock shall be established immediately by the objective fact of delivery of the child (See 1960 (O) No. 1189, judgment of the Second Petty Bench of the Supreme Court of April 27, 1962, Minshu Vol. 16, No. 7, at 1247).

The existing legal system of the Civil Code concerning a natural parent-child relationship is based on a parent-child relationship by blood. The reason why the Civil Code presupposes as the basis for such a system that a legal

mother-child relationship shall be established immediately by the fact of delivery of the child may be that at the time of the enactment of the Civil Code, every woman who conceived and delivered a child had a genetic relationship with the child, and based on such a fact, the Civil Code was intended to acknowledge the establishment of a mother-child relationship between them by focusing the objective and apparent fact of delivery of the child. Another reason may be that it would be conducive to the child's welfare to definitely determine a mother-child relationship between a woman and the child delivered by her as soon as the child was born.

In light of when the Civil Code was enacted and when the aforementioned judicial precedent was rendered, it is obvious that the provisions under the Civil Code concerning the establishment of a mother-child relationship and the aforementioned judicial precedent undoubtedly presuppose that a woman should conceive and deliver a child using her own egg. However, today, artificial reproduction by ART does not only serve as a substitute for part of the process of natural reproduction but has made it possible to realize a form of conception that can never be achieved by natural reproduction. It is now possible for a woman to conceive and deliver a child by way of ART using another woman's egg. Under these circumstances, a question is posed regarding, in the case where the woman who has conceived and delivered a child and the woman who has donated her egg for the child are not the same, whether or not the existing Civil Code can be construed to also acknowledge the establishment of a mother-child relationship between the child and the woman who has conceived and delivered the child immediately by the fact of delivery of the child. In this respect, no provision of the Civil Code seems to be intended to acknowledge the maternity of the child for a woman who has not conceived or delivered the child. The absence of a provision specifying the legal relationship in such case is due to the fact that such situation was not anticipated at the time of the enactment of the Civil Code. However, considering that, as explained above, a natural parent-child relationship is deeply involved in the public interest as well as child welfare, and therefore it should be uniformly determined according to definite and clear criteria, there is no choice but to construe the existing Civil Code to require that a woman who has conceived and delivered a child shall be the mother of the child, and that a mother-child relationship cannot be deemed to be established between the child and the woman who has not conceived or delivered the child, even where the child is born using the egg donated by that woman.

It may be a publicly known fact, however, that some women, because of their strong desire to have children genetically related to them by using their eggs, ask other women to conceive and deliver children by way of ART using their own eggs, and children are actually born through such arrangements generally called surrogate birth. Since surrogate birth, which was not anticipated under the Civil Code, actually occurs and is expected to continue to occur in the future, it is necessary to start discussion about how to treat surrogate birth under the existing legal system. This issue should be considered in terms of both the legal system for medical services and the legal system for parent-child

relationship, focusing on various possible problems such as the problems in terms of medical aspects, the problems expected to occur between the parties concerned, and the problems involving the welfare of a child to be born, while also taking into consideration the sincere desire of women to have children genetically related to them as well as the sense of ethics generally accepted in society regarding a woman's decision to ask another woman to deliver her child. In this area, there is strong demand that legislative measures should be taken promptly.

(3) According to the reasons explained above, it should inevitably be deemed that the Judicial Decision is incompatible with the fundamental principle or fundamental philosophy of the rules of law on personal status in Japan, and contrary to public policy as prescribed in Article 118, item 3 of the Code of Civil Procedure, because the Judicial Decision acknowledges the establishment of a natural parent-child relationship between persons who are not eligible for such relationship under the Civil Code, which forms the rules of law on personal status in Japan. Therefore, we should deny the effect of the Judicial Decision in Japan.

Accordingly, whether or not a legitimate parent-child relationship can be found between the appellees and the Children shall be decided by using the appellee's national law, i.e. the law of Japan, as the governing law (Article 28, para.1 of the Act on General Rules on Application of Laws). Since the Civil Code of Japan cannot be construed to acknowledge a mother-child relationship between Appellee X2 and the Children, we cannot find a legitimate parent-child relationship between the appellees and the Children.

(4) The determination of the court of second instance mentioned above contains an apparent violation of laws that has affected its judgment, and the decision of prior instance should inevitably be quashed. The appellant's argument is well-grounded. In addition, since the decision of the first instance dismissing the appellees' appeal is justifiable, the appeal filed by the appellees against the decision of the first instance shall be dismissed.

