

## The Fair and Equitable Principle and its Background Knowledge

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### Abstract

In this paper, the author grouped various kinds of background knowledge of the fair and equitable principle systematically. Many variations of meta-knowledge that has been abstracted during these five years were classified into four groups. When we think about the fair and equitable principle, this background knowledge is mutually related. On the whole, they construct a logical aggregate that aims at controlling legal value judgments on the basis of the fair and equitable principle.

### 1 . Introduction

The author classified various kinds of background knowledge of the fair and equitable principle systematically. The meta-knowledge of legal topos, the movable system, general clauses, the fair and equitable principle, good faith in CISG (United Nations Convention on Contracts for the International Sale of Goods), and legal value judgments are included in the background knowledge. This background knowledge can be classified into four types as follows : (a) principles of the high-dimensional legal value, (b) principles related to the fair and equitable principle itself, (c) the viewpoints which legislators and judges must consider in the enactment, interpretation, and application of law, (d) principles of legal maxims.

### 2 . The Basic Rule

When a collision occurs between different legal topos, the following basic rule controls the conflict.

Basic rule : The more important legal topos that leads to the most reasonable decision should be applied and given priority in the concerned case. [Struck (1971), p.47]

Let me classify background knowledge as follows.

Here, T represents “ Topoikatalog. ” [Struck (1971), pp.20 - 34]

Ca represents meta-knowledge in “ Canaris et al. ”

Cs represents meta-knowledge in “ CISG. ”

Pe represents meta-knowledge in “ Perelman. ”

### 3 . Legal Topos about High-dimensional Legal Value .

#### 3.1 Justice (Procedural Justice) [Hirata (1994)]

According to Martin Golding, the elimination of arbitrariness (T51) is more fundamental for the concept of justice than simple equality. He includes rationality, objectivity, consistency, equity and equality among the concepts of the elimination of arbitrariness. [Golding (1985), p.162]

T51. Willkür ist verboten. [Golding (1985), p.162]

##### T51.1 Rationality

Pe127. When a judge seeks legally satisfactory grounds, Vorverständnis becomes a guide. And Vorverständnis is related to the question of the fairness and rationality of the resolution and its approval by the people. [Perelman (1986), p.150]

Pe128. According to the Perelman, Vorverständnis is not nonlegal consideration. For the judge, his value judgment about the adequacy of decisions becomes a guide. [Perelman (1986), pp.150 - 151]

Pe137. There is the thought that value gives a directive to legal hermeneutics through Vorverständnis and the formation of consensus about rationality of judgment. [Perelman (1986), pp.153 - 154]

T51.1.1 Complete Agreement [Rawls (1971), pp.142 - 150]

T51.1.2 Rationality based on the Dialogue [Tanaka (1989)]

##### T51.2 Neutrality

T7. Et audiatur altera pars.

T8. Das Verbot des Richters in eigener Sache.

##### T51.3 Objectivity

Pe129. This adequacy is not judged according to a subjective standard, rather it is judged intersubjectively. [Perelman (1986), p.151]

T51.3.1 Reproducibility [Rawls (1971), pp.516 - 519]

T51.4 Consistency

Pe138. In legal reasoning, we must combine the flexibility and the unity of the legal system as flexible, and must pursue a satisfactory resolution. [Perelman (1986), p.154]

T51.5 Equity

Ca71. It is assumed that a topos belongs to the tendency toward individualization in equity, that is to say, postulate of justice. Canaris wrote :

Die Topik ist der Billigkeit, also der individualisierenden Tendenz des Gerechtigkeitsgebotes zugeordnet. . . . [Canaris (1983), p.151]

Ca96. The bare equity lacks an elemental property. Canaris wrote :

So wehrt sich Wilburg denn auch nachdrücklich gegen Entscheidungen nach bloßer Billigkeit, weil . . . dieser die ' Grundsätzlichkeit ' fehle. . . . [Canaris (1983), p.82]

Pe132. We have to take account of the systematic thought. The legal reasoning does not only seek for a mere fair resolution. [Perelman (1986), p.151]

T22. Gleichheit

T14. Im Zweifel zu gleichen Teilen.

