ABHANDLUNGEN / ARTICLES

The Sanctity of Contract: Breach of Good Faith in the Merger Negotiation between Japanese Banks

Methodological Reflection on the Study of Legal Cases as Social Phenomena

Hisashi HARATA*

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* Professor at Graduate School of Law and Politics, The University of Tōkyō. The author acknowledges with deep gratitude that this article was inspired by Prof. ISHIGURO'S book on the case (especially, see K. ISHIGURO [石黒一憲], 契約の神聖さ [Sanctity of Contract] (2010) 42 note). He also thanks Prof. Mindy CHEN-WISHART, Prof. Munin PONGSAPAN, and other participants for their thoughtful and helpful comments at the workshop held at Thammasat University in 2023. All errors in this article are the author's own. This article is a spin-off of the research funded by Trust Forum Foundation. The author also expresses his gratitude for its

I. INTRODUCTION

Traditionally, contract and comparative contract law scholars do not seem to have paid as much attention to the social foundations and preconditions of contractual institutions as they have to legal norms or, more broadly, to social norms regarding the relationship between contractual parties. This focus seems to have so diluted the conceptual content of the contract that it is now taken as a global language, such that people think there is contract law in every society, and whatever promise-and-agreement practice they find can be deemed as contracts with legal binding effects.

But then how would current scholars of contract and comparative contract law explain why Romeo and Juliet's love was not fulfilled? Say Romeo and Juliet contract to marry, but their agreement breaks down and comes to a tragic end. What are the reasons behind their tragedy?

How do those involved in contract law and comparative contract law react? Does current contract law and comparative law scholarship have the methods and tools to consider their cause and its background? Can they even work up an interest in exploring such causes and backgrounds in the first place? Or do they think it not worthy of contract and comparative contract law scholarship?

How, then, would contract law and comparative contract law scholars deal with similar events if they occurred in the real world? This article raises the question with a focus on a legal case from Japan, providing a case-study, not of a failed engagement, but of a failed corporate merger. The study will be unconventional in that it examines the details of the case's social background.

The case is *Sumitomo Trust Bank v UFJ HD et al.*[1] regarding the breach of an exclusive agreement to negotiate a merger, litigated in 2004. When the bubble burst and Japan's economy stagnated in the 1990s, UFJ FG, one of Japan's leading financial groups, suffered a substantial financial crisis. In order to recover, it formed a self-rehabilitation plan, a part of which was to sell a retail trust division, UFJ Trust Bank, to another Japanese bank, Sumitomo Trust Bank, and the parties concluded a basic agreement for exclusive negotiations.

But suddenly this financial group breached its agreement and opted instead for an inter-group merger with another group, Mitsubishi Tōkyō FG

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support. The views expressed in this article are solely of the author and have nothing to do with this grant.

1 Tōkyō District Court, 27 July 2004, 商事法務 Shōji Hōmu 1708 (2004) 22, Tōkyō High Court, 11 August 2004, 商事法務 Shōji Hōmu 1708 (2004) 23, and Supreme Court, 30 August 2004, 民集 Minshū 58, 1763. Another following lawsuit is Tōkyō District Court, 13 February 2006, 判例タイムズ Hanrei Taimuzu 1202 (2006) 212.

(MT FG). Sumitomo Trust Bank responded by seeking a preliminary injunction, which the Supreme Court denied, and later filed a claim for damages, which the Tōkyō District Court dismissed. After an appeal, the case was settled out-of-court.[2]

In practice, what surprised people was that a dispute between major Japanese financial institutions would wind up in litigation. On the one hand there was sympathy for UFJ FG's unilateral withdraw from the agreement, given its difficulties, and on the other hand there was a favorable attitude towards the legalization of the dispute. From the outset, the dispute attracted academic attention, and much attention throughout the litigation was paid to such legal issues as the binding force of the parties' basic agreement, whether the unilateral breach extinguished other obligations for the future, and the grounds for a preliminary injunction, *viz.* the necessity of the disposition, etc.

The public's attention was also not limited to the legal aspects of the case. First, another financial group (Sumitomo Mitsui FG) made a merger proposal to UFJ FG, which led to a conflict with Mitsubishi Tōkyō FG over its merger plans with UFJ FG. UFJ FG managers employed a kind of poison pill to prevent the take-over by Sumitomo Mitsui FG and keep to the merger plan with Mitsubishi Tōkyō FG.[3] Second, the resolution of UFJ FG's case was regarded as a near-final stage in the restructuring of the Japanese financial system as a whole, and the Financial Services Agency (FSA) (金融庁 *Kin'yū-chō)* and other government bodies, like the Ministry of Economy, Trade and Industry (経済産業省 *Keizai Sangyō-shō*), were also interested in its restructuring.[4] The government's posture toward the case was taken as a potential signal of a change in policy from the traditional convoy system (護送船団方式 *gosō sendan hōshiki*),[5] which would have had a considerable impact on the Japanese financial system.

However, the reasons for this public attention may not have been limited to the contemplated merger's impact on society or the importance of the legal issues or the consequences of financial restructuring in Japan. There

2 See *supra* note 1.

3 M. NAKAHIGASHI [中東正文]/Y. IKEDA [池田裕一], UFJ 統合問題 [UJF Merger Problems], in: Nakahigashi [中東] (ed.), UFJ vs. 住友信託 vs. 三菱東京 M&A のリーガルリスク [UFJ vs Sumitomo Trust vs Mitsubishi Tōkyō Legal Risk of M&A] (2005) 12–32. NIHON KEIZAI SHINBUN-SHA [日本経済新聞社] (ed.), UFJ 三菱東京統合 [Integration of UFJ Mitsubishi Tōkyō] (2004) 80–109.

4 H. MAEDA [前田裕之], ドキュメント銀行 [Bank Documentary] (2015) 214–217; NIHON KEIZAI SHINBUN-SHA, *supra* note 3, 125.

5 This expression indicates the initiative taken by the governmental authorities to lead an industrial sector, typically the banking sector, to promote certain national policies as well as to protect members of the sector.

was something about the tensions and conflicts emanating from this case that touched and reverberated in the public consciousness.

There is a gap between jurisprudence and legal practice on the one hand and the media and commercial sectors on the other hand in the way this case has been covered, and this gap has not been sufficiently explored. Because of this gap, the biases and deficiencies in the way the Supreme Court dealt with, argued, and balanced the conflicting values in the case have not been filled in clearly enough. In addition, too little light has been shed on the characteristics and problems of Japanese society that should have been suggested by the social phenomenon of the overall reaction in jurisprudence, legal practice, the media and society at large to the Supreme Court's biased decision.

This article attempts to examine both the legal case and its observation as a social phenomenon by bridging a conventional legal case-study approach with a survey of the circumstances and background. The article thereby clarifies some of the characteristics and problems of Japanese society that in this case crystallized into technical aspects of how to legally deal with the case in litigation.

The article points to tensions and conflicts, even to a failure to raise awareness in Japanese society, over and about the fact that good faith – the gentlemanly observance of agreements – is threatened, and has been buried. It points to a lack of awareness of the foundational freedom comprised as the premise of good faith as well as a guarantee of something that every private actor regards as irreplaceable. In this case, we see interested parties in a wider sense exerting pressure on the immediate parties in a substantially narrow sense to contradict an agreement that the latter are trying to comply with in a gentlemanly manner. That collective pressure may possibly involve political power as well as certain parts of the society. Furthermore, global financial forces and regulation may also be connected with creating an atmosphere of social pressure. Ultimately the legal concepts that are expected to preserve the autonomy and fundamental liberty of private actors in the midst of such a whirlwind of interests do not work well enough.

This rare case attracts attention not merely as a lawsuit between leading financial institutions. As further background, there is a broadly shared assumption that it is not common habitus in Japan to manifest oppositions and claims in the form of litigation. Why did it this time? To answer that question, this article also touches on the influence of global regulatory trends in corporate governance and corporate finance as a factor in these tensions manifesting in litigation.

Even as a phenomenon reflecting social structural tensions in local Japanese society, the case is not completely irrelevant outside Japan as long as local phenomena operate in conjunction with global structures. It is neces-

sary to look carefully at each local society to see whether the conditions are in place for the establishment of good faith and what structural impediments exist, if any. On the other hand, how global structures can have an impact locally, how they are connected to the structures of local societies, and what the impediments to good faith are at both layers, are issues that we all share globally. In this sense, comparative law should be global.

Through the case-study, we not only identify our common global and local problems, but we take them as objects of study for comparative law. In addition to issues of comparative contract law, this article's case-study also shows the potential of case-studies in comparative law in general as well as the methodological challenges of developing that potential.

First comes an introduction of the fact-finding and legal issues before the court, followed by an examination of the court decision(s) and reasoning (II.). This section is meant to demonstrate the conventional way of discussing about this case in Japan. But this article goes on to point out that there are aspects of the Supreme Court's decision that this way fails to clarify, making it necessary to examine the background of the case (III.). On that basis, the next step is to view the case as a social phenomenon and observe the conflict in its social context (IV.). This observation shows that UFJ FG's decision-making leading up to the dispute is still not fully understood, a lack of clarity that suggests that the UFJ side did not decide to break its agreement solely on the basis of reasonable managerial judgement, but that some external or internal social pressure may have been directly or indirectly at work. Next, as a final stage of the case analysis, the social background developed in the previous sections will inform further observations about certain legal aspects of the case (V.). These expose the problems of the social lack of awareness of the necessity of guaranteeing inalienable goods or interests for the preservation of fundamental liberty, and of the frailty of the good-faith relationship in the face of social pressure in the deeper layers of the conflict. Furthermore, it confirms that there is no sufficiently clear-cut awareness of the problem of the social conditions for maintaining the good-faith relationship (including the legal situation), as the Supreme Court's decision also represents. In conclusion, we suggest that the case-study exposes a common issue in the social setting in which good-faith relationships are embedded, and in particular how they may be sustained between companies as conceptual entities through the activities and relationships of individuals (VI.). We hope that the presentation of this common problem will suggest further issues and methods to be considered in contract law and comparative law.

II. STB v UFJ CASE: CONVENTIONAL ANALYSIS

1. Facts & Adjudicatory Process

The case this article deals with is *Sumitomo Trust Bank* [hereinafter "STB"] *v UFJ Trust Bank, UFJ Bank and UFJ HD* [hereinafter collectively "UFJ FG"]. In May 2004, STB and UFJ FG concluded a "Basic Agreement" to begin negotiations for the merger of UFJ Trust, its retail trust banking division, with STB. The Basic Agreement contained an article stipulating "*bona fide* [=good faith] consultations" and a provision that "the parties shall not […] provide information to or have consultations with a third party". But there were no explicit provisions obliging both parties to reach a final agreement and there was no provision for sanctions or penalties for breach of the agreement.

Two months after concluding the agreement, UFJ FG unilaterally notified STB that it was cancelling their Basic Agreement and proceeded to pursue a merger with another big financial group, Mitsubishi Tōkyō FG, with which it also entered formally into negotiations.

Soon afterward, STB sought a preliminary injunction before Tōkyō District Court to prohibit UFJ FG from providing information to or having consultations with a third party other than STB until the end of March 2006 (thus for about 20 more months).

Tōkyō District Court granted STB's request. UFJ FG immediately moved for reconsideration, but without success,[6] and then appealed to Tōkyō High Court, which reversed the district court's decisions and dismissed STB's application.[7] STB then appealed to the Supreme Court, which upheld the high court's dismissal.

2. Legal Issues Addressed Before the Courts

The first issue was the binding effect of the Basic Agreement. As the agreement did not include any obligation to complete the merger, the question was whether it was to be deemed a binding contract, as opposed to a letter of intent or memorandum of understanding without any legal effect. Very interestingly, all three courts affirmed the binding effect of the Basic Agreement. Tōkyō District Court straightforwardly granted an injunction on that basis before Tōkyō High Court and the Supreme Court[8] revoked or upheld the revocation of the injunction, each for different reasons.

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6 Tōkyō District Court, 27 July 2004, *supra* note 1.

7 Tōkyō High Court, *supra* note 1.

8 Supreme Court, *supra* note 1.

Tōkyō High Court held that the obligation deriving from the agreement was extinguished and that STB had no substantive right on which a preliminary injunction could be based. Thus, the second specific legal issue in the Tōkyō High Court decision was whether the obligation to negotiate in good faith had been extinguished by UFJ FG's *volte-face*. The court stated that UFJ FG's *volte-face* had already undermined trust between the parties, and therefore it had already become impossible to expect both parties to continue *bona fide* consultations to finalize a merger as intended. While the court recognized the binding effect of the Basic Agreement, it also held that the duty to negotiate in good faith expired with the breach of the covenant of good-faith in the parties' relationship. According to Tōkyō High Court, the ostensibly binding effect of the good-faith obligation was in this regard just a precarious mirage which only existed as long as the good-faith relationship is maintained.

The Supreme Court, on the other hand, held that UFJ FG's obligations under the Basic Agreement were not fully extinguished and hence substantial rights still existed as the basis for a preliminary injunction. However, the Supreme Court went on to hold that provisional relief was not warranted because the motion did not substantiate that an injunction was necessary to avoid irreparable harm or imminent danger, the third specific legal issue addressed in this case. In this regard, the Supreme Court considered 1) that any harm to STB was not deemed to be so serious that it could not be sufficiently compensated *ex post*;[9] 2) that it was very unlikely for the parties to reach a final agreement, and 3) an injunction lasting as long as 20 months would inflict considerable harm on UFJ FG.