Therefore, the decision has been rendered in the form of the main text by the unanimous consent of the Justices. In addition to the court opinion, there is a concurring opinion by Justice TSUNO Osamu and Justice FURUTA Yuki and a concurring opinion by Justice IMAI Isao.

The concurring opinion by Justice TSUNO Osamu and Justice FURUTA Yuki is as follows.

There is no doubt that the appellees have been taking care of the Children, who were delivered by A (surrogate mother), and devoting their affection to them.

However, when construing the Civil Code and other relevant provisions in this case, it is necessary to consider the issue of parent-child relationship, not focusing on this case only but giving consideration to all possible cases where the woman who has donated an egg (egg donor) and the woman who has conceived and delivered a child using the egg (surrogate mother) are not the same.

A mother-child relationship is one of the most fundamental relationships of persons, and it is also an essential matter that affects a child's identity. Under the existing Civil Code,

there is no special provision on a legal relationship between a child born through a surrogate birth arrangement, the surrogate mother, and the egg donor.

In countries where surrogate birth arrangements are performed, various problems have actually occurred, such as the surrogate mother feeling affection for the child she conceived and delivered and refusing to give the child to the clients, or the clients changing their mind and refusing to accept the child. When such a problem occurs, if the relationship between the surrogate mother, the egg donor, and the child is not clearly defined by law, the child's status would be insecure, and furthermore, a conflict would be caused between the parties concerned. This would be significantly prejudicial to the child's welfare.

If a surrogate birth arrangement is to be allowed in certain cases, from the perspective of the welfare of children to be born and the public interest of a parent-child relationship as well as protection of surrogate mothers, it is necessary to set clear requirements for recognizing the validity of a surrogacy contract. Furthermore, if the satisfaction of these requirements is to be the condition for acknowledging a natural parent-child relationship between a child born through a surrogate birth arrangement and the woman who requested the surrogate birth, the existence or nonexistence of a natural parent-child relationship would be decided based on the determination of the validity of the surrogacy contract, which will be made on a case-by-case basis. This would not only make a natural parent-child relationship unstable but also lead to a situation where some children are acknowledged as natural children while others are not, despite the fact that they are born through objectively the same process.

It is well understandable that there are special circumstances, as in this case, where a surrogate birth arrangement is the only way for a woman to have a child genetically related to her by using her own egg. Also, it is significantly important to ensure the welfare of a child born through such arrangement, and due consideration should be given to it. Nevertheless, under the present situation where there is no legal system for dealing with various problems that might arise from a surrogate birth arrangement, we cannot but hesitate to acknowledge the maternity of a child as the woman who has donated the egg, by changing the principle of acknowledging the maternity of a child as the woman who has conceived and delivered the child, thereby actually bringing a new life into existence.

Since the same or similar problems are expected to be raised in the future due to the progress in ART, we strongly hope that legislative measures will be taken as soon as possible to solve the issues of surrogacy and parent-child relationships involving the persons concerned, while taking into consideration the various problems suggested in the court opinion.

Viewing the circumstances in other countries, surrogate birth arrangements are allowed in some states of the United States as well as the United Kingdom, but there is difference in terms of how to handle such arrangements; in some places, the surrogate mother is provisionally identified as the mother of the child, and then the procedure to identify the clients as the parents of the child shall be taken after birth; in other places, the clients shall be identified as

the parents of the child upon birth. The requirements for the validity of a surrogacy contract also differ from place to place. On the other hand, in Germany, France, and other states of the United States, surrogacy is prohibited completely, and if a child is born through a surrogate birth arrangement, the surrogate mother shall be identified as the mother of the child. In such case, an adoption between the child and the clients is allowed in some places and is not allowed in other places. Thus, there are diverse legal systems regarding surrogacy depending on the circumstances in individual countries or regions. This fact suggests that opinions would necessarily be divided regarding surrogacy in various aspects, and for this reason, legislative measures are strongly demanded in this area.

In this case, due consideration should be given to the appellees' desire to take care of the Children as their own children, and to fulfill their desire, a legal parent-child relationship should be established between them. Given the fact that A and B manifested to a court, although it is a foreign court, the intention to agree to identify the appellees as the Children's parents because they do not desire to take care of the Children by themselves, we find enough room, even under the existing Civil Code, to establish a special adoption between the appellees and the Children.

The concurring opinion by Justice IMAI Isao is as follows. I am in agreement with the court opinion that a legitimate parent-child relationship cannot be established between the appellees and the Children. However, I would like to state my opinion regarding how to solve the issue of parent-child relationship in a situation that is not anticipated by the Civil Code, as is the situation in this case.