T15. Auf derselben Stufe steht das Lösen als letzter Ausweg bei einer Teilung.

3.2 Angemessenheit (T41)

The Fair and Equitable Principle has the function of making a final check of whether the effect of the application of law is " proper. " [Matsuura (1997)]

3.3 Rechtssicherheit (T63)

Let me enumerate theses concerning the legal topos (Rechtssicherheit) here.

Ca80. It is more difficult for the movable system to guarantee the legal security than a

system which has fixed legal conditions and strict hierarchical structure.

Canaris wrote :

Was zunächst die letzteren betrifft, so liegt es auf der Hand, daß ein bewegliches System in geringerem Maße die Rechtssicherheit gewährleistet als ein unbewegliches, streng hierarchisches System mit festen Tatbeständen. [Canaris (1983), p.82]

Ca81. The movable system guarantees more powerfully than the case of bare equity article. Canaris wrote :

Auch die Rechtssicherheit ist ja immerhin noch in weit stärkerem Maß gewahrt als bei einer bloßen Billigkeitsklausel. . . .  
[Canaris (1983), p.84]

Ca82. An immovable system should have priority over the movable system without qualification in the domain that a more advanced legal security is needed.

Canaris wrote :

In Gebieten, in denen ein erhöhtes Rechtssicherheitsbedürfnis besteht, ist daher unbedingt letzterem der Vorzug zu geben. . . .  
[Canaris (1983), p.82]

Ca89. There is the possibility that the movable system contradicts not only the value of legal security, but also justice. The request of generalization of justice becomes obstructed when the judge considers a tendency toward individualization. The tendency toward generalization, which equal clause causes, creates obstruction when the judge makes a balance of the elements in individual case.

Canaris wrote :

Und schließlich sollte man auch nicht verkennen, daß neben dem Wert der Rechtssicherheit außerdem noch der der Gerechtigkeit in Widerspruch zu einem beweglichen System geraten kann ; denn die ' generalisierende ' Tendenz des Gerechtigkeitsgebotes, die sich aus dem Gleichheitssatz ergibt, wirkt jedem Abstellen auf die Umstände des Einzelfalles und damit auch einem Abwägen von . . . wenn auch generell festliegenden . . . ' Elementen '

entgegen. [Canaris (1983), p.83]

### 3.4 Verhältnismäßigkeit (T42)

### 3.5 Zweck (T57)

### 3.6 Ordnungsprinzip (T62)

Let me classify various kinds of background knowledge of the legal topos (Ordnungsprinzip) here.

#### T62.1 Systematic Thought

Ca67. Topical thought is not opposed to systematic thought exclusively, and they supplement and penetrate each other. Canaris named this proposition thesis23.

[Canaris (1983), p.160]

Ca73. The tendency toward generalization in postulate of justice seems to be found in systematic thought abstracting an individual problem typically. In demonstration of equity, there is no probability that an arguable viewpoint is not permitted and rejected in principle from the beginning. Canaris wrote :

Bei der grundsätzlich kein irgendwie diskutabler Gesichtspunkt von vornherein als unzulässig zurückgewiesen werden kann, wie das für das abstrahierende, auf der generalisierenden Tendenz des Gerechtigkeitsgebotes aufbauende Systemdenken typisch ist. [Canaris (1983), p.151]

Ca75. When a provision is lacking an adequate level of the legal value judgments, a topos functions as an emergency measure. Canaris named this proposition thesis23. [Canaris (1983), p.160]

Ca77. In case of a poor coverage of newly coming cases, it is important for the judge to replace unstable topoi in the definite value judgment immediately, and to make the situation stable systematically. Canaris wrote :

In denen das positive Recht keine Wertungen für die Ausfüllung enthält . . . möglichst bald die unsicheren topoi durch klare

Wertungen zu ersetzen, die Lösung also systematisch zu verfestigen. [Canaris (1983), pp.151 - 152]

Pe135.It is imperative that the legal system incorporates a legal value judgment beforehand. [Perelman (1986), p.153]

## T62.2 Topical Thought

Ca65.About a change of the system influenced by the embodiment of universal principle of law, mere topoi play at least a definite role in the early stage.