III. How the Conventional Case-Study Misses the Point: Understanding the Case as a Social Phenomenon

Following the decisions in three instances, legal scholars and lawyers have mainly focused on the legal issues the courts articulated, such as the binding effect of the Basic Agreement[10], the existence of an obligation after the about-face by UFJ FG[11], and the necessity of temporary relief as one of the

9 The Tōkyō High Court decision required UFJ FG to put up a total of yen 7.5 billion as security.

10 The decisions at each instance as well as the academic literature do not disagree with the recognition of the legally binding nature of the law.

11 For example, regarding the comparison between the High Court decision and the Supreme Court decision, H. Morita [森田果], Case Note, in: Kansaku [神作]/Fujita [藤田]/Katō [加藤] (eds.), 会社法判例百選第 4 版 [Selected cases on Corporate Law, 4th ed.], 別冊ジュリスト Bessatsu Jurisuto 254 (2021) 192, 193; I. Hata [畑郁夫], Case Note, 民商法雑誌 Minshō-hō Zasshi 132 (2005) 1, 21; K. Ōtsuka [大塚和成], Case Note, 金融法務事情 Kin'yū Hōmu Jijō 1723 (2006) 4, 5; S. Nomura [野村修

conditions for granting an injunction[12], which were addressed and touched upon by the courts.[13]

也], Case Note, 金融法務事情 Kin'yū Hōmu Jijō 1748 (2005) 75, 77; K. SHIMADA [島田邦雄]/H. ASAI [浅井弘章]/Y. KANEKO [金子由美]/Y. NAKAYAMA [中山靖彦]/T. TOMIOKA [富岡孝幸], Case Note, 商事法務 Shōji Hōmu 1714 (2004) 38; ISHIGURO, *supra* note *, 48–53.

12 Many case notes focus on the Supreme Court's decision in relation to the general issue of whether it is possible to take into consideration the possible damages suffered by the debtor as a result of the provisional measures. They do not consider the specific details of the "damages" or how to balance them with the rights and interests to be secured on the part of the creditor.

13 The case notes on this case in Japanese are numerous. For instance, K. ASATSUMA [浅妻敬]/M. YUKIOKA [行岡睦彦], M&A の実施に対する債権者・契約関係者等からの提訴 [Filing a claim by creditor, contractual party etc. regarding M&A], in: Kanda [神田]/Takei [武井] (eds.), 実務に効く M&A・組織再編判例精選 [Selected cases on M&A and Corporate Restructuring for practice] (2013) 36; HATA, *supra* note 11, 1; S. HAYASHI [林昭一], Case Note, in: Uehara [上原]/Hasebe [長谷部]/Yamamoto [山本] (eds.), 民事執行・保全判例百選第 3 版 [Selected cases on Civil Enforcement and Preservation, 3rd ed], 別冊ジュリスト Bessatsu Jurisuto 247 (2020) 174; T. KAMIYA [神谷高保], Case Note, in: Iwahara [岩原]/Kansaku [神作]/Fujita [藤田] (eds.), 会社法判例百選第 3 版 [Selected cases on Corporate Law, 3rd ed.], 別冊ジュリスト Bessatsu Jurisuto 229 (2016) 196; S. KASHŪ [賀集唱], Case Note, 銀行法務 21 増刊 Ginkō Hōmu 21 Zōkan 644 (2005) 11; MORITA, *supra* note 11, 192; Y. NAKAYAMA, Case Note, 金融法務事情 Kin'yū Hōmu Jijō 1729 (2005) 58; T. NISHIMOTO, Case Note, 銀行法務 21 増刊 Ginkō Hōmu 21 Zōkan 644 (2005) 107; NOMURA, *supra* note 11, 75; M. OGAWA [小川雅敏], Case Note, 判例タイムズ臨時増刊 Hanrei Taimuzu Rinji Zōkan 1215 (2006) 236; M. OKINO [沖野眞已], Case Note, ジュリスト臨時増刊 Jurisuto Rinji Zōkan 1291 (2005) 68; ŌTSUKA, *supra* note 11, 4; S. SHIDAHARA [志田原信三], Case Note, 法曹時報 Hōsō Jihō 58–10 (2006) 217; SHIMADA et al., *supra* note 11, 38; T. SHIMIZU [清水建成], Case Note, 判例タイムズ Hanrei Taimuzu 1259 (2008) 73; M. SHINTANI [新谷勝], Case Note, 金融・商事判例 Kin'yū Shōji Hanrei 1206 (2004) 58; M. SHINTANI [新谷勝], Case Note, 判例タイムズ Hanrei Taimuzu 1172 (2005) 100; T. SHIOZAKI [塩崎勤], Case Note, 民事法情報 Minji-hō Jōhō 221 (2005) 93; H. TEZUKA [手塚裕之] Case Note, 商事法務 Shōji Hōmu 1708 (2004) 12; H. TEZUKA [手塚裕之], Case Note, 金融財政事情 Kin'yū Zaisei Jijō (25 October 2004) 66; K. TOKUDA [徳田和幸], Case Note, ジュリスト臨時増刊 Jurisuto Rinji Zōkan 1291 (2005) 139; T. YAMADA [山田剛], Case Note, 判例評論 Hanrei Hyōron 558 (2005) 19.

As for case notes in English, T. NIIMURA, Case No. 31, in: Bälz/Dernauer/Heath/Petersen-Padberg (eds.), Business Law in Japan – Cases and Comments (2012) 331; J. M. RAMSEYER, アメリカから見た日本法 [Japanese Law viewed from the U.S.] (2019) 220; V. L. TAYLOR, Japanese Commercial Transactions and Sanctions Revisited: Sumitomo v. UFJ, Washington University Global Studies Law Review 8 (2009) 399.

In addition to the three issues mentioned in the main text, some case notes discuss whether the substantive right to seek an injunction arises from the obligation

This kind of approach – following the way the courts set the issues and the framework of their analysis – is broadly accepted among legal scholars and lawyers. However, to simply follow the courts makes us miss some crucial points. In particular, we miss a potential close capture of the nature of the case as a social phenomenon that could shed light on the socio-politico-economic structure of the country and reveal insufficiently explored dimensions of the dispute that can shed light on certain characteristics and issues of Japanese society. It will be useful for us here to recover the points our conventional way of observation has missed. We must not uncritically follow the framework of discourse the courts set and other scholars and practitioners share, but rather we must try to clarify the cognitive bias inherent in their approach to litigation.

For this reason, we will pay attention to points that the conventional analysis largely misses or ignores.

1. Is Ex-Post Compensation a Sufficient Remedy for STB?

As aforementioned, the Supreme Court, like Tōkyō High Court, upheld the validity and binding effect of the Basic Agreement. While the latter found that the obligation to negotiate in good faith did not survive the unilateral cancellation of the agreement, the former held that it did but nevertheless dismissed STB's application for a preliminary injunction, holding that there was no substantial interest to be protected by such a measure. It held that any damage caused by the breach of the agreement could be sufficiently compensated *ex post* and did not require temporary relief ex ante.

However, this raises a serious question: Is the harm to STB from the breach of the duty to negotiate in good faith really so slight as to be sufficiently covered by ex-post compensation? Here, the Supreme Court misses a very important point for the law, one that is closely connected to the aforementioned social indifference to good faith in Japan.

What did STB demand in its motion for a preliminary injunction? It asked that UFJ FG be prohibited not only from negotiating with Mitsubishi Tōkyō FG but also from revealing information it had obtained in the negotiation with STB. Of course, merger negotiations require the exchange of sensitive information about management, clients, know-how etc. It is necessary for due diligence. Such exchanges should be dealt with on the basis of a good-

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of exclusive negotiation (and whether the Supreme Court made a decision on this point) and on the content of "harm" and methods of estimating possible claims for damages that the Supreme Court decision suggests. Whether directors have the power to conclude an agreement on exclusive negotiation like in the Basic Agreement and the validity of the Basic Agreement from the viewpoint of corporate law are also discussed.

faith relationship so as not to transfer information obtained in this fashion to any third party.[14] But this point was not paid much attention to by the Supreme Court in regard to the necessity of granting temporary relief. In their case notes, almost all scholars ignore the importance of this point.[15]

2. How to Consider the Circumstances and Potential Harm to UFJ FG?

Secondly, the Supreme Court held that prohibiting UFJ FG from negotiating with third-party Mitsubishi Tōkyō FG would cause "considerable damage" to UFJ FG. However, it was UFJ FG that concluded the Basic Agreement (the binding effect of which the Supreme Court acknowledged) and unilaterally breached. In such a case, may one not say, unlike the Supreme Court, that it should therefore bear the harm, even considerable harm, for its own unilateral breach? Can this potentially considerable harm justify denying the necessity of temporary relief to the aggrieved party from this unilateral breach?

In addition, as UFJ FG's motivation for extracting itself from the Basic Agreement, the Supreme Court referred to its "current situation" or "current difficulties". What difficulties, and can they justify the unilateral cancellation? Or at least the denial of injunctive relief regarding obligations deriving from an agreement whose binding effect is recognized? If so, how are such considerations justified? We find no explanations in this regard in the judgement given by the Supreme Court.[16]

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14 As of 13 July 2004, the date of the notice of termination of the Basic Agreement, the signing of the Basic "Contract" had been scheduled for 22 July 2004, and due diligence for asset valuation was to be completed the following week. S. SUDA [須田慎一郎], UFJ 消滅 [Disappearance of UFJ] (2004) 23. Regarding STB's request for a reduction of the purchase price based on their assessment of UFJ Trust's assets, SUDA, op. cit., 36. It can be assumed that STB had already provided its information to UFJ FG or UFJ Trust. For this point, ISHIGURO, *supra* note *, 21.

15 From exceptionally careful observation, ISHIGURO, *supra* note *, 20, 43, 60–61. ISHIGURO is clearly aware of the problems that arise once "information" passes through UFJ FG to a third party. See also M. NAKAHIGASHI [中東正文], 法的問題点の整理と司法の役割 [Analysis of Legal Issues and the Role of the Judiciary], in: Nakahigashi [中東] (ed.), UFJ vs. 住友信託 vs. 三菱東京 M&A のリーガルリスク [UFJ vs Sumitomo Trust vs Mitsubishi Tōkyō Legal Risk of M&A] (2005) 39. Many studies analyzing the Supreme Court's decision fail to distinguish between the no-third-party bargaining clause and the third-party confidentiality clause in the Basic Agreement and in the STB filing.

16 In explaining that the obligation still exists after the unilateral cancellation of the Basic Agreement by UFJ FG, the Supreme Court holds that, "in light of the overall history of this case, it still cannot be said that uncertain factors [*sic*: uncertainty of factors] have completely been lost, and according to common social standards, it is

3. Disproportionate Balancing of Interests Between the Parties?

As noted above, insufficient consideration was given to the imminent situation of STB though it perhaps ought to have been significant.[17] Combined with the lack of explanation by the court of the circumstances it considered, one impression may be that the Supreme Court considered the circumstances that favored UFJ FG's position.[18] As discussed in III.2., what circumstances did the Supreme Court really take into account when it found UFJ FG was in difficulty even as it held that the current situation was still in flux?[19] Why did the justices understand this as leading to the business judgment to breach the Basic Agreement with STB and pivot to negotiations with MT FG, and why did they focus on the potential harm of a 20-month injunction against negotiating with MT FG as a third party?[20] What,

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impossible to go so far as to judge that there is no likelihood that a final agreement would be made".

What circumstances were measured by what socially accepted evaluation scale to determine whether the obligation could or could not be fulfilled? On the unclear nature of the factors considered by the Supreme Court decision, HATA, *supra* note 11, 18. Depending on the attitude of the Supreme Court itself, the situation could become fluid and unstable. See ISHIGURO, *supra* note *, 56.

17 KAMIYA criticizes the part of the Supreme Court decision where it states that the harm to UFJ FG would be substantially significant if a preliminary injunction were granted. He points out that even if UFJ FG is unable to raise yen 400 billion at market, it will only have to specialize in domestic operations and will not go bankrupt. KAMIYA, *supra* note 13, 197. On the other hand, HATA holds that, "according to subsequent media reports, if the court had granted the preliminary injunction, the turmoil in the financial community itself would clearly have been greater than if the court had not granted the injunction". HATA, *supra* note 11, 42. These points may raise the question of whether the fact that UFJ FG will be able to conduct only domestic business and not international business is a "substantial" "harm", and what circumstances on the part of UFJ FG should be considered as "harm".

18 HATA, *supra* note 11, 42 (arguing that, depending on how the Supreme Court considers the circumstances of the UFJ FG side, this could mean that the Supreme Court's decision is committed to the UFJ FG side).

19 Was there a situation in which "UFJ HD may not be able to avoid a business crisis if it does not proceed with negotiations for a merger with MT FG" as suggested by SHIMIZU (*supra* note 13, 77)? Were there circumstances under which you could say, "even if UFJ were to temporarily suspend negotiations with a third party, it is highly unlikely that a final agreement based on the Basic Agreement in this case would be reached" as held by SHIMIZU (*supra* note 13, 75)?