The issue directly questioned in this case is whether a foreign judicial decision acknowledging a natural parent-child relationship between the appellees and the Children is effective in Japan. As the court opinion indicates, however, if the contents of a foreign judgment addressing an issue concerning the fundamental principle or fundamental philosophy that serves as the basis of the rules of law on personal status in Japan, the issue of parent-child relationship, are unacceptable based on the construction of the Civil Code of Japan, such decision will not be deemed to be effective in Japan on the grounds that it is contrary to public policy as prescribed in Article 118, item 3 of the Code of Civil Procedure. Therefore, in the end, it is a question of how to construe the maternity of the child who is born through a surrogate birth arrangement within the framework of the Civil Code of Japan.

Along with the rapid progress in medicine, various new technologies are being developed and put into practice in the field of ART. Such advance in technology has made it possible for men and women, married or not, who are otherwise incapable of having their own children, to fulfill their wish. However, this has also caused various legal problems that have never been anticipated before. One of such problems is the issue of whether or not a father-child relationship can be established between a child born as a result of in vitro fertilization using a frozen egg and the man who has donated the egg (See 2004 (Ju) No. 1748, judgment of the Second Petty Bench of the Supreme Court of September 4, 2006, Minshu Vol. 60, No. 7, at 2563). The

issue of surrogacy disputed in this case is also included in these problems. Since these problems concerning the law of personal status that occur along with the advance in technology were not anticipated when the Civil Code was enacted, it is no wonder that the Civil Code does not have any provisions addressing these problems. It is not appropriate to immediately deny a legal parent-child relationship only because it is not provided for in the Civil Code. It is the duty of the court to examine the contents of the legal relationship in dispute and acknowledge the relationship if it is acceptable based on the construction of the existing Civil Code.

However, as the court opinion states, the establishment of a personal relationship, especially a natural parent-child relationship, is the foundation for various relationships in social life, and it is an issue concerning the fundamental principle or fundamental philosophy that serves as the basis of the rules of law on personal status. Therefore, we should consider it not only from the perspective of whether or not to protect the rights and interest of the parties concerned in specific cases, but also from the perspective of what would become of the rules of law on personal status in Japan if the relationship in dispute is legally acknowledged. In this case, the court of second instance determined the following facts: (i) The appellees and the Children have relationships by blood; (ii) The appellees had no option but to arrange a surrogate birth in order to have a child with their genes; (iii) The Surrogacy Contract cannot be found to contain any unjust aspect regarding the motive or intention of concluding it, nor can it be found to have any aspect that is prejudicial to the surrogate mother's dignity; (iv) The surrogate mother and her husband do not hope to accept the Children as their children whereas the appellees strongly desire to take care of the Children as their natural children. In order to ensure the welfare of the Children, it might be desirable to acknowledge a legal natural parent-child relationship between the appellees and the Children. However, the situation is not so simple. We should consider this issue by also taking into consideration any possible influence on the rules of law on personal status in Japan that would occur if a natural parent-child relationship is legally acknowledged between the parties of this case. There are diverse opinions on surrogacy, regarding whether or not it is allowable from the perspective of bioethics or medical ethics, and if it is allowable at all, what conditions should be imposed. In addition, how to coordinate legal relationships between the child born through a surrogate birth arrangement, the surrogate mother, the egg donor, and other parties concerned is also a controversial issue. If the existing Civil Code of Japan is construed in the direction toward legally acknowledging a natural parent-child relationship between the appellees and the Children in this case, it would result in ratifying a surrogate birth arrangement for which, at present, there is a controversy regarding the appropriateness of its implementation and negative views are frequently heard in medical circles, while leaving legal issues affecting the parties concerned unsolved. In my opinion, such a situation should be avoided. In order to solve this problem, it is necessary to develop a legal system for surrogacy by considering the various matters concerned from the perspective of medical services

law and parent-child relationship law. More specifically, from the perspective of medical services law, consideration should be made regarding whether or not a surrogate birth arrangement is acceptable, and if it is acceptable at all, what conditions should be imposed. From the perspective of parent-child relationship law, sufficient consideration should be made, based on the results of the consideration from the perspective of medical services law, regarding how to coordinate legal relationships between the child born through a surrogate birth arrangement, the surrogate mother, the egg donor, the spouses of these women, and other parties concerned. A legal system for surrogacy should be developed based on consideration on these matters. The issues of how to protect the legitimate rights and interest of the parties concerned and how to ensure the child's welfare cannot be solved fairly and equitably until a legal system for surrogacy is adequately developed.

