C. Contracts in Japanese Law

The conclusion of a contract under Japanese law follows the principle of consensuality and is governed uniformly on a national level. This was not always true. Over the course of history, contracts went from something regulated by local customs with variations across communities and, perhaps, social classes, to a pan-Japan standardised formula. The path of development shows radical changes, which have not only affected the way in which contracts are concluded, but also how they are understood. Before giving a definition of contracts in Japanese law in Section II. below and exploring the historical development of contract law and the current legal practice in Sections III. and IV. respectively, mention must be made of the exceptional character of Japanese law. In the final section (V.), the changes occurring in relation to the formation of contracts under the reform project of the Japanese Civil Code that has recently been completed will be considered.

I. Classification of the Legal Tradition of Japanese Law and the Sources of its Contract Law

The Japanese legal system can be classified as a mixed legal system,[1583] constructed from several inspirations, a composition referred to as unique.[1584] The definition of the Japanese legal tradition will be elaborated further in the following section (1.), while its sources will be identified in Section 2.

1583 See Harald Baum and Moritz Bälz, *§ 1 Rechtsentwicklung, Rechtsmentalität, Rechtsumsetzung* [Chapter 1 Legal Development, Legal Mentality, Legal Implementation], in: ibid (fn 16) 2 para 2. Also see Keizō Yamamoto, *Rechtsverständnis und Rechtsentwicklung: Die Erfahrungen der Rechtswissenschaft und Rechtspraxis in Japan* [Understanding of Law and Legal Development: The Experiences of Legal Academia and Legal Practice in Japan], in: Grundmann and Thiessen (fn 40) 85, 90.

1584 Harald Baum and Eiji Takahashi, *Commercial and Corporate Law in Japan: Legal and Economic Developments after 1868*, in: Wilhelm Röhl (ed), *History of Law in Japan Since 1868* (Brill 2005) 330, 331.

1. Classification of the Legal Tradition of Japanese Law

The Japanese legal system can be described as a mixed system for several reasons. There is a general and a more detailed explanation. The basic idea comprises the following two aspects: First, the Japanese legal system has incorporated legal concepts from various countries, adapting these to its own needs.[1585] Secondly, and more importantly, these principles stem from different origins: While 'traditional' Japanese law (ie, that law in existence before the reception of Western legal concepts; 'indigenous'[1586]) was influenced by Chinese norms,[1587] the modern regime moreover incorporates concepts of both civil- and common law origin; namely, from France and Germany, and the US and the UK respectively.[1588] As will be

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1585 See Wilhelm Röhl, *Generalities*, in: ibid (fn 1584) 1, 23, who speaks of the foreign laws being 'japanized', meaning that the concepts were merged with 'indigenous ideas' and subsequently interpreted in a Japanese fashion by legal academics. Another term used in this context is 'assimilation', see Baum and Takahashi (fn 1584) 331. Also see Baum and Bälz (fn 1583) 2 paras 2–3, who use the term 'acculturation' ('*Akkulturation*') to describe this process.

1586 This term is used by several authors including Yamamoto K, '*Rechtsverständnis*' (fn 1583) 86, who defines this as the law existing in Japan, different from the law received from the West, and reflecting the Japanese way of looking at law (*Rechtsbewusstsein*), ie, as the law that was marked by Japanese culture and society, see ibid 92–95.

1587 This occurred in the Ancient and the Classical eras (between sixth and eighth century), see Röhl, '*Generalities*' (fn 1585) 23; see also Christiane C Wendehorst, *Rezeption deutschen Zivilrechts — Was bleibt übrig im 21. Jahrhundert?* [Reception of German Civil Law — What Remains in the 21st Century?], in: Jörg-Martin Jehle and others (eds), *Rezeption und Reform im japanischen und deutschen Recht* [Reception and Reform in Japanese and German Law] (Universitätsverlag Göttingen 2008) 19, 20. For a brief summary of the objectives of this reception, see Yamamoto K, '*Rechtsverständnis*' (fn 1583) 88. Contrast Paul H-C Ch'en, *The Formation of the Early Meiji Legal Order: The Japanese Code of 1871 and its Chinese Foundation* (OUP 1981) xix (foreword) and 21–24, who traces the main inspiration of law during the first years of the Meiji (明治) era (between 1867 and 1882) back to Chinese institutions, in particular with regard to criminal law. He concedes, however, that this influence was only strong to begin with and declined as the interest in Western legislation increased. For further information on the periodisation of Japanese history adopted in this dissertation, see Carl Steenstrup, *A History of Law in Japan Until 1868* (2nd edn, Brill 1996) 192–195.