20 Is it that 20 months is generally too long regardless of UFJ FG's circumstances and that there is room for a shorter injunction? SHINTANI, 金融・商事判例 Kin'yū Shōji Hanrei, *supra* note 13, 61, 63. Regarding the 6-month negotiation period stipulated in the template used in Japanese practice, ISHIGURO, *supra* note *, 47. See also *infra* note 109.

exactly, was the potential harm? What did the Supreme Court's balancing and denial of a preliminary injunction mean for the parties and, more generally, for Japanese society at the time?[21]

Whether because the case concerned trade secrets related to the merger or because of the differences between the emergent procedure and ordinary civil proceedings in an adversary hearing, the fact remains that the Supreme Court did not explicitly address the circumstances and difficulties faced by UFJ FG in the contemporary environment.[22]

IV. SOCIAL DIMENSIONS OF THE CASE

1. Approach to the Case as Social Phenomenon

The text of the Supreme Court decision does not provide us with sufficient clues to examine how the balance was struck or the circumstances in as much as they were thought to favor UFJ FG. In order to understand this point, it becomes necessary for us to address the case's context and social circumstances ourselves. While such an examination cannot directly reveal the circumstances as the Supreme Court considered them, it can indirectly indicate what the Supreme Court may have considered.

As a historical event, the case is situated in a contemporary context, and there is no doubt that the Supreme Court was in some ways aware, through its review of the case file and facts in the public domain. This awareness led to the Supreme Court's suggestions for the difficult situation in which UFJ FG found itself although its decision gives no detailed explanations of that situation.

To get at the substance of the faintly perceptible consideration the Supreme Court's decision paid to the UFJ side, we have no choice but to supplement our awareness of the social context on our side. Since we cannot directly clarify the Supreme Court's perceptions, there will of course be an unavoidable cognitive gap between what the Supreme Court actually thought and our own direct perceptions. However, in order to clarify the meaning of this Supreme Court decision and assess the reactions of academia and practitioners and the characteristics of Japanese society that they illuminate, we have no choice but to challenge the perception of this case as a social phenomenon anyway. At the very least, we can hope to gain a more accurate understanding of one possible social implication of this decision.

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21 For analysis regarding how the Supreme Court decision coordinated the necessity requirement for preliminary injunctions, NAKAHIGASHI, *supra* note 15, 49–51 (suggesting the decision may be seen as a status-quo-type decision because it is overly influenced by already-accomplished facts). See also ISHIGURO, *supra* note *, 53, 59.

22 KAMIYA, *supra* note 13, 196.

2. Social Background of the Case

a) UFJ's crisis and self-rehabilitation plan

The case, broadly speaking, regards the breach of agreement. More specifically, it regards the breach of a *bona fide* consultation agreement, in particular for the negotiation of a merger between banks. Focusing on this last element – a banking merger – might be a window from the legal aspects of the case onto the case's deeper social dimensions.[23]

To look at and understand the case as a social phenomenon, the first element to consider is why UFJ FG decided to sell UFJ Trust Bank to STB: UFJ FG was concerned with its own financial difficulty. After the collapse of the "bubble economy" and the Japanese financial crisis of the 1990s and the wave of restructuring in Japan's banking sector, UFJ (United Financial of Japan) Bank itself was established through the merger of Tōkai Bank and Sanwa Bank in 2002. Now one of the biggest financial groups in Japan, UFJ FG faced financial difficulties from the beginning due to non-performing loans owed by major borrowers like Daiei, Sōjitsu (Nisshō-Iwai and Nichimen), Daikyō, Misawa-Home and so on.[24] Its capital adequacy ratio was nearing the 8-percent threshold for an international banking operation in accordance with the global standard.

In this difficult situation, UFJ FG chose not to pump the government for more public funding[25] or to retreat from international operation[26], but chose instead to realize a capital increase as a way of self-rehabilitation,[27] for

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23 As general description about the background and the process of the case, NAKAHIGASHI/IKEDA, *supra* note 3, 12–32.

24 For UFJ FG's difficulties, MAEDA, *supra* note 4, 215 et seq.; NIHON KEIZAI SHINBUN-SHA, *supra* note 3, 24 et seq.

25 The infusion of public funds results in the government's acquisition of preferred shares. If dividends on the preferred shares are not realized for a certain period of time, voting rights arise, and government intervention in management becomes more pronounced, in effect nationalizing the company. The example of Resona was kept in mind in the financial sector at that time. For the case of Resona Bank, MAEDA, *supra* note 4, Chapter 1; R. KAMIKAWA [上川龍之進], 小泉改革の政治学 [Politics of Koizumi's reform] (2010) 59–65; NIHON KEIZAI SHINBUN-SHA, *supra* note 3, 34–35; A. TAKAHASHI [高橋温], 金融再編の深層 [Deep Layer of Financial Industry Reconstruction] (2013) 181.

26 There were concerns that UFJ's business partner Toyota would be hindered in its international business operations.

27 A securities firm told UFJ FG that it could raise yen 400 billion on the market, NIHON KEIZAI SHINBUN-SHA, *supra* note 3, 26. Subsequently, a plan for a capital increase was finalized, with this securities firm as lead underwriter. After the business improvement order issued in June, the firm refused to underwrite the company, allegedly due to difficulties in fund-raising.

which it estimated that yen 7 000 billion would be necessary. It planned to raise yen 4 000 billion by way of a capital increase (stock issue) and the other yen 3 000 billion by selling UFJ Trust to STB. To execute this initial plan, the three legal entities that comprised UFJ FG concluded the aforementioned Basic Agreement with STB in May 2004.

b) Social context: Burst of the bubble economy and pressure to accelerate the resolution of bad debt

UFJ FG's substantially insolvent situation – even though insolvency had not yet been formally declared – and its rehabilitation planning are deemed as the final stage of reconstruction of the Japanese financial system after the crisis of the 1990s. Before the financial crisis, banks under the traditional financial system in Japan were the core of both corporate finance and governmental economic policy, called the "main banking system". For banks were so important that Japanese government policy was always to enact rescue measures to stave off bankruptcy under what was called the "convoy system". For instance, when any bank incurred financial difficulties, the government would actively seek out a partner for merger, the effort being regarded as one of the measures to rescue the insolvent bank. The government regarded mergers as a tool for avoiding the bank's bankruptcy.

After the collapse of the bubble economy, Japanese banks in the 1990s suffered seriously under non-performing loans while they were compelled at the same time to survive global competition caused by financial deregulation under severe international standards. In the 1990s – for the first time after World War II – some large banks in Japan entered insolvency, giving an impression that the myth of "banks never go bankrupt" had ended. Some have mentioned this phenomenon as symptomatic of the change in governmental financial and banking policy under the convoy system.[28] What matters in this regard is whether the policy or mechanisms of the previous system has really changed, and if so, in what manner (see IV.4.d)).

Japanese banks started to undergo mergers to survive in the new era of financial markets open to global competition. From 1999 to 2002, mergers created the four biggest banks in Japan. UFJ FG, the last of these, was also regarded as the conclusion of this movement. The Tōyō Trust Bank, which became the very target of sale in this case, was one of the units that merged into UFJ FG.

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28 N. YANAI [箭内昇], 水面から出るか、沈むか　ポスト冬の時代 "メガバンクの計算" （インタビュー） [Get out of the Water or Drown – the "Megabank Calculation" of the Post-Winter Era], in: Nakahigashi [中東] (ed.), UFJ vs. 住友信託 vs. 三菱東京 M&A のリーガルリスク [UFJ vs Sumitomo Trust vs Mitsubishi Tōkyō Legal Risk of M&A] (2005) 6, 11.

The government-led restructuring of Japan's financial system, which began in the early 1990s with the clearing of non-performing loans through the injection of public funds and the "financial Big Bang" and restructuring of financial sectors, had by the late 1990s settled down to a certain extent, but things began to move rapidly again in the 2000s.[29]

Under the KOIZUMI Government, which came to power in April 2001, Heizō TAKENAKA, who became Minister of Economy and Finance, emphasized the problem of major companies with bad debts and indicated that he would do more than ever to dispose of the financial institutions' bad loans and would not hesitate to inject public funds for this purpose.[30]

At the US–Japan summit in June 2004, KOIZUMI reiterated his commitment to proceed with the disposal of non-performing loans, and the halving of non-performing loans at financial institutions by the fiscal year ending 31 March 2005 became an international commitment. A climate was created in which another injection of public funds was unavoidable in order to dispose of the bad loans.[31]

In January 2002, a letter arrived from G. W. BUSH to remind KOIZUMI of his commitment.[32] In May 2002, the growing influence of the Financial Services Agency became apparent with the nationalization of Resona Bank.[33] Hakuo YANAGISAWA,[34] long cautious about continuing to inject public funds, was removed from his post in September 2002 in a cabinet reshuffling, and TAKENAKA was appointed Minister for Financial Services.[35] In October 2002, TAKENAKA launched the Financial Recovery Program[36],

29 The following narrative owes much to KAMIKAWA, *supra* note 25, Chapter 2.

30 NIHON KEIZAI SHINBUN-SHA, *supra* note 3, 172.

31 TAKAHASHI, *supra* note 25, 146, M. SASAKI [佐々木実], 竹中平蔵　市場と権力 [Takenaka Heizō – Market and Power] (2020) 180.

32 SASAKI, *supra* note 31, 193.

33 In Resona's resolution process, the bank was bailed out with public funds, but the shareholders were not held responsible. The stock price of the bailed-out bank rose, and the shareholders of the old bank reaped profits from the sell-off. The bailed-out bank is nationalized and later sold to new shareholders at a lower price. There is no doubt that foreign institutional investors welcomed such a scheme. KAMIKAWA, *supra* note 25, 81 note 147. See also *infra* note 89.

34 Hakuo YANAGISAWA was Chairman of the Financial Reconstruction Commission (1998–1999, and 2000–2001) following his term as the Minister of State for Financial Reconstruction from 1998 until the establishment of the Commission and was Minister of State for Financial Services from January 2001 to September 2002. He stepped down due to a disagreement with the minister in charge of economic and fiscal policy, Heizō TAKENAKA, who took the position.

35 H. YANAGISAWA [柳澤伯夫], 平成金融危機 [The Financial Crisis of the Heisei era] (2021) 332–333; SASAKI, *supra* note 31, 192–199. For Heizō TAKENAKA's connec-

after which pressure increased on the major financial institutions of UFJ, Mizuho, Sumitomo Mitsui and Tōkyō Mitsubishi. In particular, UFJ FG, which was behind in dealing with its large portfolio of non-performing loans, came under close scrutiny from the FSA.

In addition to the 30% rule[37] and the risk of nationalization through the injection of public funds already in place in the 1990s, the 8% capital requirement under the international financial regulations, especially Basel II (2004) and the halving of non-performing loan by March 2005 under TAKENAKA's Financial Reconstruction Program were not easy targets.[38]

Among the measures UFJ FG considered were a further request for public funds; a withdrawal from international operations at a rate of less than 8-percent capital adequacy ratio; and a self-initiated restructuring through a capital increase. Further public funds were not requested on the grounds that failure to pay dividends on government-owned preference shares would effectively lead to nationalization of the group, giving the government voting rights and enabling it to intervene in management. Suspending

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tions to the US financial and political worlds, SASAKI, *supra* note 31. On US support for the TAKENAKA Plan, SASAKI, *supra* note 31, 225 et seq.

36 The Financial Reconstruction Program was supposed to 1) strictly limit the inclusion of deferred tax assets in equity capital and 2) ensure that audits by auditing firms are appropriate. The first point was revised and settled in a toned-down form after it was opposed by major financial institutions as being too strict and having a large impact on them. However, the second point allows for a stronger channel of indirect pressure by the FSA on audit firms dealing with bank audits. For the contents of the Financial Recovery Program and the behind-the-scenes conflicts and coordination leading up to its release, KAMIKAWA, *supra* note 25, 51–56. NIHON KEIZAI SHINBUN-SHA, *supra* note 3, 123–124; SUDA, *supra* note 14, 91; SASAKI, *supra* note 31, 205, 214, 232–233; T. KIMURA [木村剛], 竹中プランのすべて [The whole picture of Takenaka's plan] (2003).

As a close associate of TAKENAKA, Takeshi KIMURA became an advisor to the FSA and contributed greatly to the implementation of the financial revitalization program by actively encouraging financial institutions to dispose of their non-performing loans. He later established the Japan Development Bank, serving as its president and chairman. Later, in September 2009, the bank collapsed, and KIMURA was arrested, indicted, and convicted for evading an inspection under the Banking Act. For Takeshi KIMURA and the establishment of Incubator Bank of Japan, Limited, see SASAKI, *supra* note 31, 203; SUDA, *supra* note 14, 101–106. For KIMURA's gain from the sale of shares immediately prior to the bankruptcy, SASAKI, *supra* note 31, 413. Regarding the problems pointed out by the verification report on the issuance of a banking business license to the bank, SASAKI, *supra* note 31, 415.

37 See *infra* note 77.

38 Regarding the opposition of the financial community to the TAKENAKA Plan, TAKAHASHI, *supra* note 25,167, 173; SASAKI, *supra* note 31, 223–225. SUDA, *supra* note 14, 92.

international operations would have affected the international business of UFJ FG's client Toyota.[39] And so what was eventually adopted was the self-rehabilitation plan of a capital increase through the stock market and sale of UFJ Trust Bank.[40] This historical context constituted the build-up to UFJ FG's initial plan.

3. Points that Remain Unclear

a) UFJ FG's choice of STB in the initial self-rehabilitation plan

UFJ FG's actions, including the establishment of the initial self-rehabilitation plan, subsequent abandonment of the Basic Agreement, and the attendant circumstances are unclear and puzzling in many respects.