Since the issue of surrogacy involves many parties who have different opinions, it may not be necessarily easy to establish an adequate consensus among them. However, if this issue is left unsolved because of the difficulty in solving it, that would result in the accumulation of faits accomplis, which is obviously never beneficial to the welfare of children to be born through surrogate birth arrangements. In order to ensure that many people can enjoy the benefit of the progress in medicine without any worries, efforts should be made to establish a consensus in society and take legislative measures based on such consensus.

In addition, I agree with the concurring opinion by Justice TSUNO Osamu and Justice FURUTA Yuki in that there is enough room to establish a special adoption between the appellees and the Children.

Presiding Judge

Justice FURUTA Yuki  
Justice TSUNO Osamu  
Justice IMAI Isao  
Justice NAKAGAWA Ryoji

(This translation is provisional and subject to revision.)

## The Civil Code\*

(Minpō)

## BOOK I

## General Provisions

(Sōsoku)

*Article 1. (Exercise of private rights)*

1. All private rights shall conform to the principles of maintaining the public welfare.

2. The exercise of rights and performance of duties shall be carried out in accordance with the principles of good faith and trust.

3. No abuse of rights shall be permitted.

*Article 1-2. (Construction)*

This Code shall be construed in a manner consistent with respect for the dignity of individuals and the essential equality of the sexes.

## CHAPTER I

## Persons

(Hito)

## SECTION I

## Enjoyment of Private Rights

(Shiken no Kyōyū)

*Article 1-3. (Commencement of capacity)*

The enjoyment of private rights shall commence at birth.

*Article 2. (Legal capacity of aliens)*

Aliens shall enjoy private rights, except where prohibited by law, ordinance, or treaty.

\* Amendments have been included in this statute up to and including Law No. 41, 2000.

## SECTION II

## Capacity

(Nōryoku)

*Article 3. (Age of majority)*

Majority is attained at the age of twenty years.

*Article 4. (Capacity of minors)*

1. A minor shall obtain the consent of his legal representative to do any juristic act except an act solely to acquire a right or to be relieved of a duty.

2. An act done in violation of the preceding paragraph is voidable.

*Article 5. (Minor's disposal of property)*

A minor who is given permission by his legal representative to dispose of property for a purpose specified by the latter may freely dispose of the same within the scope of such purpose; a minor may likewise dispose of any property which his legal representative gives him permission to dispose of without specifying any purpose.

*Article 6. (Capacity to carry on business)*

1. A minor who is given permission by his legal representative to carry on one or more kinds of business has the same capacity as a person of the age of majority in so far as such business or businesses are concerned.

2. If, in the case contemplated in the preceding paragraph, there are facts showing the minor still to be incapable of carrying on the business, his legal representative may, in accordance with the provisions of the Book of Relatives (Shinzoku), revoke or restrict said permission.

*Article 7. (Adjudication of commencement of guardianship)*

A person in a condition of habitual inability to make judgments due to mental disturbance may be given, by the family court, an adjudication of commencement of guardianship upon the application of the person himself, his spouse, any relative within the fourth degree of relationship, the person's minor guardian, supervisor of the guardian, curator, supervisor of the curator, adviser, supervisor of the adviser, or a public prosecutor.

*Article 8. (Full-age guarded person and his guardian)*

A person given an adjudication of commencement of guardianship shall be a full-age guarded person and a guardian shall be appointed for him.

*Article 86. (Immovables and movables)*

1. Land and things firmly affixed thereto are immovables.
2. All other things are movables.
3. Obligation-rights payable to bearer shall be deemed to be movables.

*Article 87. (Primary thing and accessory)*

1. If the owner of a primary thing has caused another thing owned by him to pertain to the former thing in order to facilitate the ordinary use of the former thing, the latter thing is an accessory.
2. An accessory follows the disposition of the primary thing.

*Article 88. (Natural fruits and legal fruits)*

1. Products derived from a thing in conformity with the use for which the thing is intended are natural fruits.
2. Money and other things to be received in exchange for the use of a thing are legal fruits.

*Article 89. (Vesting of fruits)*

1. Natural fruits belong to the person who has the right to take them at the time of their severance from the principal thing.
2. Legal fruits shall accrue in proportion to the number of days during which the right to acquire them continuously exists.

**CHAPTER IV****Juristic Acts***Hōritsu Kōi***SECTION I****General Provisions***(Sōsoku)**Article 90. (The public order and good morals)*

A juristic act whose object is contrary to the public order or good morals is null and void.