Canaris wrote :

Sodann spielen auch bei einer systemorientierten Rechtsfortbildung praeter legem und insbesondere bei der Konkretisierung außergesetzlicher ' allgemeiner ' Rechtsprinzipien . . . mithin aber auch bei den durch diese bewirkten Systemänderungen . . . bloße topoi zumindest in den Anfangsstadien der Entwicklung eine maßgebliche Rolle. . . . [Canaris (1983), p.153]

Ca66.In the formation of a new principle of law, we can recognize topical construction without exception. Canaris wrote :

Man kann dem Entstehen ' neuer ' Rechtsprinzipien sogar in gewisser Hinsicht durchaus topische Struktur zusprechen. . . .

[Canaris (1983), p.153]

Ca68.In topical thought, the grounds of legitimacy are put in a commonly accepted idea. Accordingly, the grounds of legitimacy are put in " an opinion of all persons or the majority of people or a sage. " Canaris named this proposition thesis20. [Canaris (1983), p.159]

Ca69.The definition of all persons thinking just and fairly whom court precedents used for to embody Article 138 of the Germany Civil Code is hardly a definition of commonly accepted idea. Canaris wrote :

So ist z.B. die zur Konkretisierung des § 138 BGB von der Rechtsprechung geprägte Formel von der Anschauung ' aller recht und billig Denkenden ' nahezu eine Definition der . . . .

[Canaris (1983), p.150]

Ca70. When a law invokes common sense and judges equity as a reason, topical thought is suitable. Canaris wrote :

Die Topik als funktionsgerechtes Verfahren bei gesetzlicher Bezugnahme auf den ' common sense ' und bei Billigkeitsentscheidungen. [Canaris (1983), p.150]

Ca72. A topos is a suitable procedure for individual problems that were formulated narrowly as much as possible. Moreover, it is a suitable procedure in the demonstration of equity pointed to individual circumstance. Canaris wrote :

Sie stellt das adäquate Verfahren für eine am möglichst eng formulierten Einzelproblem, ja am Einzelfall orientierte Billigkeitsargumentation dar. . . . [Canaris (1983), p.151]

Ca76. In case of a poor coverage of newly coming cases, nothing remains besides topical methods. First of all, the judge must extract various viewpoints according to his feelings, and he must apply a solution for a problem tentatively and weigh all interests mutually. Canaris wrote :

Hier bleibt in der Tat nichts anderes übrig, als zunächst einmal mehr oder weniger tastend verschiedene Gesichtspunkte aufzugreifen, am Problem zu erproben und gegeneinander abzuwägen, d.h. topisch zu verfahren. . . . [Canaris (1983), p.150]

### T62.3 An Immovable System

Ca91. The individualization is possible to some extent by subdividing the system having a strict hierarchical structure. Moreover, the movable system is constituted by limited elements. The movable system does not forgive unlimited individualization. Canaris wrote :

Denn zum einen ist eine gewisse Individualisierung auch durch starke Differenzierung eines unbeweglichen, streng hierarchischen Systems möglich, und zum anderen erlaubt auch das bewegliche System keine unbegrenzte Individualisierung, da es ja auf einer beschränkten Zahl von ' Elementen ' aufbaut. [Canaris (1983), p. 83]

#### T64.4 A Movable System

Ca78. The movable system discovered and developed by Walter Wilburg occupies an in-between position with fixed legal conditions and general clauses. Canaris named this proposition thesis 11. [Canaris (1983), p. 157]