1588 These incorporations occurred mainly in the Meiji, Taishō (大正), and Shōwa (昭和) eras respectively, see Röhl, '*Generalities*' (fn 1585) 23, 28. See Steenstrup (fn 1587) 194 for how these periods are identified. Depending on the system used to classify legal traditions, the civil law system inspiration can be broad-

seen, the influence of German and English law is particularly relevant in the formation of contracts.

A more — perhaps even the most — comprehensive analysis of the nature of the Japanese legal system is achieved by applying five factors that Zweigert and Kötz have identified as those aspects which affect a country's 'legal style' (*Rechtsstil*): the legal system's historical origin and development; its predominant legal thinking; specific characteristic legal institutions; legal sources and their interpretation; and ideology, in particular religious or political factors.[1589] These aspects will be analysed separately, starting with the sources (Section 2.) and the historical development of Japanese contract law (Section III.). Characteristic aspects of the law will be identified in Section IV.1. below. Finally, the legal way of thinking in Japan will be considered in Section IV.2.

It should be noted that while the origins of several legal concepts vary,[1590] the Japanese tendency to interpret them according to German legal theory irrespective of their origin has led to the original connection being lost,[1591] so that the current Japanese understanding of such concepts cannot be explained by mere reference to the legal theory of the country of

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ened further, since the influence stems from civil-germanic (German law; see on this Section B.I.1. above) and civil-roman (French law) traditions, compare Zweigert and Kötz (fn 15) 68.

1589 Zweigert and Kötz (fn 15) 67–73, in particular 68–71. The authors note that the style of hybrid systems, which cannot be assigned to one tradition, should be categorised according to the current predominant legal orientation.

1590 This contrasts with the often-held misconception that modern Japanese private law is basically a replica of the German *Bürgerliche Gesetzbuch* ('BGB'). In fact, although it may appear to be so from its structure, the content of the Japanese Civil Code (*Minpō*, see fn 1606 below) follows first one and then another inspiration. See Roland R Bahr, *Das rechtliche Verhältnis von Grundstück und Gebäude als Beispiel* [The Relationship Between Land and Buildings as an Example], in: Heinrich Menkhaus (ed), *Das Japanische im japanischen Recht* [The Japanese in Japanese Law] (Iudicum 1994) 103, 111. Further reasons for this being a misconception are given by Zentarō Kitagawa, *Rezeption und Fortbildung des europäischen Zivilrechts in Japan* [Reception and Subsequent Development of European Civil Law in Japan] (Alfred Metzner Verlag 1970) 34–35, 43.

1591 Yamamoto K, '*Rechtsverständnis*' (fn 1583) 91. See also Tanaka and Smith (eds), *The Japanese Legal System: Introductory Cases and Materials* (10th edn, UTP 2000; fn 2) 189–190, 242–245.

origin.[1592] This split between the country of origin of a legal provision and the legal dogma applied to it has thus created a dual structure system.[1593]

2. Sources of Japanese (Contract) Law

Japanese contract law has various sources on different levels. The first and most important one is naturally the contract itself.[1594] The sources of the Japanese legal system are secondary, but they are numerous and of two natures. On the one hand, there are several 'legal' sources, namely: general and specific pieces of legislation (the specific term for enactments, like an act or a code, is *hōritsu*, 法律; while the collective term for laws and regulations is *hōrei*, 法令 [1595], see Section b. below), and case law (*hanrei*, 判例, Section c.). Furthermore, there are international treaties, out of which the CISG is relevant for the present discussion, as it may come into play in relation to cross-border contracts.