*Article 91. (Discretionary provisions and declaration of intention)*

If the parties to a juristic act have declared an intention which deviates from any provision of a law or ordinance not concerned with the public order, such intention shall prevail.

(Rel.34-12/02 Pub.368)

*Article 92. (Effect of customs)*

If there is a custom deviating from any provisions of a law or ordinance not relating to the public order, such custom shall prevail if the parties to a juristic act are deemed to have intended to be bound by such custom.

**SECTION II****Declarations of Intention***(Ishi-Hyōji)**Article 93. (Mental reservation)*

A declaration of intention shall not be invalidated by the fact that the declarant made it knowing such declaration not to be his true intention; however, such declaration of intention shall be null and void if the other party was aware, or should have been aware, of the true intention of the declarant.

*Article 94. (False declaration of intention)*

1. A false declaration of intention made in collusion with the other party is null and void.
2. The voidness of a declaration of intention referred to in the preceding paragraph may not be set up against a third person who has acted in good faith.

*Article 95. (Mistake)*

A declaration of intention shall be null and void if made under a mistake in regard to any essential element of the juristic act; however, if such mistake was caused by gross negligence on the part of the declarant, the declarant himself may not assert its voidness.

*Article 96. (Fraud or duress)*

1. A declaration of intention induced by fraud or duress is voidable.
2. If a third person has committed fraud inducing a party's declaration of intention to another party, such declaration of intention may be voided only if such other party had knowledge of the fraud.
3. The voidance of a declaration of intention induced by fraud may not be set up against a third party who has acted in good faith.

*Article 97. (Declaration of intention made to a person at a distance)*

1. A declaration of intention made to a person at a distance shall be effective from the time notice of it has reached the other party.
2. The validity of a declaration of intention shall not be affected by the declarant's death or loss of capacity occurring after he has dispatched the notice.

(Rel.34-12/02 Pub.368)

*Article 597. (Borrower's duty to return)*

1. The borrower is obligated to return the thing borrowed at the time fixed by the contract.

2. When the parties have not fixed the time for return, the borrower must return the thing when he has finished making use of and profiting by it according to the purpose fixed in the contract; however, even prior thereto the lender may demand the return at once if a period of time sufficient for using and taking the profits has elapsed.

3. When the parties have not fixed the time for return or the purpose of using and taking profits, the lender may demand the return at any time.

*Article 598. (Borrower's right to remove attached things)*

The borrower may, on restoring the thing borrowed to its original condition, remove things which the borrower has attached thereto.

*Article 599. (Borrower's death)*

A loan for use becomes ineffective upon the death of the borrower.

*Article 600. (Limitation of compensation for damages, etc.)*

Compensation for damages which have arisen from the use of the thing or taking of profits contrary to the main sense of the contract, and the reimbursement of expenses disbursed by the borrower must be demanded within one year from the time the thing borrowed was returned to the lender.

**SECTION VII****Lease***(Chintaishaku)***SUBSECTION I****General Provisions<sup>12</sup>***Article 601. (Lease)*

A lease becomes effective when one of the parties agrees to allow the other party to use a thing and take profits therefrom and the other party agrees to pay rent therefor.

<sup>12</sup> In the case of real estate, leases are governed also by the Land Lease Act (Law No. 49, 1921), the House Lease Act (Law No. 50, 1921) and Building Protection Act (Law No. 40, 1909). These three statutes, designed to protect the lessee's interests in the case of lease of immovables, are often cited in decisions. See Pt. 11, Ch. 5.

*Article 602. (Short-term lease)*

Where a lease is concluded by a person who has no capacity or authority to dispose of the property leased, the duration of the lease shall not exceed the period stated below:

1. Ten years for the lease of a forest for the planting or cutting of trees;
2. Five years for the lease of any other land;
3. Three years for the lease of a building;
4. Six months for the lease of a movable.

*Article 603. (Ibid.—renewal)*

The terms specified in the preceding article may be renewed; however, such renewal must be made at least one year before the maturity of the term in the case of land, three months in the case of buildings, or one month in the case of movables.

*Article 604. (Period)*

1. The period of a lease may not exceed twenty years. If a lease has been made for a longer period, it shall be reduced to twenty years.
2. The period stated in the preceding paragraph may be renewed; however, the renewed period may not exceed twenty years from the time of renewal.

**SUBSECTION II****Effect of Lease***Article 605. (Registered lease of immovable)*

The lease of an immovable, if registered, shall be effective even as against persons who subsequently acquire real rights in such immovable.