Ca79. The movable system is apart from rigorism of norm, which becomes stiff, and goes away from vagueness of pure equity article equally. Canaris wrote :

Von den Rigorismen starrer Normen hält es sich gleichermaßen fern wie von der Konturlosigkeit reiner Billigkeitsklauseln. [Canaris (1983), p. 84]

Ca83. Generally we cannot describe which resolution should have priority in each case, and it is dependent upon the construction of the regulation object and the core value. In this point, a movable system occupies an in-between position with fixed legal conditions and general clauses, and it is a very good form of circumstances. As long as this movable system gives room for the generalization and the individualization tendency of justice, it is very important. Canaris wrote :

Welche Lösung jeweils zu bevorzugen ist, läßt sich allerdings nicht generell sagen, sondern hängt von der besonderen Struktur der betreffenden Regelungsmaterie und dem für sie im Vordergrund stehenden Wert ab. Dem beweglichen System kommt dabei insofern eine besonders wichtige Aufgabe zu, als es, wie gesagt, in sehr glücklicher Weise die Mitte zwischen festem Tatbestand und Generalklausel hält und der generalisierenden wie der individualisierenden Tendenz der Gerechtigkeit Raum gibt. [Canaris (1983), p. 85]

Ca84. Wilburg fixes extremely important elements by contents and quantity generally. Also he constitutes the distribution rate of some elements as movable, and lets the rates change by the situation of each case. Canaris wrote :

Wilburgs Bestreben ist demgegenüber darauf gerichtet, die maßgeblichen 'Elemente' nach Inhalt und Zahl generell zu bestimmen



und nur ihr 'Mischungsverhältnis' variabel zu gestalten und von den Umständen des Falles abhängen zu lassen. [Canaris (1983), p.82]

Ca85. When a human judge faces a movable system, it is too troublesome to balance the comparative aspects of many elements. Canaris wrote :

Weiter ist zu bedenken, daß der Richter einfach überfordert wäre, wenn er sich ausnahmslos einem beweglichen System gegenübersähe und damit in jedem Fall vor den Schwierigkeiten der Abwägung zwischen der oft verhältnismäßig großen Zahl von 'Elementen' stünde. [Canaris (1983), p.83]

Ca86. The movable system adjusts the opposition between the generalization tendency and the individualization tendency of justice. Canaris named this proposition thesis11. [Canaris (1983), p.157]

Ca87. The movable system shows a good compromise among various requests of the idea of laws. The movable system leads to an opposition to the balanced resolution. Canaris wrote :

Das bewegliche System stellt einen besonders glücklichen Kompromiß zwischen den verschiedenen Postulaten der Rechtsidee dar . . . und bringt deren 'Polarität' in einer abgewogenen, 'mittleren' Lösung zum Ausgleich. . . . [Canaris (1983), p.84]

Ca88. The movable system is generally settled with various points of reference of justice. This system has a tendency toward generalization by this thing. Also it has a tendency to individualize. Canaris wrote :

Es berücksichtigt die generalisierende Tendenz, indem es die maßgeblichen Gerechtigkeitskriterien allgemein festlegt, und es trägt der individualisierenden Tendenz Rechnung, indem es die konkrete Rechtsfolge vom Zusammenwirken dieser Gesichtspunkte im Einzelfall abhängig macht. [Canaris (1983), p.83]

Ca90. There is the thought that quotes this individualization trend for the justification

of the movable system, for the justice has the tendency both to individualize and to generalize. Canaris wrote :

Die Gerechtigkeit weist allerdings nicht nur eine generalisierende, sondern auch eine individualisierende Tendenz auf, und es liegt daher nahe, sich zur Rechtfertigung des 'beweglichen' Systems auf diese zu berufen. [Canaris (1983), p.83]

#### T64.5 General Clauses

Ca92.The general clause needs filling of value. Canaris wrote :

Denn für die Generalklausel ist charakteristisch, daß sie wertausfüllungsbedürftig ist. . . . [Canaris (1983), p.82]