On the other hand, the Japanese legal system, just like the English and German legal system,[1596] has known a range of other, parallel forms of regulation besides law for a long time. These are: most importantly customs (*kanshū*, 慣習)[1597], eg, in commerce, or of distinct classes of people

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1592 This seems to be a natural consequence, since Alan Watson, *Legal Transplants: An Approach to Comparative Law* (2nd edn, University of Georgia Press 1993) 27 notes that '[a] successful legal transplant […] will grow in its new body, and will become part of that body […].'

1593 See Kitagawa, '*Rezeption*' (fn 1590) 24. He goes on to note that Japanese law has developed a kind of German legal character due to the double influence of German law and German dogmatism, ibid. It should be noted that this observation was made some 45 years ago, and indeed Kitagawa himself points out that the 'Germanness' of Japanese law is being questioned (see ibid), and proceeds by listing differences between the Japanese Civil Code and the BGB, see ibid 34–35.

1594 See, generally, Smits (fn 37) 16–17.

1595 This term ought not to be confused with the former Japanese legislation concerning the application of laws, '法例' (hōrei), which has been replaced by the *Hō no tekiyō ni kansuru tsūsoku-hō*, 法の適用に関する通則法, General Rules for Application of Laws, Law No 78/2006. An English translation is available online at www.japaneselawtranslation.go.jp/law/detail/?id=1970&vm=04&re=2&new=1.

1596 On this, see Sections B.I.2.a. and B.I.2.b. above respectively.

1597 A first official definition of the Japanese Justice Department from the end of the nineteenth century termed 'custom' to be 'whatever has been enforced by the prefectural offices and law courts', and later also included 'traditional pop-

like samurai, villagers, or towns-people;[1598] *jōri* (条理)[1599]; and *giri* (義理).[1600] These norms are of varying importance today; however, neither is relevant for the formation of contracts. *Kanshū*, whether of civil or commercial nature, may generally come into play as a subsidiary source of law where a matter is not regulated by statutory provisions,[1601] and are taken into account when interpreting the content of a contract,[1602] whereas the courts sometimes rely on the principle of *jōri* in their reasoning.[1603] On the

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ular practice' as that 'recognized by civil law'. The second official definition was: 'those usages not contrary to reason [ie, the logic of things, *jōri*, see below] which are recognised by civil law as popular practices and precedents heretofore in use between the government and the people'. See on this Ryōsuke Ishii (ed) and William J Chambliss (tr), *Japanese Culture in the Meiji Era, Vol IX: Japanese Legislation in the Meiji Era* (repr edn, The Toyo Bunko 1969) 50–51; also see Röhl, '*Generalities*' (fn 1585) 123. This definition coincides with the translations found in the Dictionary of Standard Japanese Legal Terms (fn 9) 569 as 'custom', 'usage', or 'practice'. A commercial custom is considered to be a use or convention (決まり, *kimari*) of commercial transactions that is promoted to the level of a custom by the legal consciousness (法意識, *hō-ishiki*), see Kiyoshi Endō and Kazuhisa Matsuda, *Puchi konmentāru: shōhō sōsoku, shōkō'i-hō* [Small Commentary: Commercial Law, General Provisions and Commercial Transactions] (revised edn, Zeimu Keiri Kyōkai 2015) 3.