*Article 606. (Lessor's liability to repair)*

1. A lessor is obligated to effect all repairs necessary for the use of the thing leased and for the taking of profits therefrom.

2. If a lessor desires to do some act necessary for the preservation of the thing leased, the lessee cannot object thereto.

*Article 607. (Lessor's act of preservation against lessee's will)*

Where the lessor desires to do an act of preservation against the will of the lessee, if the lessee is thereby rendered incapable of attaining the object for which the lease was obtained, the lessee may rescind the contract.



*Article 608. (Necessary expenses and useful expenses)*

1. If a lessee has disbursed any necessary expenses relating to the thing leased which are chargeable to the lessor, the former may demand immediate reimbursement thereof from the latter.

2. If the lessee has disbursed any useful expenses, the lessor shall, in accordance with the provisions of Article 196, paragraph 2, reimburse the same at the time the lease terminates; however, the court may, on the application of the lessor, allow such lessor reasonable time.

*Article 609. (Reduction of profits due to vis major)*

If a person who has leased land for the purpose of taking profits therefrom has by reason of *vis major* received profits which are less than the amount of the rent, such person may demand a reduction of the rent to the amount of such profits; however, this shall not apply to the lease of residential land.

*Article 610. (Ibid.)*

In the case referred to in the preceding article, if the lessee has by reason of *vis major* received profits which are less than the amount of the rent for two or more consecutive years, such lessee may rescind the contract.

*Article 611. (Partial loss of leased thing)*

1. If part of the thing leased has been lost other than by the fault of the lessee, the lessee may demand a reduction of rent in proportion to the part which has been lost.

2. In the case referred to in the preceding paragraph, if the remaining part is not sufficient to enable the lessee to attain the object for which the lease has been made, the lessee may rescind the contract.

*Article 612. (Assignment of lease; sublease)*

1. A lessee may not, without the consent of the lessor, assign his rights or sublease the thing leased.

2. If the lessee allows a third person to use or take profits from the thing leased contrary to the provisions of the preceding paragraph, the lessor may rescind the contract.

*Article 613. (Effect of sublease)*

1. If a lessee has lawfully subleased the thing leased, the sublessee assumes obligatory duties directly to the lessor; in such case, payment of rent in advance to the lessee cannot be set up against the lessor.

2. The provisions of the preceding paragraph shall not prevent the lessor from exercising his rights against the lessee.

*Article 614. (Time for payment of rent)*

Rent shall be paid at the end of each month in the case of a movable, a building, or a building site, and at the end of each year in the case of any other land; however, in the case of a thing which has a harvest season, rent shall be paid without delay upon the close of such season.

*Article 615. (Lessee's duty to notify)*

If the thing leased requires repairs, or if a third person claims a right over it, the lessee must without delay notify the lessor thereof; however, this shall not apply if the lessor is already aware of the fact.

*Article 616. (Application mutatis mutandis of the provisions on loan for use)*

The provisions of Article 594, paragraph 1, Article 597, paragraph 1 and Article 598 shall apply *mutatis mutandis* to a lease.

## SUBSECTION III

## Termination of Lease

*Article 617. (Notice to terminate)*

1. If no period has been fixed by the parties for a lease, either of the parties may at any time give notice to the other party to terminate the contract; in such case the lease shall come to an end upon the expiration of the following periods of time after such notice has been given:

1. one year in the case of land;
2. three months in the case of a building; and
3. one day in the case of a room for hire or of a movable.

2. In the case of a lease of land which has a harvest season, notice to terminate shall be given after the end of the harvest season and before commencement of the next cultivation.

*Article 618. (Reserved right to terminate)*

Even in the cases where a period has been fixed by the parties to the lease, if one or both of the parties have reserved a right to terminate the contract, the provisions of the preceding article shall apply *mutatis mutandis*.

*Article 619. (Implied renewal)*

1. In the case where the lessee continues to use the thing leased or to take profits therefrom after expiration of the period of the lease, if the lessor fails to raise any objection thereto, notwithstanding that he is aware thereof, such lessor shall be presumed to have given a lease anew on the same terms as those of

however, if such performance was rendered by the obligor by mistake, the obligee must return the benefits derived therefrom.

*Article 707. (Performance by person other than obligor)*

1. In the cases where a person other than the obligor has rendered performance of an obligatory duty by mistake, if the obligee, in good faith, has destroyed documentary evidence or has relinquished any security, or has lost his obligatory right by prescription, the person who has rendered performance may not demand the return of the subject thereof.