Ca93.The general clause does not show the points of reference, which is necessary for the embodiment. In principle, the distinction of the general clause lies in the fact that the points of reference are decided only on an individual concrete case. Canaris wrote :

Denn für die Generalklausel ist charakteristisch, . . . daß sie die zu ihrer Konkretisierung erforderlichen Kriterien nicht angibt und daß diese sich grundsätzlich nur im Hinblick auf den jeweiligen konkreten Fall festlegen lassen. . . . [Canaris (1983), p.82]

Ca94.A topos is a thing more than a simple emergency measure when the judge embodies the general clause. Canaris wrote :

Aber auch bei der Konkretisierung wertausfüllungsbedürftiger Generalklauseln, bei der die Topik weit mehr als ein bloßer Notbehelf ist. . . . [Canaris (1983), p.152]

Ca95.The general clause does not always obey equity nor is entrusted to topical thought. Canaris wrote :

So ist auch die Generalklausel keineswegs gänzlich der Billigkeit und damit dem topischen Denken überlassen. [Canaris (1983), p. 153]

Ca97.The general clause is often called an entrance to equity, and it is partially proper. Canaris wrote :

Die Generalklauseln werden dagegen immer wieder, und mindestens teilweise mit Recht, als 'Einbruchsstellen der Billigkeit' bezeichnet. [Canaris (1983), p.82]

Ca98. In the general clause, there is an interactive property between the individualization and generalization tendencies of justice. And the generalization tendency continuously proceeds to systematization. Canaris wrote :

Vielmehr macht sich auch in ihr die Gegenläufigkeit der individualisierenden und der generalisierenden Tendenz der Gerechtigkeit bemerkbar, und letztere drängt wie immer zur Systematisierung. [Canaris (1983), p.153]

Ca99. The general clause must be always interpreted from the viewpoint of all legal order, and therefore it must be interpreted, backed up by the legal system.

Canaris wrote :

Die Generalklauseln stets im Lichte der Gesamtrechtsordnung, also vor dem Hintergrund des Systems zu interpretieren sind. . . .

[Canaris (1983), p.152]

Ca100. The general clause should not be interpreted based on a commonly accepted idea. Canaris wrote :

Nicht nur, daß auch die Generalklauseln stets im Lichte der Gesamtrechtsordnung, also vor dem Hintergrund des Systems zu interpretieren sind . . . mithin systemgebunden und nicht aus der

auszulegen. . . . [Canaris (1983), p.152]

Ca101. Forming types broadly embodies the general clause, and it is done by the construction of definite legal conditions more partially. The embodiment proceeds the systematization. Canaris wrote :

Vor allem geschieht die Konkretisierung auch weitgehend durch Typenbildung, ja z.T. durch klare Tatbestandsbildung und drängt dadurch zur systematischen Verfestigung. [Canaris (1983), p.152]

Cs117. If the Fair and Equitable Principle must be regarded in the application of each article, there is an anxiety that the judge escapes to the general clause. [Sono

and Yamate (1993), p.73]

#### 4 . Legal Topos about Fair and Equitable Principle

Let me classify various kinds of background knowledge of the fair and equitable principle here.

##### 4.1 Individual Legal Propositions of Fair and Equitable Principle

###### 4.1.1 Exception to Fraud

Ca103.The exception to general fraud was born in Roman law. And it was an approved exception when the cause of action of plaintiff included bad faith in the initial stage, but afterward it became the exception, which did not ask the intent of the plaintiff, and aimed at objective equity. [Takeuchi et al. (1989)]

Ca104.Roman law made use of the exception to general fraud to accomplish a principle of justice for the stiff citizen. [Gotoh (1993), p.49]

Ca105.A personal request to a legal ethical act of the opposing party is always expressed in the exception to fraud. [Gotoh (1993), p.34]

Ca106.The exception to fraud is independent in the systematization work of the Fair and Equitable Principle, and it remains as the subordinate general clause, which still needs filling of value. Canaris wrote :

Hier die ' Arglistenrede ' verselbständigt, und innerhalb dieser, die ja noch immer eine wertausfüllungsbedürftige ' Untergeneralklausel ' bleibt. . . . [Canaris (1983), p.152]

Ca107.A close look at exception to fraud shows the following three domains act mutually :

- (a) Immovable legal conditions
- (b) Movable legal conditions in the meaning used by Wilburg
- (c) The rest is completely open and it can be grasped by topical thought.