1598 See Steenstrup (fn 1587) 122, 66, 136, and 137–139 respectively.

1599 *Jōri* is often translated as 'reason', '*Natur der Sache*' (nature of things), '*natürliche Vernunft*' (natural common sense), or 'natural reason'. See Wilhelm Röhl, *The Courts of Law, Appendix: Execution of Penalty*, in: ibid (fn 1584) 711, 731; Rahn, '*Rechtsauffassung*' (fn 1600) 89, 88; and Tanaka and Smith (fn 2) 125 respectively. This seems to flow from the concept itself, which has been described as 'an ideal picture of how the law should be' ('*ein Idealbild vom Recht, wie es sein sollte*.'). See Wilhelm Röhl, *Rechtsgeschichtliches zu Jōri* [The Legal History of *Jōri*], in: Menkhaus (fn 1590) 39, 43. For an extensive account on the meaning of *jōri* and its (etymlogical) development from the Ancient era onwards, see ibid 39–49.

1600 Guntram Rahn, *Rechtsdenken und Rechtsauffassung in Japan* [Legal Thinking and Legal Opinion in Japan] (Beck 1990) 51 describes *giri* as a social obligation to express one's thankfulness ('*Dankespflicht*').

1601 See Zentarō Kitagawa, *Contracts and Business Activities*, in: ibid (ed), *Doing Business in Japan* (Bender 1980, 2017 release of loose-leaf work) Vol 2 § 2.01[1][a] at 2-20.1 and § 2.01[3][a] at 2-27–2-28. Nevertheless, this seems to not have happened in relation to contract formation.

1602 Sei'ichirō Ueda, *Dai-3-hen dai-2-chō keiyaku [zenchū]* [Part 3 Chapter 2 Contracts [Preliminary Note]], in: Hisakazu Matsuoka and Kunihiro Nakata (eds), *Shin konmentāru minpō (zaisan-hō)* [New Commentary on the Civil Code (Property Law)] (Nihon Hyōron-sha 2012) 753, 756.

1603 See Hans-Peter Marutschke, *Einführung in das japanische Recht* [Introduction to Japanese Law] (2nd edn, Beck 2010) 11, who states that *jōri* is most often

other hand, *giri* is of a social nature and thus embedded in the Japanese mentality, rather than its law. As none of these concepts is relevant, they will not be examined further in this dissertation. Before elaborating on each of the above-named sources, their inter-relationship will be briefly explored.

a. The Inter-relationship of the Sources of Japanese (Contract) Law

To avoid a clash of different sources on a single matter, Japanese contract law follows a specific order of application,[1604] beginning with — where applicable — special commercial statutes (*shōji tokubetsu-hō*, 商事特別法), followed by the Japanese Commercial Code (*Shōhō*, 商法, hereinafter '*Shōhō*'),[1605] commercial customs (*shō-kanshū*, 商慣習); otherwise beginning with special civil statutes (*minji tokubetsu-hō*, 民事特別法), followed by the Japanese Civil Code (*Minpō*, 民法, hereinafter '*Minpō*'[1606]), and (civil) customs (*minji kanshū*, 民事慣習). In accordance with art 98 para 2 Japanese Constitution (*Nihon-koku Kenpō*, 日本国憲法, hereinafter

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used in relation to questions of private international law, although it has also been applied in, eg, tort cases. This practice seems to have existed before the Middle Ages and continued until the Meiji era, as evidenced by art 3 Rules for the Conduct of Court Affairs (*Saiban jimu kokoro'e*, 裁判事務心得) of 1875 (Government Decree No 103/1875; English translation available in Ishii and Chambliss (fn 1597) 307–308). In the wake of the modernisation of Japanese law during the Meiji era, *jōri* as a standard for (legislated) law disappeared; however, it may be that *jōri* 'lives on as a source of law and therefore as a basis for decision-making in [legal] practice', see Röhl, '*Jōri*' (fn 1599) 49. cf Marutschke, '*Einführung*' (fn 1603) 12, who states that the Rules for the Conduct of Court Affairs are said to be still in force.

1604 Kitagawa, '*Contracts*' (fn 1601) § 2.01[1][b][iii] at 2-20.2–2-21. In the sphere of commerce, this order may generally be preceded by commercial autonomous regulation (*shōji jichi-hō*, 商事自治法), such as company statutes, and commercial treaties (*shōji jōyaku*, 商事条約) from international law, see Endō and Matsuda (fn 1597) 9.