2. The provisions of the preceding paragraph shall not prevent the person who has rendered performance from exercising his right to reimbursement against the obligor.

*Article 708. (Performance for illegal cause)*

A person who has rendered performance for any illegal cause may not demand the return of the subject of such performance; however, this shall not apply if such illegal cause existed only as to the person enriched.

## CHAPTER V

### Torts

#### (Fuhō kōi)

*Article 709. (Tort—compensation for damage)*

A person who intentionally or negligently violates the rights of another is obligated to compensate for damages arising therefrom.

*Article 710. (Nonpecuniary damage)*

A person who is liable for damages in accordance with the provisions of the preceding article must compensate therefor even with regard to nonpecuniary damage, irrespective of whether such injury was to the person, liberty or reputation of another or to such person's property rights.

*Article 711. (Damages for death of close relative)*

A person who has caused the death of another is liable for damages to the parents, the spouse and the children of the deceased, even in the cases where no property right of theirs has been violated.

*Article 712. (Liability of minor)*

A minor who has caused damage to another person is not liable for damages for such act if he did not possess sufficient capacity to understand his responsibility for the act.

(Rel.35-603 Pub.368)

*Article 713. (Liability of a mentally unsound person)*

A person who, while in a state where he lacks the capacity to understand his responsibility for his acts due to mental disturbance, has caused damage to another, is not liable for such act; however, this shall not apply if such state was brought on by the person himself, either intentionally or negligently.

*Article 714. (Liability of supervisor of person without capacity)*

1. When a person without capacity is not responsible in accordance with the provisions of the preceding two articles, the person under a legal duty to supervise him is liable for damage inflicted by such person on a third person, unless the person obligated to supervise has not neglected his duty.

2. One who supervises a person without capacity on behalf of the person obligated to supervise is also subject to the responsibility of the preceding paragraph.

*Article 715. (Liability of an employer)*

1. One who employs another person for a certain undertaking is liable for damage caused by such employee to third persons in the execution of such undertaking unless the employer has exercised due care in the selection of the employee and in the supervision over the undertaking, or unless the damages would have arisen even if due care had been exercised.

2. A person who supervises the undertaking on behalf of the employer is also subject to the responsibility of the preceding paragraph.

3. The provisions of the preceding two paragraphs shall not prevent an employer or supervisor from exercising his right to reimbursement from the employees.

*Article 716. (Liability of person ordering work)*

A person who has ordered work is not obligated to compensate for any damage to a third person caused by the contractor in the course of such work; however, this shall not apply if the person who has so ordered was at fault with regard to the order or his instructions.

*Article 717. (Liability for defect in a structure on land)*

1. If any damage has been caused to another person by reason of any defect in the construction or maintenance of a structure on land, the person in possession of the structure shall be liable for damages to the injured party; however, if the person in possession has exercised due care to prevent the occurrence of such damage, compensation for the damage must be made by the owner.

2. The provisions of the preceding paragraph shall apply *mutatis mutandis* in the cases where any defect exists in the planting or supporting bamboo or trees.

(Text continued on page App. 4A-135)

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3. If in the cases referred to in the preceding two paragraphs there exists any other person who is responsible for causing the damage, either the possessor or the owner may exercise against such other person the right of reimbursement.

*Article 718. (Liability of possessor of animal)*

1. The possessor of an animal is liable for any damage caused by it to another person; however, this shall not apply if the owner has kept it with such care as is proper according to the species and nature of the animal.

2. A person who has custody of an animal in place of the possessor shall also assume the responsibility referred to in the preceding paragraph.

*Article 719. (Joint torts)*

1. If two or more persons have by their joint tort caused damage to another, they are jointly and severally liable to compensate for such damage; the same shall apply if it is impossible to ascertain which of the joint participants has caused the damage.

2. Instigators and accomplices are deemed to be joint participants.

*Article 720. (Proper self-defense; necessity)*

1. A person who, in order to protect his own right or that of a third person against a tort of another, unavoidably commits a harmful act, is not liable to compensate for damages; however, this shall not preclude a demand for compensation of damages by the injured party against the person who committed the tort.

2. The provisions of the preceding paragraph shall apply *mutatis mutandis* in the cases where a thing belonging to another is damaged in order to avert an imminent danger which has arisen from such thing.

*Article 721. (Liability regarding unborn child)*

For purposes of the right to demand damages, an unborn child is deemed to have been born.