Canaris wrote :

Hat sich ein Zusammenspiel von festem Tatbestand, beweglichem Tatbestand i.S. Wilburgs und gänzlich offenem, nur topisch zu

erfassendem Restbereich ergeben. . . . [Canaris (1983), p.152]

Ca108. We may say that the exception to past fraud is the legal condition, which was already broadly filled according to the immovable value judgment. Canaris wrote :

Der Einwand des ' dolus praeteritus ' dürfte bereits ein fester, wertungsgemäß weitgehend ausgefüllter Tatbestand sein. . . .

[Canaris (1983), p.152]

Ca109. The exception to present fraud cannot exist without the exercise of the rights of plaintiff, and it does not combine with the legal ethical criticism. [Gotoh (1993), p.19, p.48]

Ca110. The exception to the present fraud does not require bad faith in legal conditions. [Gotoh (1993), p.32]

#### 4.1.2 Venire contra factum proprium. (T28)

Ca112. We may say that the exception of Estoppel is intermediate between the movable legal conditions and general clauses opened topically. Canaris wrote :

Der Einwand des ' venire contra factum proprium ' schließlich dürfte heute noch auf der Grenze zwischen ' beweglichem ' Tatbestand und topisch-offener Generalklausel stehen. . . .

[Canaris (1983), pp.152 - 153]

#### 4.1.3 Schikane ist verboten. (T33)

T34. Sachwidrigkeit eines Kampfmittels.

T56. Mißbrauchsgefahr

Cs120. In CISG, there is no room for the Doctrine of Abuse of Rights to argue alike in Common Law. [Sono and Yamate (1993), p.74]

T43. Das Gebot des schonendsten Mittels.

#### 4.1.4 Verwirkung (T52)

Ca111. The exception of lapse is the movable legal condition occupying an in-between

position with fixed legal condition and general clauses. In the case of movable legal conditions, the elements are stable. But the legal effect becomes clear with the distribution rate of some elements, which can change, in every case.

Canaris wrote :

Der Einwand der Verwirkung stellt demgegenüber einen beweglichen Tatbestand dar, bei dem zwar die ' Elemente ' feststehen, die Rechtsfolge sich aber erst aus ihrem von Fall zu Fall variablen ' Mischungsverhältnis ' ergibt. . . . [Canaris (1983), p.152]

#### 4.1.5 Prohibition of Malicious Production of Legal State in Litigation

T38.Favor legitimitatis.

#### 4.2 Other Legal Topos about Fair and Equitable Principle

T31.Der Rechtsgedanke des § 162 BGB [Kobe Univ. research group of foreign law (1955)]

T39.Vertrauen verdient Schutz.

T40.Das Recht braucht dem Unrecht nicht zu weichen.

T45.Opportunes Handeln ist erlaubt.

#### 4.3 Key Words and Phrases in the Fair and Equitable Principle availing [Matsuura (1997)]

4.3.1 Societal sense of justice

4.3.2 Social distress

4.3.3 Social validity of factum of parties

4.3.4 Slight error

#### 4.3.5 Unreasonableness of acts of opposing parties

#### 4.4 Other Knowledge of the Fair and Equitable Principle

Ca102. The Fair and Equitable Principle has its origin in Roman law and this principle has developed from limiting principle of the exercise of rights. [Kanno (1994)]

Cs113. In CISG, the Fair and Equitable Principle goes in a dimension of the interpretation of article or contract clause. It does not function as a general clause. [Sono and Yamate (1993), p.74]