First of all, it is unclear why UFJ FG should have initially chosen STB. STB was not the only candidate; why not shop its trust division around to another financial group, such as MT FG or Sumitomo Mitsui FG (referred to as SM FG hereinafter)? By selling to STB, which had a policy of specializing in trust banking, rather than to other FGs competing with itself, UFJ FG may have been seeking its own way to survive as a financial group. STB had a very particular standing among Japanese banks, even during that period of financial crisis, for its policy of independence, sound business, and continuing profitability, having already completed full repayment of public funding it had received at the time.[41]

But MT FG could have been a strong candidate, too, and in fact had approached UFJ FG for merger even before UFJ FG concluded the Basic Agreement.[42] MT FG was seen as an easy target for foreign capital, as an amendment to the Companies Act had made it easier for foreign investors

39 Cf. NIHON KEIZAI SHINBUN-SHA, *supra* note 3, 43.

40 It did not choose to increase its capital through loans from its business partners, as Mizuho FG did. Mizuho pleaded with its business partners to increase its capital, which would be used as a source of funds to dispose of its non-performing loans. MAEDA, *supra* note 4, 216. NIHON KEIZAI SHINBUN-SHA, *supra* note 3, 173–174. UFJ FG was not without this choice. See *infra* note 50.

41 For features of STB, NIHON KEIZAI SHINBUN-SHA, *supra* note 3, 242. For STB President TAKAHASHI, MAEDA, *supra* note 4, 16. The government-led plan for STB to merge with and rescue the bankrupt Long-Term Credit Bank of Japan, Ltd. and its failure, MAEDA, *supra* note 4, 160–163. TAKAHASHI, *supra* note 25, Chapter 2.

42 MAEDA, *supra* note 4, 221. For the consideration of the merger between Sanwa Bank and Bank of Tōkyō-Mitsubishi at that time in 1999, N. ONO [小野展克], 竹中平蔵の戦争 [Heizō Takenaka's Battle] (2005) 191.

to acquire Japanese companies,[43] including in the financial sector. Increasing share value was a pressing issue for MT FG.[44]

UFJ FG had a close, collaborative relationship with MT FG on various projects in various sectors, for example in master trusts; Mitsubishi Trust Bank and UFJ Trust Bank had joined Nippon Life and others to form the Master Trust Bank of Japan, which was in competition with Japan Trustee Services Bank, which STB had joined.[45]

Any merger between STB and UFJ Trust Bank would have led to twists and turns in the master trust sector.[46] Furthermore, it was essential for UFJ FG to cooperate with MT FG to solve the problems of Sōjitsu (Nisshō-Iwai and Nichimen), a particularly large borrower plagued by bad loans.[47] The choice of STB had the potential to hinder the existing, cooperative relationship between MT FG and UFJ FG. In view of the above, it must be said that UFJ FG's choice to sell its trust division to STB still leaves some points unclear.

b) Unclear logic of UFJ FG's shift to merging with MT FG

There is another question: Why did UFJ FG break the Basic Agreement and change its posture to seeking a comprehensive merger with MT FG? In this regard, the Supreme Court, following the factual record established by the lower courts, held that "[UFJ FG] made a business judgment that, in order for the [UFJ FG] to overcome the current difficulties, there was no option for [UFJ FG], including [UFJ Trust Bank], but to call off the Basic Agreement and merge with [MT FG]." However, there is no mention or examination of whether this business judgment was reasonable or why it should have been respected when the Supreme Court discussed the legal effect of breaching the Basic Agreement.

As discussed below, it is generally said that as of June 2004, the initial self-rehabilitation plan became ineffective and other measures needed to be looked for.[48] But why not look for other methods of raising capital as a

43 On pressure from the US government believed to have been behind the revision of the Commercial Code and the enactment of the Corporate Law in Japan, ISHIGURO, *supra* note *, 66.

44 NIHON KEIZAI SHINBUN-SHA, *supra* note 3, 21. NAKAHIGASHI/IKEDA, *supra* note 3, 18.

45 For The Master Trust Bank of Japan, Ltd., TAKAHASHI, *supra* note 25, 153.

46 NIHON KEIZAI SHINBUN-SHA, *supra* note 3, 48–49.

47 NIHON KEIZAI SHINBUN-SHA, *supra* note 3, 74.

48 SUDA, *supra* note 14, 34, points to the avoidance of having UFJ FG's capital adequacy ratio fall below 8% in its April-June 2004 financial results as the reason for at least publicly maintaining the plan to sell UFJ Trust to STB until the 13 July notice to break the Basic Agreement. If this explanation is acceptable, it means that

modification of the initial plan? Despite the fact that a similar method of raising capital was being considered around 2003 in the case of Mizuho FG, why was it not adopted at that time,[49] and why was it not adopted as of June/July 2004?[50]

Assuming the original plan would not have worked, why did UFJ FG make the immediate and total shift to a comprehensive merger?[51] Was it not possible and acceptable to merge the remaining units into other financial groups while maintaining its commitment to sell the retail trust business to STB?[52] Indeed, MT FG resisted the idea of divesting itself of UFJ's trust

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UFJ FG had been looking at a full merger with MT FG since the end of June or even earlier. Prior to the meeting at the end of June, UFJ FG leaders visited the Bank of Tōkyō-Mitsubishi head offices in late May. SUDA, *supra* note 14, 37. On 15 June, AZEYANAGI of Mitsubishi-Tōkyō visited the Industrial Revitalization Organization, SUDA, *supra* note 14, 47. The general explanation that the administrative action and the suggestion of possible criminal charges on 18 June forced the abandonment of the initial self-rehabilitation plan may also be open to question. Cf. YAMADA, *supra* note 13, 22; SHINTANI, 判例タイムズ Hanrei Taimuzu, *supra* note 13, 101.

49 For the fact that they did not adopt it, ONO, *supra* note 42, 161, 167.

50 There seemed to be a possibility of support by the business community in the Chūbu region, led by Toyota. On 25 November 2002, Toyota Chairman OKUDA made a statement that could be interpreted as positive about supporting UFJ FG. NIHON KEIZAI SHINBUN-SHA, *supra* note 3, 43. SUDA, *supra* note 14, 143. However, it is reported that within UFJ FG, this method of raising capital was rejected as insufficient. NIHON KEIZAI SHINBUN-SHA, *supra* note 3, 43. On the other hand, UFJ FG is said to have made a decision to wait until the time came to increase its ordinary shares rather than underwrite a capital increase with preferred shares for Toyota. NIHON KEIZAI SHINBUN-SHA, *supra* note 3, 175. It is reported that Toyota rejected the capital increase in March 2003. Then in 2004, it sent Iwao ŌKISHIMA from its subsidiary Hino Motors to UFJ FG as an outside director. SUDA, *supra* note 14, 143–152. Toyota's attitude may have been subject to the conflict within UFJ FG between former Sanwa Bank and former Tōkai Bank (which had strong ties to Toyota). For the Chūbu business community's frosty attitude toward UFJ FG as of June 2004, NIHON KEIZAI SHINBUN-SHA, *supra* note 3, 176. There appears to be room for examination of the decision not to adopt a capital-increase strategy by pleading with business partners like in the case of Mizuho and the reasons for that decision, including the conflict between the former Sanwa and Tōkai units of UFJ FG. On the possibility of the former Tōkai team's turnaround after the decision to merge with Mitsubishi-Tōkyō, NIHON KEIZAI SHINBUN-SHA, *supra* note 3, 180. On the relationship between UFJ FG and the Chūbu business community, SUDA, *supra* note 14, Chapter 4.

51 For consideration at UFJ FG, NIHON KEIZAI SHINBUN-SHA, *supra* note 3, 41–43

52 Many argue that UFJ FG had to give up on the capital increase when a business improvement order was issued in June 2004 and the possibility of criminal charges was suggested. NAKAHIGASHI/IKEDA, *supra* note 3, 18.

division; resistance by the Mitsubishi Trust Bank, a unit of MT FG, was particularly fierce.[53] In response, MT FG as a whole adopted the position that the merger with UFJ FG must include UFJ Trust Bank.

However, a two-stage process was also envisaged whereby the units of UFJ FG other than UFJ Trust Bank would be merged for the time being while maintaining the Basic Agreement, and then the merger of the trust division would take place following the expiry of UFJ FG's obligations under the Basic Agreement.[54] In other words, breaching the Basic Agreement was not essential to the business judgment of preferring an overall merger with MT FG.

Moreover, why was the full merger with MT FG concluded after UFJ FG signed and then breached the Basic Agreement? As mentioned above, MT FG and UFJ FG were in contact before the Basic Agreement with STB was concluded as well as after it was concluded but before it was formally abandoned.[55] Two days after UFJ FG gave notice that it was cancelling the agreement on July 14, it had already signed an agreement with MT FG toward the integration of the two groups.

UFJ FG's negotiations with MT FG and STB at the same time already constituted a breach of the Basic Agreement.[56] The unclear point is why. Who engaged in unfaithful dealing of this kind? This point suggests the possibility that there might have been discrepancies or tension within the internal management of UFJ FG.[57]

Many also suppose this was why UFJ opted for a full-scale merger and was forced to break the Basic Agreement. However, as noted (*supra* note 50), there is room for verification as to whether a Mizuho-type capital increase truly became impossible.

53 For strong resistance from Mitsubishi Trust Bank, MAEDA, *supra* note 4, 227. NIHON KEIZAI SHINBUN-SHA, *supra* note 3, 47–48. Mitsubishi Trust showed serious concern about the absorption of UFJ Trust into STB, which would have made a trust bank bigger than it. In this regard, there was always incentive for MT FG to intervene and make UFJ FG shift to negotiating with it instead.

54 NIHON KEIZAI SHINBUN-SHA, *supra* note 3, 47, 83.

55 NIHON KEIZAI SHINBUN-SHA, *supra* note 3, 16, 44, 50.

56 NAKAHIGASHI, *supra* note 15, 41–42 (suggesting director liability in this regard.)

57 Since the merger and establishment of UFJ FG, there were whispers of a conflict between the former Sanwa and Tōkai units. The sequence of events leading up to the bankruptcy of UFJ and its integration into MT FG was triggered by an insider's tip-off that UFJ was evading inspection during the October 2003 special inspection of UFJ by the FSA. The negative campaign and newspaper reports on the UFJ scandals since the beginning of 2004 (see *infra* note 84) and the relationship between UFJ FG and Toyota, which has strong ties to the Chūbu business community (see *supra* note 50), may also have been influenced by problems within UFJ FG.

c) Choice between Sumitomo Mitsui and Mitsubishi Tōkyō

There are further questions about UFG FG's attitude. Even if it were to opt for a full merger, why MT FG of all options?[58] This issue becomes apparent when SM FG comes forward to merge with UFJ FG.[59] After UFJ FG's unilateral cancellation of the Basic Agreement and agreement with MT FG to start merger negotiations, SM FG intervened as a friend of STB and proposed a merger with UFJ FG on better terms in terms of share ratio for merger.[60] UFJ FG refused this offer and kept its choice of MT FG while a kind of poison pill against SM FG's proposal was put into action.[61] UFJ Bank, the major banking unit of UFJ FG, issued preferred stock to MT FG. Initially, these shares did not represent the right to vote but rather the right to convert them into voting stock (35 percent) if anyone (like SM FG) were to acquire a 20-percent share of UFJ Bank. This scheme worked as a kind of poison pill against SM FG's bear hug. This course of action by UFJ FG's managers looks contrary to the interests of UFJ HD's shareholders, at least in terms of the share ratio for merger.[62]

In explaining that the obligation not to negotiate with a third party survived the unilateral cancellation of the Basic Agreement by UFJ FG, the Supreme Court, as noted above, held that

"in light of the overall history of this case, it still cannot be said that uncertain factors have completely been lost, and according to common social standards, it is impossible to go so far as to judge that there is no likelihood that a final agreement would be made."

Regarding the conflict between the former Sanwa and Tokai units within UFJ FG, SUDA, *supra* note 14, Chapter 3; ONO, *supra* note 42, 158.

58 ONO, *supra* note 42, 190 tells of a proposal among FSA officials to seek a merger with UFJ FG and Resona. See also NIHON KEIZAI SHINBUN-SHA, *supra* note 3, 36. UFJ also requested a meeting with Eiji HOSOYA, Chairman of the Resona Group. NIHON KEIZAI SHINBUN-SHA, *supra* note 3, 30.

59 Nihon Keizai Shinbun-sha, *supra* note 3, 83 et seq.

60 UFJ had also approached SM FG as of June 2004. Sumitomo Mitsui did not agree to the merger at that time, and it was in July 2004 that it submitted a merger proposal to UFJ FG. There are many unknowns regarding the contacts (subject, content, and timing of meetings) between UFJ FG and SM FG in June. In any case, at this point, SM FG, and especially President NISHIKAWA, did not initiate positive action. The puzzling points remain despite NISHIKAWA's own explanation (see Y. NISHIKAWA [西川義文], ザ・ラストバンカー [The Last Banker] (2013) 213 and TAKAHASHI, *supra* note 25, 216–220). MAEDA, *supra* note 4, 222–226; ONO, *supra* note 42, 189; SUDA, *supra* note 14, 53.

61 For details of the measures taken by UFJ FG to prevent the takeover by SM FG, NAKAHIGASHI/IKEDA, *supra* note 3, 29; NIHON KEIZAI SHINBUN-SHA, *supra* note 3, 105–107.