1605 See arts 501–503 *Shōhō* (Law No 48/1899 as amended; English translation available online at www.japaneselawtranslation.go.jp/law/detail/?id=2135&vm=04&re=02&new=1).

1606 Law No 89/1896 and No 91/1889 as amended. An English translation (taking into account amendments until 2006) is available online at www.japaneselawtranslation.go.jp/law/detail/?id=2057&vm=04&re=2&new=1 (Books 1–3) and www.japaneselawtranslation.go.jp/law/detail/?id=2058&vm=04&re=2&new=1 (Books 4–5).

'*Kenpō*'[1607]), international treaties (*jōyaku*, 条約) 'concluded by Japan [...] shall be faithfully observed'.[1608] While it is therefore clear that treaties such as the CISG are to be observed, the constitution does not state explicitly whether these have superior rank to other national laws (arguably, except for the constitution itself, as it is 'the supreme law of the nation' ('国の最高法規であつて', *kuni no saikō hōki de ate*, see art 98 *Kenpō*). Nevertheless, as will be seen in Section E.I.1. below, the automatic applicability of the CISG to international contracts — unless the parties provide otherwise — solves this question.

By way of exception, this order is not followed in relation to consumers. This is because Japanese consumer law is geared towards the protection of the consumer,[1609] so that it is given priority over other enactments. As a consequence, consumer legislation is applied first; the *Minpō* — not the *Shōhō* — only comes into play if there is no applicable consumer regulation. This means that B2B transactions are governed primarily by the *Shōhō*, while B2C or C2C transactions are governed either by Japanese consumer law or the *Minpō*.

In the exposition of Japanese contract law in Section IV. below, these two orders of application will be kept in mind; however, the rules contained in the 'basic' laws, ie, in the *Minpō* or the *Shōhō*, will be set out first, whereby deviating norms found in special regulation will be highlighted where appropriate.

b. Japanese Legislation: *Hōrei* (法令), Japanese Laws and Regulations

Japanese contract law is regulated in three main areas: First, the *Minpō* is the general, default source.[1610] It sets out all the general rules for contracts

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1607 Constitution of 3 November 1946. An English translation is available online at www.japaneselawtranslation.go.jp/law/detail/?id=174&vm=04&re=2&new=1.

1608 The original provision states: '日本国が締結した条約[...]は、これを誠実に遵守することを必要とする' (*nihon-koku ga teiketsushite jōyaku* […] *ha, kore wo seijitsu ni junshu suru koto wo hitsuyō to suru*).

1609 See Section b. below.

1610 Despite its place at the end of the order of application (see Section a. above), the *Minpō* is of great importance in Japanese contract law, as the sources that have priority over it, like the *Shōhō*, do not regulate all matters exhaustively. Thus, the rules contained in the *Minpō* may apply, even when other sources are *a priori* applicable. On the *Shōhō*, see Kitagawa, '*Contracts*' (fn 1601) § 2.01[1][c][ii][D][II] at 2-26.

in the fifth Part (*hōritsu kōi*, 法律行為; Juristic Acts)[1611] of its first Book (*sōsoku*, 総則; General Provisions) and in the first two Parts (*sōsoku*, and *keiyaku*, 契約; Contracts, respectively) of its third Book (*saiken*, 債権; Obligations).[1612]

Secondly, the *Shōhō* contains contract rules for commercial transactions (*shō-kōi*, 商行為), ie, transactions between merchants (*shōnin*, 商人), whereby 'merchant' is defined as 'a person who engages in the business of conducting a commercial transaction in his/her own name' (art 4 para 1 *Shōhō*).[1613] Having said this, the *Shōhō*'s provisions can also apply to transactions between a merchant and a private individual (a non-merchant, *hi-shōnin*, 非商人)[1614], where the transaction constitutes a commercial act for at least one of the parties (art 3 para 1 *Shōhō*).[1615] This is true for,

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1611 Translation taken from the source indicated in fn 1606. cf the translation contained in the Dictionary of Standard Japanese Legal Terms (fn 9) 246: 'juridical act'.