Cs114. The Fair and Equitable Principle goes in a dimension of interpretation of a contract through the meaning of due consideration in the paragraph 3 of the article 8 of CISG. [Sono and Yamate (1993), p.74]

Cs115. It is desirable to spread the Fair and Equitable Principle to an international level. [Sono and Yamate (1993), p.72]

Cs116. If the Fair and Equitable Principle functions as a general clause in CISG, there are fears that each country applies it differently and the unification cannot be achieved. It is unreasonable for the developing countries to make reference to the principle of fair trade. [Sono and Yamate (1993), pp.72 - 73]

Cs118. In a fix of the meaning of each article in CISG, regard is made to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade. The so-called plain meaning rule should be expelled. [Sono and Yamate (1993), p.73]

Cs119. Almost every article in CISG is a discretionary provision. Also, it has a nature of a supplementary provision unless the parties have agreed otherwise. [Sono and Yamate (1993), p.73]

Cs125. The following are examples of the general principles on which CISG is based :

- (a) The demand for a conservation of confidence to declaration
- (b) The notice in an important phase
- (c) The demand for a reply or information
- (d) The cooperative duty and the alleviative duty of damages

But it is safe to say that they are individual legal propositions of the Fair and

Equitable Principle. [Sono and Yamate (1993), p.78]

## 5 . The Legal Topos that Shows the Viewpoints which Legislators and Judges must Consider in the Enactment, Interpretation, and Application of Law

Let me classify various kinds of background knowledge of the legal topos that shows the viewpoints which legislators and judges must consider.

### 5.1 Legal Topos, etc.

T3. Ausnahmen müssen eng ausgelegt werden.

T13. Kompensation

T20. Veranlassungsprinzip

T24. Der Rechtsgedanke des § 254 BGB

T26. Privatautonomie

T32. Recht braucht Sanktionen.

T36. Standards

T37. Verkehrsschutz

T30. Auch wer nicht will, will ; oder richtiger gesagt : Es kommt auf das Gewollte,  
nicht auf das Gewünschte an.

T44. Das Notwendige ist erlaubt.

T46. Ausnahmen sind bei besonderen Härten erlaubt.

T49. Pauschalierung

T5. De minimis non curat praetor.

T50. Tatsächliche Unmöglichkeit

T54. Unerträgliches ist nicht rechtens.

T53. Unzumutbares darf nicht verlangt werden.

T48. Praktikabilität

T58. Interesse

T21. Priorität

T59. Öffentliches Interesse

T61. Volkswirtschaftliches Interesse



T60. Sozialer Schutz

T64. Bei Evidenz kann das Verfahren abgekürzt werden.

Ca74. In the case of application of laws, the application must be legitimized based on the law presently in force. The judge must not seek grounds for application of a law in a commonly accepted idea. Canaris named this proposition thesis 21. [Canaris (1983), pp. 159 - 160]

Pe140. An idea of agreement occupies an important place, when a method of proof is insufficient or does not exist. [Perelman (1986), p. 182]

## 5.2 Knowledge of CISG

Cs121. One of the ideas of the paragraph 1 of the article 7 of CISG is to regard the need of the observance of good faith in international trade. It is often difficult to discriminate definitely the problem of interpretation of a convention from the problem of filling a gap in the law, and both of these frequently overlap each other. [Sono and Yamate (1993), p. 75]

Cs122. According to the paragraph 1 of the article 9 of CISG, the parties are bound by any usage to which they have agreed and by any practices, which they have established between themselves, so the contents of contract are supplemented by these points. According to the paragraph 2 of the article 7 of CISG, it imposes upon the problem of filling a gap restrictions to matters regulated by CISG. [Sono and Yamate (1993), pp. 75 - 76]

Cs123. The legislators of CISG carefully avoided reference to the general principles alone on which CISG is based, because these principles are vague and bring the uncertainty of the application of law. For this reason, the paragraph 2 of the article 7 of CISG was inserted. [Sono and Yamate (1993), p. 76]