62 NAKAHIGASHI, *supra* note 15, 52 et seq.

Immediately beforehand, the Supreme Court decision touches on the negotiations and agreement between UFJ FG and MT FG to integrate their businesses; but parallel to this existed a rival, SM FG, who might have prevented this integration with MT FG. It is difficult to believe that the Supreme Court would ignore these facts, which were, so to speak, public knowledge.[63]

Hence, in such a fluid and, as the court characterized it, "uncertain" situation, why should UFJ FG stick with MT FG? The explanation that the agreement with MT FG cannot also be broken following the case with STB – because it would cost UFJ FG credibility – is not necessarily convincing.[64] To borrow a phrase from the Supreme Court decision, in view of UFJ FG's difficult, fluid or "uncertain" situation, couldn't a second reversal also be assessed as an unavoidable "business judgment" from the perspective of overcoming the situation and escaping insolvency, and could a social atmosphere acknowledging and supporting such a decision not be created?[65] (See IV.4. on the social atmosphere fostered at the time.)

Should UFJ FG's preferred merger partner be MT FG or SM FG? Different sources report different positions on this point, some stating that within UFJ FG, SM FG was initially preferred over MT FG.[66] But another assessment is that MT FG was assumed to be the merger partner from the outset.[67] Since June, UFJ FG had reportedly been simulating merger scenarios with both. Some explain that MT FG was chosen for its healthier finan-

63 H. KOBAYASHI [小林秀之], 最高裁仮処分却下決定の衝撃 [The impact of the Supreme Court's Dismissal of the Injunction], in: Nakahigashi [中東] (ed.), UFJ vs. 住友信託 vs. 三菱東京　M&A のリーガルリスク [UFJ vs Sumitomo Trust vs Mitsubishi Tōkyō Legal Risk of M&A] (2005) 135 states that this part of the Supreme Court decision, unlike the explanation in the main text, refers to the fact that there was also the possibility of a two-step integration (temporary pendency of the integration of the UFJ Trust portion) if a preliminary injunction decision was issued.

64 According to the Nihon Keizai Shinbun, 2 August 2004 morning edition, UFJ FG has also committed to exclusive negotiations with Mitsubishi Tōkyō in a memorandum of understanding signed on 16 July 2012, which means that at this point UFJ FG was so bold as to enter into an obligation incompatible with exclusive negotiations under the Basic Agreement with STB. NAKAHIGASHI, *supra* note 15, 61. Wouldn't that be a credibility issue for UFJ FG?

65 As long as there was an integration proposal from Sumitomo Mitsui, UFJ FG management had to be required to compare and contrast it with the integration with MT FG. In some scenarios the executives would have been required to reverse the negotiated agreement with MT FG. For Fiduciary Out, SHIMIZU, *supra* note 13, 75 note 9; MORITA, *supra* note 11, 193.

66 MAEDA, *supra* note 4, 222; TAKAHASHI, *supra* note 25, 211; ONO, *supra* note 42, 16; NIHON KEIZAI SHINBUN-SHA, *supra* note 3, 27.

67 Regarding the rejection of SM FG by the former Sanwa unit within UFJ, NIHON KEIZAI SHINBUN-SHA, *supra* note 3, 45.

cials,[68] but other factors would also have led to the choice, such as the overlap of large borrowers and the existing joint venture frameworks. On the other hand, there were also factors favoring SM FG, such as the terms of integration and the company's corporate culture. Financial soundness is unlikely to have been the only decisive factor.

What was the reason behind this choice? Who made such a decision within UFJ FG? Were there any pressures external or internal? All these points are unclear.[69]

d) The power of the FSA: UFJ FG abandons self-rehabilitation

Regarding the reason for UFJ's change of mind and cancellation of the Basic Agreement, the Supreme Court merely suggested that UFJ FG had difficulties keeping the Basic Agreement at that moment. In fact, UFJ FG initially wanted, but reportedly was unable, to realize its own self-rehabilitation through the initial plan of selling its trust division to STB. Critical in this regard were regulatory actions taken by FSA that triggered the financial difficulty of UFJ FG.

In 2001, the FSA was poised to introduce special inspections to accelerate the disposal of non-performing loans.[70] UFJ FG was subject to a follow-up inspection by inspector MEGURO. In October 2003, an insider revealed

68 NIHON KEIZAI SHINBUN-SHA, *supra* note 3, 73. On the soundness of MT FG's finances, SUDA, *supra* note 14, 40–41. UFJ FG emphasized the certainty of capital increase support from MT FG within the timeframe; NIHON KEIZAI SHINBUN-SHA, *supra* note 3, 188.

69 It is also not entirely clear why SM FG withdrew from the merger battle. NISHIKAWA, then president of SM HD, recalls that the game was already decided at the time of the yen-700-billion capital increase and introduction of the poison pill (NISHIKAWA, *supra* note 60, 219). In fact, however, SM FG did not immediately abandon the UFJ FG merger either after the Supreme Court decision or after the capital increase by MT FG to UFJ Bank. On 7 October 2004, SM HD announced the acquisition of 300 UFJ HD shares. The acquisition was said to be for the purpose of acquiring the right to make proposals at the general meeting of shareholders; NAKAHIGASHI/IKEDA, *supra* note 3, 30. It was not until 25 February 2005 that Sumitomo Mitsui FG officially withdrew its takeover bid. During this period, an inspection by the FSA, with FSA Inspector Mr. MEGURO, forced SM FG to revise its financial results downward significantly for the fiscal year ending 31 March 2005; KAMIKAWA, *supra* note 25, 68. "金融機関・中小企業を追い詰める金融庁の横暴" [The tyranny of the Financial Services Agency that corners financial institutions and small and medium-sized enterprises], 週刊ダイヤモンド [Weekly magazine Diamond], 4 July 2005, 32. In March 2005, NISHIKAWA (reportedly planned from the beginning, NISHIKAWA, *supra* note 60, 215) stepped down as president.

70 H. GOMI [五味廣文], 金融動乱 [Financial Turmoil] (2021) 72–80.

that UFJ Bank had been evading inspections by withholding documents.[71] In January 2004, the FSA resumed inspections of UFJ FG's financial condition and management, citing various grounds and employing various methods including regular inspections, special inspections and inspections of its large-debt-management systems.[72] The FSA then issued a notice of inspection results (which should have been reflected in the accounts as of the end of March 2004) and required UFJ FG to submit a report under Article 24 of the Banking Act.[73]

As a result, UFJ FG was forced to make business judgements: the resignation of certain managers due to two consecutive terms of losses and to the bank having run afoul of the 30% rule; the initial self-rehabilitation plan involving the sale of UFJ Trust, which, to reiterate, was to avoid suspension of international operations due to a capital adequacy ratio below 8% and nationalization through the conversion of the government's preferred stock into ordinary shares with voting rights.

Decisive during this period was the change in attitude of the auditing firm Chūō Aoyama Audit Corporation with regard to the treatment of deferred tax assets (i.e., whether the convention of including five years' worth of deferred tax assets in equity capital should continue to be observed). The audit firms took a more sympathetic stance towards the FSA.[74]

Changes in the auditor's methods and standards resulted in significant changes to UFJ FG's finances, with the financial group now closing in the red and its capital adequacy ratio falling below 8 percent.[75] UFJ FG's response

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71 ONO, *supra* note 42, 142–153; GOMI, *supra* note 70, 128; KAMIKAWA, *supra* note 25, 65; NIHON KEIZAI SHINBUN-SHA, *supra* note 3, 128–130; SUDA, *supra* note 14,76, 82–88.

72 For the categories of ordinary inspection, special inspection, and inspections of a bank's credit risk management system for large borrowers, NIHON KEIZAI SHINBUN-SHA, *supra* note 3, 136. For the latter kind of inspection, ONO, *supra* note 42, 181; MAEDA, *supra* note 4, 219; NIHON KEIZAI SHINBUN-SHA, *supra* note 3, 135-136.

73 Initially, UFJ FG reported a profit in its financial results for the fiscal year ending 31 March 2004, although this was revised downward in response to the FSA's inspection report. However, in May, the FSA requested a report under Article 24 銀行法 (*Ginkō-hō* [Banking Law], Law Nr. 59/1981) claiming that it did not fully reflect the inspection results.

74 For deferred tax assets, KAMIKAWA, *supra* note 25, 76 note 92. See SASAKI, *supra* note 31, 249, who cites the inspector's testimony regarding the possibility of arbitrary manipulation of the accounting treatment of deferred tax assets. SASAKI, *supra* note 31, 293 reports that a certified public accountant testified that there was a change in FSA policy during the UFJ FG inspection process.

75 On the use of auditing firms to pressure financial institutions to accept injections of public funds under the leadership of TAKENAKA, Minister of State for Financial

was to draw up the initial self-rehabilitation plan including the sale of UFJ Trust[76] and announce the resignation of some of the management team.[77]

However, the FSA's oversight measures did not stop there: on 18 June 2004, an administrative action was taken against UFJ FG in the form of a

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Services, KAMIKAWA, *supra* note 25, 58–59, 80 note 135; NIHON KEIZAI SHINBUN-SHA, *supra* note 3, 35; SASAKI, *supra* note 31, 250.

In the audit firms of the time, the partners (representative partners) were jointly and severally liable without limit. The partner also assumed the risk in the event that the audit firm lost a claim for damages. Akio OKUYAMA, the representative partner of Chūō Aoyama Audit Corporation, which was responsible for auditing UFJ FG, served as the chairman of the Japanese Institute of Certified Public Accountants (JICPA) and issued a notice on stricter auditing standards at the request of TAKENAKA; SUDA, *supra* note 14,167; SASAKI, *supra* note 31, 251; KAMIKAWA, *supra* note 25, 67.

The role played by audit firms in the process leading up to the bankruptcy and nationalization of Resona Bank, KAMIKAWA, *supra* note 25, 59–61; SASAKI, *supra* note 31, 253–283; A. YAMAGUCHI [山口敦雄], りそなの会計士はなぜ死んだのか [Why did Resona's accountant die?] (2003). It is highly likely that a similar approach was used for UFJ FG; KAMIKAWA, *supra* note 25, 67–68; ONO, *supra* note 42, 182; NIHON KEIZAI SHINBUN-SHA, *supra* note 3, 140. Is the "financial official" who appears in the UFJ FG case the same Takeshi KIMURA who appears in the *Resona* case? KAMIKAWA, *supra* note 25, 66–67; SASAKI, *supra* note 31, 273.

76 Chūō Aoyama Audit Corporation required UFJ FG to sell UFJ Trust as a condition for allowing the inclusion of five years' worth of deferred tax assets in its own capital; ONO, *supra* note 42, 185.

77 In 1999, the Financial Reconstruction Committee, the predecessor of the FSA, established the so-called 30% rule as a guideline. Banks injected with public funds are required to submit a management soundness plan to the Financial Services Agency. If a bank falls more than 30% short of the final profit target indicated in that plan, the FSA can require a report from the bank and issue a business improvement order; NIHON KEIZAI SHINBUN-SHA, *supra* note 3, 138; ONO, *supra* note 42, 160.

Under TAKENAKA, Minister of State for Financial Services, this rule was tightened and new guidelines were established in April 2003. It was generally understood that once a bank had received a business improvement order, it would be required to replace its management if it again fell below 30% or more for two consecutive terms; NIHON KEIZAI SHINBUN-SHA, *supra* note 3, 138–139; SUDA, *supra* note 14, 93. In August 2003, the Financial Services Agency had already issued the first business improvement orders against 15 banks, including UFJ, and UFJ FG managers were left with no choice. The series of responses on the part of UFJ FG (KAMIKAWA, *supra* note 25, 65–66), including the avoidance of inspections, reveal the persistent efforts of UFJ FG managers to avoid violating the 30% rule at all costs; NIHON KEIZAI SHINBUN-SHA, *supra* note 3, 139. The threat of a change in management due to the application of the 30% rule stood in the background. Furthermore, there was a conflict within UFJ FG in the background; SUDA, *supra* note 14, 109. See *supra* note 49.

In contrast, regarding FSA's discretionary flexible stance, see *infra* note 80.

four-point business improvement order.[78] In addition, criminal charges were suggested against UFJ FG managers. The FSA pushed UFJ FG to realize further improvements with the threat of criminal prosecution.[79]

It is said that this series of governmental actions made it difficult for UFJ FG to pursue a capital increase on the market,[80] rendering the merger with STB (the other part of the initial plan) in vain as a means of rescuing

78 For the Business Improvement Order against UFJ FG, MAEDA, *supra* note 4, 217–219; KAMIKAWA, *supra* note 25, 67; NIHON KEIZAI SHINBUN-SHA, *supra* note 3, 39, 143–146.

79 Regarding criminal charges, ONO, *supra* note 42, 186, 194–197; NIHON KEIZAI SHINBUN-SHA, *supra* note 3, 27–28, 153–159. On 18 June 2004, Minister TAKENAKA mentions the possibility of criminal charges; NIHON KEIZAI SHINBUN-SHA, *supra* note 3, 42. However, criminal charges are not filed immediately. It was not until October 2004 that charges were actually filed. In the meantime, UFJ managers are placed in an extremely precarious position under the FSA's play of its criminal prosecution card, potentially a very powerful social enforcement mechanism for the FSA or anyone who could use it; KAMIKAWA, *supra* note 25, 69, 83 note 179; NIHON KEIZAI SHINBUN-SHA, *supra* note 3, 133.

During this period, further personnel changes within UFJ FG were realized as well as a series of developments stemming from Toyota's plan to acquire Misawa Homes, a UFJ Bank client with non-performing loans. Misawa Homes was forced to join the Industrial Revitalization Organization due to its bankruptcy and be integrated into Toyota, which had wanted to acquire the company from the beginning. The president of the subsidiary of Misawa Homes involved in this case is TAKENAKA's own brother. When TAKENAKA ran for the House of Councilors election, executives from a subsidiary of Misawa Homes HD and others joined his campaign; SASAKI, *supra* note 31, 406–410.