*Article 722. (Manner of compensation, fault in common)*

1. The provisions of Article 417 shall apply *mutatis mutandis* to the compensation to be made for damages arising from a tort.

2. If there is any fault on the part of the injured party, the court may take such fault into account in assessing the amount of the damages.

*Article 723. (Defamation)*

If a person has defamed another, the court may, on the application of the latter, order the former to take suitable measures for the restoration of the latter's reputation, either in lieu of or together with compensation for damages.

*Article 724. (Extinctive prescription)*

The right to demand compensation for the damage which has arisen from a tort shall lapse by prescription if not exercised within three years from the time when the injured party or such party's legal representative became aware of such damage and of the identity of the person, who caused it; the same shall apply if twenty years have elapsed from the time when the tort was committed.

[Editor's Note: Book IV (Relatives: Articles 725 to 881) and Book V (Succession: Articles 882 to 1044) are not included.]

## APPENDIX 4D

## Products Liability Act

*Seizoubutsu Sekinin Ho\**

(Law No. 85, 1994)

*Article 1. (Purpose)*

The purpose of this Act is to contribute to the stability and improvement of the national livelihood, the sound development of the national economy and the protection of injured persons by stipulating the liability of producers, or the like for damages arising to a person's life, body or property caused by defective products.

*Article 2. (Definitions)*

1. In this Act, the term "products" means produced or processed movables.

2. In this Act, the term "defects" means that the relevant product lacks the safety it should normally have taking into consideration its characteristics, the normally anticipated method of use, the time of its delivery by producers, or the like, and any other circumstances relating to the relevant product.

3. In this Act, the term "producers, or the like" means a person falling under any of the following items:

- (1) A person who, as a business, produces, processes, or imports the relevant product (hereinafter referred to as a "producer");
- (2) A person who, by putting his or her name, tradename, trademark, or any other representation on the product, presents himself or herself as its producer (hereinafter referred to as "representation of name, or the like"), or a person who makes such a representation concerning

\* Translation assisted by Michelle Tan (Kyoto Comparative Law Center).

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name, or the like, which is misleading as to the identity of the producer;

- (3) Any other person who makes a representation on the relevant product which identifies him or her as being, in essence, the producer, taking into consideration the means of production, processing, importing or distribution of the relevant product, and any other circumstances.

*Article 3. (Products Liability)*

In cases where a product which a producer, or the like produces, processes, imports, or on which he or she makes a representation as to name, etc. under the preceding Article, paragraph 3; items 2 and 3, was delivered and a defect has caused death, injury to a person or property, the producer, or the like is liable to compensate for such damage, provided that this does not apply in cases where such damage has arisen only to the relevant product.

*Article 4. (Exemption)*

In the preceding Article, a producer, or the like is not liable to compensate to damages as stipulated thereunder, if he or she proves one of the following matters:

- (1) That the defect in the relevant product was not able to be discovered according to the state of scientific and technical knowledge at the time of its delivery by the producer, or the like.
- (2) That, in the case where the relevant product is used as a raw material or a component of another product, the defect arose as the result of observing the instructions given by the producer of other product and no fault was attributable to a producer, or the like for its occurrence.

*Article 5. (Limitation of Time)*

1. The right to demand compensation for damage provided for under Article 3 lapses by prescription, if the injured person or his or her legal representatives do not exercise that right within three years from the time of becoming aware of such damage and the

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identity of the person who is liable to compensate for such damage; the same shall apply when ten years have elapsed from the time the producer, or the like delivered the relevant product.

2. With regard to damage caused by a substance that upon accumulation in the human body harms human health, or damage the diagnosis of which appears after the lapse of a latent period, the period of time prescribed under the latter half of the preceding paragraph begins to run from the time of occurrence of such damage.

*Article 6. (Application of Civil Code)*

In addition to the provisions of this Act, those of the Civil Code (Law No.89,1898) apply to the liability of a producer, or the like for damage caused by a defective product..

*Supplementary Provisions*

*(Enforcement date, etc.)*

1. This Act shall come into force from the date which is calculated to be one year from the date of proclamation and shall apply to a product delivered by its producer, etc. after the date of enforcement.-----

*(Partial amendment of the Compensation for Nuclear Damage Act)*

2. The Compensation for Nuclear Damage Act (Law No.147,1961) is partially amended as follows:

“and Shipowners Liability Limitation Act (Law No.94,1975) under Article 4 para.3 reads”, the Shipowners’ Liability Limitation Act (Law No.94,1975) and Products Liability Act (Law No. 85, 1994).