Cs124. When there is not an express provision, the court should not depend on the national law immediately. [Sono and Yamate (1993), p. 77]

Cs126. It is very important for many contracting states, which have different legal systems to have the common consent about a method of interpretation of each provision because the unity of the application must be secured. [Sono and

Yamate (1993), p.79]

### 5.3 Knowledge of Legal Reasoning

Pe130.The legal reasoning cannot be simple syllogization. [Perelman (1986), p.151]

Pe131.In simple syllogization, even if a conclusion is felt irrational, the judge cannot but receive the conclusion. [Perelman (1986), p.151]

Pe133.The judge must respect the value of resolution and the conformity to law simultaneously, and he must also pursue the synthesis of them. [Perelman (1986), p.151]

Pe134.The application of law, which means that the changeover from an abstract norm to the concrete case, is not a mere logical process, but the operation of conformity to the various values which are colliding in the argument in court. [Perelman (1986), p.153]

Pe136.We cannot understand the legal thought without value judgment. [Perelman (1986), p.153]

Pe139.Legal Topoi are able to synthesize various considerations. [Perelman (1986), p.158]

Pe141.Dialectic reasoning purposes an agreement between value and its application. [Perelman (1986), p.182]

## 6 . Legal Topos Maxims

Let me enumerate legal topoi concerning the legal maxims here.

T1.Lex posterior derogat legi priori.

T2.Lex specialis derogat legi generali.

T4.Res judicata pro veritate accipitur.

T6.Ne ultra petita.

T9.In dubio pro reo.

T10.Einmal ist keinmal.

T11.Der immer mögliche und auch meist vorhandene Zweifel darf nicht ausschlaggebend sein.

- T12. Ein typischer Topos ist das Gebot, ohne rechtlichen Grund Erlangtes zurückzuerstatten.
- T16. *Nemo plus iuris transferre potest quam ipso habet.*
- T17. Das Verbot des Vertrages zu Lasten Dritter.
- T18. Wer begünstigt, benachteiligt auch.
- T19. *Casum sentit dominus.*
- T23. Wer Schuld hat muß für die Folgen eintreten.
- T25. Schweigen verpflichtet zu nichts.
- T27. *Quisquis praesumitur bonus.*
- T29. *Jura scripta vigilantibus.*
- T35. Kein Gleichberechtigter darf einen anderen Gleichberechtigten endgültig ausschalten.
- T47. Rechtlich relevant ist nur Bestimmtes.
- T55. Es dürfen nicht uferlose Ansprüche entstehen.

## 7 . Conclusion

This paper has systematized many kinds of background knowledge of the fair and equitable principle. The meta-knowledge of legal topos, the movable system, general clauses, good faith in CISG, and legal value judgments are included in the background knowledge of the fair and equitable principle. As mentioned above, this background knowledge was classified into four types as follows : (a) principles of the high-dimensional legal value, (b) principles related to the fair and equitable principle itself, (c) the viewpoint which legislators and judges must consider when enacting, interpreting, and applying of law, (d) principles of legal maxims. The author wants to deal with more minute systematization in the future.

Now, it must be noted that topical thought is not opposed to systematic thought exclusively, and they supplement and overlap each other. Through the systematization of Topoikatalog, the author is going to watch the relation of the mutual supplement of systematic thought and topical thought. When we think about the fair and equitable principle, we must not forget that the individual legal proposition of the fair and equitable principle is legal topos. Legal topos is able to give an appropriate indicator for legal reasoning. It increases the number of options in the choice of the intellectual methods that the judge can utilize to search rational and equitable

resolutions. If we are able to make reference to systematized Topoikatalog, then mutually related knowledge will control the legal value judgments on the basis of the fair and equitable principle.

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高松大学紀要

第 30 号

平成10年10月28日 印刷

平成10年10月30日 発行

編集発行

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