After overcoming the problems faced by the end-of-September interim financial results due to the capital increase of UFJ Bank by MT FG on 17 September 2004, criminal charges against UFJ managers were filed by the FSA on 7 October 2004. The charges were reportedly carried over to October, taking into account that the stock price at the end of September would affect the September interim results. ONO, *supra* note 42, 196.

80 It is said that due to the risk of criminal prosecution a securities company that had originally planned to underwrite the capital increase on the market, part of the initial self-rehabilitation plan, notified UFJ FG in late June that a public offering would not be possible; MAEDA, *supra* note 4, 221; NIHON KEIZAI SHINBUN-SHA, *supra* note 3, 28, 41. This is reported to explain why the capital-increase portion of UFJ FG's initial plan was unattainable; MAEDA, *supra* note 4, 220; SUDA, *supra* note 14, 39. However see also *supra* note 52. Even if foreign institutional investors (who are more concerned about compliance) will be more reluctant to invest in UFJ FG, can it be said that a public offering was off the table immediately? This reasoning is also questionable. At the very least, the plan to integrate UFJ FG and MT FG went ahead as is despite the criminal charges; NIHON KEIZAI SHINBUN-SHA, *supra* note 3, 115.

UFJ FG. Thus UFJ FG was supposed to give up on rehabilitating itself independently and accept the absorptive merger with another banking group, which was MT FG.

This narrative is not fully convincing. Even if it is accepted, it still does not explain why the FSA should have proceeded with inspection and sanctions while UFJ FG was trying to rehabilitate itself independently. Was the timing just a coincidence? Or was it an indirect and yet intentional intervention by the FSA to thwart the initial plan? It is difficult to cite evidence for any answer. Nevertheless, we can recognize that the FSA had substantial discretion in banking regulation.[81]

As a matter of fact, UFJ FG's financial crisis was also triggered by the FSA's discretional application of global standards of financial regulation. While the standards are global, their implementation is necessarily left to each country's government. At the time, the FSA had begun to tighten its interpretation and application of the accounting rules for non-performing loans and deferred taxes.[82] The abandonment of the initial plan and the crisis at UFJ FG were both triggered by the regulatory actions of the FSA.

4. Fostering a Social Climate

One of the triggers of the collapse of UFJ FG was a whistleblowing report on the evasion of the FSA inspection of October 2003. The subsequent developments in the relationship between the FSA and UFJ FG were reported by the Nikkei newspaper, probably based on leaks from the FSA side.[83] Starting in 2004, Tōkyō Shinbun (part of the same group as Chūnichi Shinbun, which had ties to what used to be Tōkai Bank) reported on a series of scandals at UFJ FG and on its bad loan issues.[84] Thus UFJ FG's critical situation became socially apparent. The media reported that a full-scale merger was unavoidable even though it meant UFJ FG would

81 The FSA also envisioned the possibility of a flexible response to the "clarification of management responsibility" through the application of the 30% rule, rather than simply requiring the resignation of the incumbent management team; this would have allowed the creation of a management structure that reflected the FSA's wishes; ONO, *supra* note 42, 172. See also *supra* note 77.

82 Regarding stricter evaluation methods for non-performing loans, SUDA, *supra* note 14, 93–94. See also *supra* notes 75 and 77.

83 SUDA, *supra* note 14, 107. Both the FSA inspection evasion report and the scoop on the planned merger between UFJ FG and Mitsubishi Tōkyō were reported by Nihon Keizai Shinbun. NIHON KEIZAI SHINBUN-SHA, *supra* note 3, 10, 130; SUDA, *supra* note 14, 22, 161.

84 SUDA, *supra* note 14, 142 (suggesting a link between the *Tōkyō Shinbun*'s series of reports and the Chūnichi Shinbun, which is based in the Chūbu region, and the Chūbu business community). See also *supra* note 57.

have to unilaterally cancel its agreement with STB[85]. This may have influenced the general public to be sympathetic to UFJ FG, which should have been held legally and morally responsible for its actions.[86]

As we have observed, there are still unclear points regarding the decision-making of UFJ FG's management. Nonetheless, at some point UFJ FG's merger with/integration into MT FG had come to be perceived almost as a fait accompli in media reports. Some observers even argued that it would be in the national and public interest and essential for the restructuring of the Japanese financial sector as a whole. STB, which still opposed the merger and resisted it by relying on the principle of the sanctity of the agreement, thus gave an impression of being so egotistical as to defy social trends and the public interest. TAKAHASHI, president of Sumitomo Trust Bank, hinted at the influence of the media and political pressure at a press conference.[87]

UFJ FG's financial crisis, unilateral cancellation of its agreement and choice of MT FG remain puzzling, as discussed above. In such an uncertain environment, the Supreme Court's decision may give the impression that it was sympathetic to UFJ FG and in tune with the social atmosphere in which a merger with MT FG was considered to be unavoidable or desirable. This impression is due in part to the decision's lack of clarity and insufficient explanation of the reasons.[88, 89]

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85 Some case studies by practitioners state that UFJ FG was in danger as a financial institution if it did not receive a capital increase by the end of September 2004. This is not entirely accurate as a perception of fact, as observed above, but is in a sense an exaggeration. The perception may have been due to media coverage, but on the other hand, it could have spread similar misconceptions (even after the incident) and reinforced the social climate that held the UFJ FG merger to be inevitable. TEZUKA, 金融財政事情 Kin'yū Zaisei Jijō, *supra* note 13, 66; NAKAYAMA, *supra* note 13, 63.

86 NIHON KEIZAI SHINBUN-SHA, *supra* note 3, 71, 82. Hirofumi GOMI, who assumed the post of Commissioner of the Financial Services Agency in July 2004, also recalls that it was extremely difficult for UFJ to rebuild itself on its own, and that the sudden decision by UFJ management to merge with Mitsubishi Tōkyō may have been unavoidable; GOMI, *supra* note 70, 137.

87 As for the impression that President TAKAHASHI of STB received from the news reports, TAKAHASHI, *supra* note 25, 212. ISHIGURO, *supra* note *, 10–15, 36–39 refers to the bias of newspaper reports at the time.

88 Not only the Supreme Court decision but also the way in which scholars and practitioners have reacted to it has been distinctive. As mentioned above, the general issue of balancing creditors' rights with consideration of harm to the debtor from a provisional disposition is actively discussed, albeit in an abstract manner.

The consideration of the circumstances on the part of UFJ FG was generally regarded as justifiable. However, there has been little examination of what specific

5. Impact of a Globalized Society on Local Financial Systems

As mentioned above, the domestic regulatory implementation of the global financial standard of an 8-percent capital adequacy ratio leaves room for discretion in interpretation and application by domestic authorities, and the auditing methods used by auditing firms are not always objective or unambiguous. In other words, global standards create uncertainty in the domestic financial sector. There is room for ambiguous social power to emerge.

The impact of a globalized economic and financial society locally, in the context of Japanese society, is not limited to UFJ FG's finances. It also affected STB's decision to litigate, or at the very least its explanation for doing so.

People hold that going to court remains an uncommon habitus in Japan. In this regard, some assumed that STB dared to sue another big bank because STB's managers were concerned about liability for breach of their duty as directors before foreign institutional investors. To avoid a derivative suit by active foreign shareholders, STB's managers were pushed to take the unusual step of filing suit, the resort to which looks like an attitude that is very unusual in Japan.

In fact, according to President TAKAHASHI's explanation, it was necessary to clarify that the breach of the Basic Agreement was exclusively the fault of UFJ FG and was to be seen in light of the risk of shareholders holding the STB directors liable.[90] The assumption was that the shareholders he had in mind were mainly foreign institutional investors; around the time of planning the merger with UFJ Trust and after its collapse, STB's president Takahashi had travelled abroad several times to explain the situation to foreign investor-shareholders.[91] However, it is also possible to think that STB managers used this kind of concern about the interests of foreign

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circumstances on the part of UFJ FG are taken into account, what harm is incurred on the part of UFJ FG, and how the Supreme Court decision took this into account. For the attitude and awareness of the courts and academic literature on injunction claims, especially those involving information, ISHIGURO, *supra* note *, 43.

89 The Supreme Court decision in this case acknowledges the legally binding nature of the problematic provisions of the Basic Agreement and the existence of negotiation obligations. Nonetheless, UFJ FG's merger process with MT FG would continue after and in a manner contrary to these parts of the decision. T. UEMURA [上村達男], UFJ の大規模第三者割当増資を如何に受け止めるべきか [What to Make of UFJ's Far-reaching Third-Party Allotment?], in: Nakahigashi [中東] (ed.), UFJ vs. 住友信託 vs. 三菱東京 M&A のリーガルリスク [UFJ vs Sumitomo Trust vs Mitsubishi Tōkyō Legal Risk of M&A] (2005) 152 comments that "the current situation is itself a breach of contract."

90 TAKAHASHI, *supra* note 25, 207, 213.

91 NIHON KEIZAI SHINBUN-SHA, *supra* note 3, 76, 81. See also TAYLOR, *supra* note 13, 418, 420.

shareholders to legitimize their break with the Japanese habitus against litigating and to get their voices heard in society.

The influence of foreign institutional shareholders has expanded since the 1990s. After the announcement of the Takenaka Plan, SM FG took measures to bolster its capital by financing through Goldman Sachs from January 2003 onwards.[92]

UFJ also initially hired Merrill Lynch to underwrite yen 120 billion in preferred stock,[93] but this was not enough for the restructuring. Sovereign Asset Management, a private investment fund based in Monaco, became the largest shareholder in UFJ HD after having built up a position since 2001. This fund and another large mutual fund in the United States began selling off their shares in late June 2004. The administrative action of 18 June and possible criminal charges (suggested on the same day) raised concerns among these shareholders that their institutional investors would hold them accountable for compliance issues at their investment vehicle, UFJ FG.[94] The fall in market share prices had a significant impact on UFJ FG's restructuring.[95]

Concerns about the growing influence of foreign capital become apparent in Japanese finance.[96] The revision of the Companies Act is perceived to have made it easier for foreign investors to acquire Japanese financial institutions through Japanese subsidiaries. Not only that, but there have actually been cases of failed banks being acquired by foreign investors following nationalization: Ripplewood invested in Long-Term Credit Bank of Japan (later Shinsei Bank); Cerberus invested in Nippon Credit Bank (later Aozora Bank).[97] In the case of the Resona Bank, shareholders escaped liability after an infusion of public funds and nationalization, resulting in (especially foreign) investors gaining from the sale of the company due to share price fluctuations.[98, 99]

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92 MAEDA, *supra* note 4, 216; NISHIKAWA, *supra* note 60, 191–193; NIHON KEIZAI SHINBUN-SHA, *supra* note 3, 175.

The high dividend rate of the preferred stock and President NISHIKAWA's heavy-handedness in his decision-making were pointed out, SASAKI, *supra* note 31, 234 et seq. SASAKI, *supra* note 31, 235, reports that TAKENAKA was involved in the realization of this capital increase scheme. For the unnatural nature of this capital-increase transaction, SASAKI, *supra* note 31, 245.

93 MAEDA, *supra* note 4, 216; NIHON KEIZAI SHINBUN-SHA, *supra* note 3, 175; SASAKI, *supra* note 31, 246.

94 NIHON KEIZAI SHINBUN-SHA, *supra* note 3, 160.

95 NIHON KEIZAI SHINBUN-SHA, *supra* note 3, 163.

96 TAYLOR, *supra* note 13, 419.

97 SASAKI, *supra* note 31, 189.

98 SASAKI, *supra* note 31, 285–286. For the differences between this and the Ashikaga Bank bankruptcy resolution, KAMIKAWA, *supra* note 25, 64–65. For TAKENAKA's own explanation of the Resona resolution, H. TAKENAKA [竹中平蔵], 構造改革の真

The accelerated disposal of non-performing loans under the KOIZUMI administration was driven by pressure from the US government and US financial institutions.[100] The infusion of public funds was strongly advocated by TAKENAKA, Minister of Economy, Trade and Industry and Minister of State for Financial Services. The injection of public funds was criticized as risking the takeover of Japanese financial institutions by US funds and their profit-taking through stock trading.[101]

Looking at the case in the context of this offensive by foreign (particularly US) capital, one can see the significance of the merger of UFJ FG and MT FG: until the collapse of UFJ FG, it was in line with the scenario possibly envisaged by TAKENAKA; but from then on, the rescue of UFJ FG did not follow the path of public funding or sale of the bank to a foreign investor. The group was not integrated into SM FG, which was already under strong foreign influence and had yet to reimburse the public funds already injected, but rather into MT FG, which was financially sound. MT FG had resolved its public funding issues earlier and was less concerned about nationalization possibly leading to sale to foreign investors; some believed that UFJ FG's merger to MT FG would enable them to avoid a similar situation to that of SM FG and Resona.[102]

6. Afterwards

STB went on to file a claim for damages against UFJ HD, but without success, and the dispute settled out of court.[103] As a matter of fact, this process

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実 [The Truth of Structural Reform] (2006)108 et seq., especially reference to stock price 122. See also *supra* note 33.

99 Yukio HARISE, Vice President of Resona HD, who resigned after the collapse of Resona, joined ORIX. MIYAUCHI, the manager of ORIX, was a close ally of TAKENAKA's, who under the KOIZUMI administration pushed for regulatory and structural reforms. Resona had increased its lending to LDP from about yen 500 million at the end of 2002 to about yen 5.4 billion at the end of 2005 after the injection of yen 2 trillion of public funds in bankruptcy, SASAKI, *supra* note 31, 404–405.

100 SASAKI, *supra* note 31, 180.

101 As for the top priority of the KOIZUMI administration in the privatization of Japan Post, some believe that the US's desire for the huge amount of money involved in postal savings and postal insurance was at play. SASAKI, *supra* note 31, 303–313, 336–338. For cheers from the US for TAKENAKA's efforts to privatize Japan Post, SASAKI, *supra* note 31, 340.

102 According to NIHON KEIZAI SHINBUN-SHA, *supra* note 3, 28–29, around June 2004, Mitsubishi Tōkyō received information that foreign financial institutions such as Citi (US) and HSBC (UK) were targeting UFJ FG, and there were discussions within MT FG that it should inform the FSA of its readiness to take over UFJ FG in its entirety, and that they informed the FSA of their intention to support UFJ FG.

finally led to the creation of MT UFJ, the biggest financial groups in the world in terms of assets. With regard to the future of UFJ FG, on 10 September 2004, MT FG announced to UFJ Bank a recapitalization of yen 700 billion through the aforementioned issuance of preferred stock, which was implemented on 17 September 2004. Initially, the price was yen 500 billion, but the price was raised due to the bidding and fighting of SM FG. The capital increase by MT FG averted a problem with the financial results at the end of September 2004.

The merger was completed in October 2005, and MT UFJ became the world's largest bank by assets,[104] avoiding nationalization and increased foreign control. This merger created the Japanese financial world's three-mega-bank structure of SM FG, Mizuho FG and MT UFJ FG, which was not directly or actively created by the government.[105] The problem, however, is that it is still impossible to dispel the suspicion that the way in which the government and political pressure intervened in this conflict may have constituted a shift to a less visible, more covert, more indirect form.[106] At

103 Tōkyō District Court, 13 February 2006, 判例タイムズ Hanrei Taimuzu 1202 (2006) 212. On 21 November 2006, both sides accepted the Tōkyō High Court's settlement recommendation and settled the case for yen 2.5 billion. In addition, STB filed another lawsuit on the merits against UFJ FG on 28 October 2004, seeking an injunction (this claim was withdrawn on 7 November; see Ishiguro, *supra* note *, 18). For a contemporary view of the possible outcome of the lawsuit on merits, S. NAKAJIMA [中島茂]/H. IKEDA [中島茂]/M. NAKAHIGASHI [中東正文, M&A 実務の第一線からみた UFJ 裁判（座談会） [The UFJ Litigation Seen From the Forefront of M&A Practice], in: Nakahigashi [中東] (ed.), UFJ vs. 住友信託 vs. 三菱東京 M&A のリーガルリスク [UFJ vs Sumitomo Trust vs Mitsubishi Tōkyō Legal Risk of M&A] (2005) 78–79. Does the Supreme Court law clerk's commentary (SHIDAHARA, *supra* note 13, 223) dare to remind us that the Supreme Court decision did not explicitly affirm the existence of the right to demand an injunction as a protected right, and that it did not make a judgment on this point? Is it related to the litigation on the merits based on the substantive right to seek an injunction? Compare MORITA, *supra* note 11, 193 (suggesting a different view of why the Supreme Court decision did not go into consideration of the existence of the right to request an injunction).

104 While Sumitomo Mitsui proposed a merger at a 1:1 integration ratio, integration negotiations between MT FG and UFJ initially proceeded in the form of defining the assignment of officers without an integration ratio being fixed. The integration ratio was indicated in the integration agreement dated 18 February 2005.

105 TAKAHASHI, *supra* note 25, 213.

106 There are views that the FSA had been intending to push UFJ into a corner since at least 2003. After the fact, some believe that the FSA may have been too rigorous in its inspections. KAMIKAWA, *supra* note 25, 68.

See the recollections of Hirofumi GOMI, who served as Director General of the FSA Inspection Bureau and then as Director General of the Supervisory Bureau and Commissioner of the FSA under TAKENAKA, Minister of State for Financial Ser-

the very least – and however neutral the FSA's stance may apparently have been[107] – there is no doubt that FSA oversight, as noted above, was a trigger of and a major factor shaping the case.

V. Bridging Legal Analysis and Societal Observation

1. Supreme Court's Balancing and Meaning of Its Consideration of UFJ FG

By combining the traditional jurisprudential case-study analysis with an examination of the background, some of this case's implications as a social phenomenon can be clarified. The first implication is the meaning of the balance struck and consideration for UFJ FG. On the one hand, as mentioned above, there is a lack of awareness of the preservation of the information that the STB wanted to protect. The court shows an insufficient

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vices, regarding the attitude of the FSA Inspection Bureau in general and its assessment of UFJ's evasion of inspection and criminal charges, GOMI, *supra* note 70, 15, 74, 133–137. For doubts within the Tōkyō District Public Prosecutors Office Special Investigation Department about the adequacy of inspections by inspectors like Mr. MEGURO from the FSA's Inspection Bureau, KAMIKAWA, *supra* note 25, 83, 293. On the other hand, for the different positions within the department regarding the UFJ FG's evasion of inspections, SASAKI, *supra* note 31, 202–296. For the relationship between the Inspection Bureau, which has MEGURO, the Minister of Financial Services, the Commissioner of the FSA, and the Supervisory Bureau, KAMIKAWA, *supra* note 25, Chapter 3, especially 117 note 25.

For Minister TAKENAKA's support of Inspector MEGURO in conducting rigorous inspections of financial institutions, especially UFJ FG, ONO, *supra* note 42, 168; SUDA, *supra* note 14, 98. Regarding TAKENAKA's negative evaluation of UFJ, SUDA, *supra* note 14, 96; SASAKI, *supra* note 31, 289. SASAKI, *supra* note 31, 247, mentions Tsuneo WATANABE's recollection (in the January 2009 issue of *Bungei Shunju*) that TAKENAKA, Minister of State for Financial Affairs, said that he would smash UFJ and Mizuho. TAKENAKA is reported to have said that he would now bring Citi in for UFJ FG. For the possibility of action by Citi, see also *supra* note 102. At latest since 1998, TAKENAKA had taken a proactive stance toward injecting public funds into financial institutions with non-performing loans. KAMIKAWA, *supra* note 25, 79 note 127.

107 For Minister of State for Financial Services TAKENAKA's ostensibly neutral stance, ONO, *supra* note 42, 193. TAKENAKA himself described the UFJ battle unfolding in front of his eyes as something that would have been impossible in the era of the convoy system. TAKENAKA, *supra* note 98, 135. See also NIHON KEIZAI SHINBUNSHA, *supra* note 3, 278. On the other hand, however, TAKENAKA and some in the FSA were pushing for the integration of UFJ and Resona. NIHON KEIZAI SHINBUNSHA, *supra* note 3, 36–37. There was reportedly a plan to merge UFJ FG with SM FG; SUDA, *supra* note 14, 183. If financially sound MT FG were to absorb UFJ FG, it would have reduced control and intervention based on the FSA's inspection and supervision authority; SUDA, *supra* note 14, 183.

sensibility for issues that cannot be dealt with *ex post* by way of monetary compensation, which we might call issues of protecting possession.[108]

On the other hand, heavy consideration is given to the UFJ FG side. The Supreme Court decision, while recognizing the binding nature of the Basic Agreement, does not in its conclusion recognize STB's interest in the preservation of confidentiality. In this sense, it denies the agreement's legal effect as a basis for a provisional remedy. In doing so, it gives due consideration to UFJ FG: the deterioration of its finances including its bad debt; its own actions, such as evading inspections; UFJ FG's business judgment in scrapping the Basic Agreement; its merger in entirety when there were, at least logically speaking, other options. Moreover, the decision upholds UFJ FG management's decision to continue negotiating with MT FG despite the availability of another merger partner in SM FG. The Supreme Court's decision disposed of the lawsuit with unusual rapidity,[109] with the outcome that UFJ was able to increase its capital before the end of September and avoid nationalization.

As noted above, the FSA's actions triggered the crisis at UFJ FG as well as its invalidation or abandonment of its voluntary restructuring plan. The FSA claims it is always neutral in terms of regulations and does not interfere with the audits of audit firms; but this also means that it respects the audits of firms that are subject to the FSA's wishes through indirect pressure. It stated that it would not intervene in the UFJ battle; however, this could have meant that it did not object to the socially established procedure of the UFJ–Mitsubishi Tōkyō merger.

At first glance, the FSA's stance appears modest compared to the traditional method of bailing out financial institutions through direct, active government intervention in the form of convoys. However, the discretionary quality if not arbitrariness of its inspections and oversight cannot be

108 On the subtle changes in perception of the prohibition on providing information since the first trial, ISHIGURO, *supra* note *, 41–43.

109 This is not limited to the appeal before the Supreme Court. The proceedings in this case were exceptionally rapid; NAKAHIGASHI/IKEDA, *supra* note 3, 22; NAKAHIGASHI, *supra* note 15, 34; H. KOBAYASHI [小林秀之], 仮処分事件の経緯と“保全の必要性” [The Background of the Injunction Case and the “Necessity of Protection“], in: Nakahigashi [中東] (ed.), UFJ vs. 住友信託 vs. 三菱東京　M&A のリーガルリスク [UFJ vs Sumitomo Trust vs Mitsubishi Tōkyō Legal Risk of M&A] (2005) 123; SHIDAHARA, *supra* note 13, 225. Is this due to the consideration of UFJ FG's earnings as of September 2004 and their impact on the 8% issue as well as nationalization? Was this behind the decision that a 20-month injunction would harm UFJ FG? If so, such an argument that 20 months was too long and that an injunction of a few months should have been granted is based on a different appraisal from the Supreme Court of the imminent situation UFJ FG was in. See *supra* note 20.

ignored. After applying pressure through its audit firms, it then appears to respect the audit firms' assessments and not intervene. Its stance of not intervening in the UFJ battle between SM FG and MT FG may be taken to imply a political decision to allow MT FG to take UFJ FG. The government intervention may have turned into a form of manipulation and influence that is more difficult to recognize from outside.

Given this context, the Supreme Court decision does not fully explain the circumstances the court considered or the basis for the balance it struck. The attitude of respecting UFJ FG's business judgment in difficult circumstances also has the effect of trivializing the substantive validity of and remedies under the Basic Agreement, which the court at the same time declares to be legally binding.

It is possible that the considerations on UFJ FG's side included not only the interests of UFJ FG as a private business group but also those of the financial industry, the government, and society as a whole.[110] It is not even clear how much scrutiny those considerations received.

In view of the situation that would likely have been on the court's mind, as suggested by its reference to the difficulties and uncertainty facing UFJ FG, 1) the Supreme Court's consideration for UFJ FG, 2) its indifference to the issue of keeping the confidentiality of information STB had transferred to UFJ FG, the loss of which is irreparable once it is in the hands of a third party and which *ex post* compensation cannot sufficiently remedy, and 3) the court's balancing all share the following characteristics.

One characteristic on display here is the excessively generalized or diluted concept of contracts, *viz.* to widely recognize the binding force of agreed promises in general but then to reduce or deny any remedy once the balancing of interests shows that enforcement is not appropriate. This can even involve ignoring or suppressing the issue of a party's possessory interests.

The Supreme Court decision gives no indication as to what justifies the suppression of a party's possessory interests and under what circumstances it is permissible. Not even this point of confrontation is made explicit. Rather, it is possible that the justices were not even conscious of it.[111] However, at least in preliminary proceedings, is preservation of the status quo with respect to non-fungible assets not to be granted *a priori,* without entering into a plenary decision of substantive rights that takes into account the various interests in such a conflict?[112]

110 For UFJ FG's own argument in this regard, see TAYLOR, *supra* note 13, 418–419.

111 Not only the court but also the lawyers who represented STB may be questioned as to their awareness of the problem. ISHIGURO, *supra* note *, 43, 62.

2. Social Foundations of Good Faith

Furthermore, the case may indicate a lack of respect for and insufficient protection of good-faith relationships in Japanese society. First, it is important to note that UFJ FG was never single-minded internally.[113] UFJ Trust did not always share common interests with UFJ Bank and UFJ HD. STB and UFJ Trust had already been involved in merger negotiations in 2003; the plan, hatched over UFJ Trust's head, and failed, as UFJ Trust rebelled.[114] This time, due to the group's critical situation, UFJ Trust reluctantly complied with a top-down decision by UFJ HD.[115] Nevertheless, the plan is abruptly discarded again from above.[116] The UFJ Trust side must have had very mixed feelings. According to TAKAHASHI, STB's president, UFJ Trust still sought to merge with STB even after the breach of the Basic Agreement.[117] As he said, it was no surprise that UFJ Trust would prefer to merge with STB at this stage, rather than stay within UFJ FG, which was in the midst of internal conflict and on the verge of insolvency.

If that is so, then what does it imply? It indicates a structure in which the agreement of parties made in good faith is not respected, but rather is suppressed from above or outside. At first, the cancelled Basic Agreement was made not simply between two legal entities, but between one bank, STB and UFJ FG, which was composed of three different legal entities. On the UFJ FG side, UFJ HD, as the parent company, took the initiative of planning the restructuring of the group. But UFJ Trust Bank, formerly Tōyō Trust Bank before its integration into UFJ FG, had its own interests not completely congruent with the policy of the parent company.

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112 Even as to the substantive right as basis for provisional order, some scholars argue that the right to seek an injunction is not recognized in such a case as the Basic Agreement in question. As an objection to this, see ISHIGURO, *supra* note *, 2–3, 43.

113 See *supra* note 50.

114 NIHON KEIZAI SHINBUN-SHA, *supra* note 3, 62, 79.

TAKAHASHI, STB president and the party involved, said that the decision was not made between President TAKAHASHI and UFJ Bank President TERANISHI, but that UFJ Trust and STB had been interacting with each other even among general employees, and that the merger was discussed at the management level in this context. Negotiations also took a bottom-up approach; TAKAHASHI, *supra* note 25, 196. However, at least in the background of that frustrated negotiation, there seemed to be a communication problem within UFJ FG, especially with the UFG Trust Bank; TAKAHASHI, *supra* note 25, 197.

115 MAEDA, *supra* note 4, 229.

116 For the reaction on the UFJ Trust side, NIHON KEIZAI SHINBUN-SHA, *supra* note 3, 61–62.

117 See record of the 14 August 2004 press conference with Atsushi TAKAHASHI, President of STB cited in ISHIGURO, *supra* note *, 30, 60, see also 44.

If we take into consideration this particular aspect of the parties to the Basic Agreement, we may find that the substantial parties in interest who hoped for the merger of the trust businesses were STB and UFJ Trust, while on the other hand there was an opposing group composed of UFJ HD, UFJ Bank, and MT FG. In addition, in view of the FSA's discretionary regulations, the social unit aligned against the substantial parties to the *bona fide* negotiation agreement might encompass not only elements of the private sector but also the government, or some part of it. This reveals that a possible critical point in this case is the antagonism between the substantial parties in interest to the merger and the social forces opposed to that plan. This antagonism ultimately endangers the independence of an end-unit within the enterprise group and the sanctity of the agreement and good faith.

Now, say this good-faith negotiation was endangered by the parent company UFJ HD, by a third party, MT FG, and by other social stakeholders (if any). In this regard, the preliminary injunction would have been a decisive legal means of protecting the good-faith relationship between STB and UFJ Trust Bank from outside interference, because once sensitive information transfers outside the relationship, it makes it impossible to recover the previous setting for their negotiation. Even if STB cannot hope to realize a merger with UFJ Trust after this bad-faith treatment by UFJ HD, it does not necessarily mean that a provisional order to keep UFJ HD at the table for merger negotiations for a while (without any negotiation with or any transfer of obtained information to any third party) would have been nonsensical in order for STB to protect and promote its own interests regarding the negotiation based on good faith.

Secondly, the resultant legal dispute indicates that issues of how to establish and protect good faith go unrecognized by society. As a matter of fact, looked at as a social phenomenon, this suppression of good faith did not appear explicitly, nor was it perceived clearly by the public or even by Japanese scholars, practitioners, or foreign comparative-law scholars. This case means that the society does not take the sanctity of contracts based on good faith seriously. Related to this lack of social recognition is also a very important legal point regarding a temporary injunction to prohibit the transfer of information that, as noted above, the Supreme Court missed.

We can thus conclude that the decision of the Supreme Court represents or reflects the perceptions of Japanese society, which ignores the fact that the case was and is closely and critically related to issues of the social environment in which good faith is to be respected and protected from opposing social pressures.

As shown in this case, Japanese courts or society as a whole apparently respect any kind of agreement that either considers to be legally binding. But once one of them finds the agreement not useful and not good for soci-

ety, it drastically changes its attitude and denies any remedies requested by one of the good-faith parties. Thus, the concept of contracts gets diluted.

Japanese legal scholars and practitioners have usually merely adopted the framework and issue-setting given by the courts. They as well as foreign comparative law scholars thereby miss this social issue of the crisis of the good-faith relationship.

3. Supplementary Note on Corporate Law: Shareholder as Owner of a Company

Once we look at the case in the conventional manner of a legal case-study with added considerations of the social background, how do we see it? This case indicates social indifference and lack of recognition of the issue of how to establish and protect good faith in Japanese society. The critical situation of good-faith relationships in society was not perceived clearly by people at large or by lawyers or scholars in Japan, as shown by their own case-study reports and discussions.

One of the reasons for this indifference is our conventional perception of shareholders as the owners of a company; another is our understanding of the relationship between parent and subsidiary. UJF HD here was a 100-percent shareholder of UFJ Trust Bank. Based on the perception that the shareholder can treat the company as its own property, the particular perception regarding the subordinate relationship between parent and subsidiary leads us not to recognize the crisis of good faith in a subsidiary. The perception is that the subsidiary company should obey whatever direction or order is issued by the parent company as its shareholder or owner. This perception minimizes or denies altogether the independence of the subsidiary as a legal entity in relation to the parent company. It has no voice of its own.

VI. CONCLUDING REMARKS

The case attracted public attention and was the subject of active debate in law and among legal scholars and practitioners. The media on the other hand concentrated on the background of the crisis at UFJ FG, internal conflicts of the financial group, and the outcome of the battle between MT FG and SM FG over UFJ FG. Not enough work has been done to grasp the significance of the litigation, the courts' decisions, or the reactions of legal scholars and practitioners as well as of the media to this case as a social phenomenon or to explore the structural characteristics and problems of Japanese society that they reflect.

This article has attempted to bridge observations of the way legal issues are formulated and discussed in the litigation and an awareness of the social back-

ground of the case to make apparent the characteristics and problems of Japanese society crystallized in it, which have not received much attention yet.

First, this litigation shows a kind of conflict between two different dimensions in terms of the role of civil courts: 1) the guarantee of irreplaceable goods or interests (freedom or fundamental liberty) of private actors embodied in the STB's transferred information and 2) the protection and realization of the interests of society as a whole (the public interest?) embodied in UFJ FG's rescue. The courts are originally charged with guaranteeing both, and both dimensions clash in this case. The Japanese courts' method of adjusting these interests is a neglected problem. Second, this case demonstrates the challenge of respecting and guaranteeing sincere agreements between good-faith parties in light of the social pressures which may undermine them.

These implications are difficult to reveal without bridging conventional legal case-studies and societal observations. The case illustrates a situation in Japanese society in which the parties' agreement and sincere relationship is not respected and the preservation of fundamental liberty, which is a prerequisite of good faith, is not seriously considered. Indeed, as mentioned above, the Basic Agreement in question was unanimously recognized as legally binding by the District Court, the High Court and the Supreme Court without any serious discussion.

However, at least in theory, it is not necessarily natural to grant legal effects to all agreements and promises. Social relationships may involve different interests based on or amplifying dubious domination – subordination relationships. These interests can also appear in the guise of agreements based on the autonomy of the parties. One must be wary of such sham agreements that pose a threat to the fundamental liberty of private individuals. In this sense, not all promises are legally regarded as contracts.

The criteria and decisions behind recognizing the legally binding force of a promise without formality as a consensual contract are not an easy matter. A free and equal relationship between the parties requires that each is able to define the relationship strictly, in language, and a prerequisite to this is a social environment that supports the parties and their relationship. There has been no well-established awareness of these theoretical issues in Japan since the enactment of the Civil Code. A kind of tautology is broadly accepted that any contract shall be based on the parties' agreement, regardless of formality, and that any contract, as an agreement, shall be given legally binding effect.[118] There has not been serious, cautious examination of the concepts of consensus or indeed of contracts. No sufficient attention

118 For the binding force of the Basic Agreement in this case, e.g., SHIMIZU, *supra* note 13, 74.

has been paid to distinguish them from ambiguous (and apparently gratuitous) promises based on a social-exchange mechanism. The decisions of courts in three instances in this case can be regarded as part of this cognitive tradition.

The problem is the concrete content of the legal effects and remedy that were actually granted following this broad recognition of the contractual nature of promises in general. As noted above, the Supreme Court held that *ex post* economic compensation was sufficient and that there was no need for temporary measures; there was no focus on the retention of STB's transferred information, and the decision largely reflected undefined considerations in favor of UFJ FG. Even taking into account UFJ FG's difficult situation and view toward a full merger with MT FG, it was not essential for it to breach the Basic Agreement. There may have been good-faith parties who genuinely wanted to keep the negotiation open, *viz.* STB and UFJ Trust Bank. There is no indication in the court decisions that these points were fully considered.

There is a lack of awareness of the issue of protecting information passed along in good faith by STB to UFJ FG that cannot be recovered once divulged to a third party; instead, the focus is on UFJ FG's difficult situation and how to get out of it. This framing focuses on the issue of substantive rights as a legal title rather than on (exclusive) possession (of sensitive information). Moreover, the focus on the issue of a substantive right is very ambiguous and complicated in this case. The Supreme Court moreover found no need to grant temporary relief, but did so without going into that intricate subject in explicit and specific detail. Once an agreement has been held to be legally binding, the balance of considerations of the various interests surrounding the case leads the court to deny legal remedy, at least in the form of a preliminary injunction. These decisions furnish no soil in which contractual rights – the irreplaceable basis of fundamental liberty – and sincere agreement between private parties can flourish.

As this case's lesson, a general issue in comparative contract law and a common question in many jurisdictions is, What are the societal conditions for establishing the good-faith relationship? What are the obstacles? What mechanisms, especially legal ones, are necessary to protect it?

This is the Romeo and Juliet problem suggested at the beginning of this article. The main reason Romeo and Juliet's love is not fulfilled is that each of them is rooted in a violent clan in which individual independence is not established, and the society in which they live cannot guarantee the basic premise of centralized political decision-making or the maintenance of order, as exemplified by the failure of the Grand Duke's order banning the use of force. In such a society, no matter how sincere an agreement between individuals is, there is no guarantee that it will be respected and implemented.

These issues might have traditionally been considered to be outside the scope of contract law scholarship. However, unless such preconditions are established, our conception of contracts and related institutions ceases to function. It may appear to at the surface, but the nature of contracts is not always the same among different societies. In one society a consensus between parties may be respected as sacred because of their sincerity, but in another kind of society certain relations and obligations are given binding and compulsory force with the legal form of "contract", allegedly and apparently based on "agreement", but then the whole society crushes such a contract or agreement whenever it finds it or the legal remedies for breaching it inconvenient. In some societies we may find that "contracts" exist in a very diluted sense. While comparative contract law scholarship focuses on the similarity of norms and their functions, is the same scholarship keeping the social preconditions in view?

If our current contract law and comparative contract law scholarship lacks the capacity, methods or interest to explain the problems of Romeo and Juliet in a literary work, could the same be said of its accounts of real-world events? The case we dealt with in this article is a most striking example that cannot be fully understood without consideration of such preconditions, in which even crucial practical points may be (and indeed were) overlooked by the court and the lawyers concerned.

What is it that we are not seeing or aware of in contracts and contract law? This article takes up the issue of good faith as a concrete attempt to clarify an issue that conventional legal studies leave out or even make invisible. In order to make visible what we are overlooking, we deviate from the ordinary legal case study and consider the social context, bridging these two dimensions.

We commonly grasp a contract as an agreement between independent, autonomous subjects whose independence tends to be assumed as a given, as a self-evident thing. However, the autonomy of the contracting parties is not self-evident in any society, and so the question of how the society ensures the independence of the subject cannot be ignored as a precondition for discussing "contracts".

Our conventional case-study analysis risks discarding aspects of the case outside that legal cognitive framework and neglecting the preconditions for that framework. Is it possible to carefully pick up elements that the prevailing conceptions and cognitive frameworks of legal studies cannot capture and incorporate them into a reconsideration of the traditional conceptions and cognitive frameworks? This is the last point this article wishes to raise.

SUMMARY

The paper takes up the 2004 case of the UFJ Financial Group's breach of an exclusive negotiation agreement it had reached in contemplation of merging with Sumitomo Trust Bank, after which it merged with Mitsubishi Tōkyō Financial Group. Litigation followed, in which Sumitomo Trust Bank filed for a preliminary injunction to uphold the agreement. This article analyses the case from a new perspective by viewing it as a social phenomenon. After describing the facts of the case and the courts' decisions, the article points out several legal issues that so far have not been discussed sufficiently. It also examines the social as well as economic and political context of the case. This leads to an analysis of the concept of good faith in connection with the conception of shareholders as owners of the company. By clarifying the societal conditions at play in establishing good faith relationships as well as the societal obstacles to keeping them, the article also aims to further comparative contract law scholarship.

(The editors)

ZUSAMMENFASSUNG

Der Beitrag greift einen Fall von 2004 auf, in dem UFJ Financial Group eine Vereinbarung über exklusive Verhandlungen für eine Fusion mit Sumitomo Trust Bank brach (und in der Folge mit Mitsubishi Tōkyō FG fusionierte), woraufhin Sumitomo Trust Bank eine Unterlassungsklage einbrachte. Der Fall wird einer neuen Analyse unterzogen, indem dieser als gesellschaftliches Phänomen verstanden wird. Nach einer Darstellung des Sachverhalts sowie der Entscheidungen der verschiedenen Instanzen untersucht der Beitrag eingehend die gesellschaftlichen ebenso wie die wirtschaftlichen und politischen Hintergründe des Falles. Darauf aufbauend wird dann der Begriff von Treu und Glauben im vorliegenden Fall analysiert und auch mit dem Verständnis, wonach die Aktionäre die Eigentümer der Gesellschaft seien, in Verbindung gebracht. Durch das Herausarbeiten der gesellschaftlichen Bedingungen für das Eingehen von Rechtsbeziehungen auf der Grundlage von Treu und Glauben sowie den gesellschaftlichen Hindernissen für deren Aufrechterhaltung möchte der Beitrag auch Anregungen für die Rechtsvergleichung im Vertragsrecht geben.

(Die Redaktion)