1612 Translation of '*saiken*' as 'obligations' by this author. The translation of this term proves difficult, as there seems to be no one English word that reflects the meaning of the term in all situations, see Kashiwagi, '*2014*' (fn 6) 5–6. Thus, in relation to private law, a more specific translation may be 'claim', see, eg, the English translation of the *Minpō* (fn 1606) and the Dictionary of Standard Japanese Legal Terms (fn 9) 107. Legal academics also often use the German equivalent, '*Forderungen*', see, eg, Keizō Yamamoto, *§ 10 Vertragsrecht* [Chapter 10 Contract Law], in: Baum and Bälz (fn 16) 465 para 5. A more literal translation might be 'obligatory rights', see, eg, Kitagawa, '*Contracts*' (fn 1601) § 2.01[1][c] 2-23, who also gives the German translation as '*Forderungen*'. While the last translation perhaps expresses the meaning of the word more exactly than 'obligation', since the two kanji in this compound-word, *sai* (債) and *ken* (権), mean 'obligation' and 'right' respectively, 'obligation' will be used hereinafter. Nevertheless, the true (literal) meaning should be borne in mind.

1613 The original definition states: '自己の名をもって商行為をすることを業とする者' (*jiko no mei wo motte shō-kōi wo suru koto wo gyō to suru mono*). 'Commercial' conduct is defined in arts 501–503 *Shōhō*. Endō and Matsuda (fn 1597) 82 state that an act counts as being commercial even where it is carried out only once. For further discussion of these provisions, see Endō and Matsuda, ibid 13–16 (art 4) and 81–86 (arts 501–503).

1614 The Japanese term is used by, eg, Endō and Matsuda (fn 1597) 11. Toshie Ōtsuki, *Ippō teki shō-kōi ni okeru shōhō no tekiyō ni kansuru ichi-kōsatsu* [Regarding the Application of the *Shōhō* to One-sided Commercial Acts] (1984) Chūō Gaku'in Daigaku Ronsō 87, at, eg, 92 uses the more complicated phrase '*hi-shōkōi-sei tōji-sha*' (非商行為性当事者), which can be translated as 'a party acting non-commercially'.

1615 See Kitagawa, '*Contracts*' (fn 1601) § 2.01[1][c][ii][D] at 2-25, who points out that while the *Shōhō* will always be applicable when all the parties are merchants, it will 'often' be applicable where one party is a non-merchant.

eg, arts 507 and 508 (Offer of contract between merchants — 'in direct communication' and 'at distance'[1616]);[1617] but not for provisions which apply only where both parties are merchants, such as arts 524–528 (Sale, 売買, *baibai*).[1618]

Thirdly, beside these general laws,[1619] other special civil or commercial laws may apply in particular cases,[1620] such as with transactions involving a commercial party (a merchant or business operator[1621], *jigyō-sha*, 事業者) and a private individual (a consumer, *shōhi-sha*, 消費者), which are regulated in a series of laws concerning consumers.[1622] The regulation in

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Arguably, the *Shōhō* will not be applicable where a special commercial statute comes into play, see the inter-relationship of the laws outlined in Section a. above. Note that the provision contained in art 3 para 1 *Shōhō* avoids the situation of two sets of laws being applicable simultaneously to the transaction, compare Endō and Matsuda (fn 1597) 11.

1616 The original titles are: '対話者間における契約の申込み' (*taiwa-sha-kan ni okeru keiyaku no mōshikomi*) and '隔地者間における契約の申込み' (*kakuchi-sha-kan ni okeru keiyaku no mōshikomi*) respectively. These two terms will be explained in Section IV.1.a.ii.dd below. Note that the slightly misleading translation of the provisions' titles as 'between merchants' is from the official English translation (fn 1605).

1617 Ōtsuki (fn 1614) 98–100. The explanation for this interpretation lies in the historical development of the stipulation on the one hand, and on its location within the *Shōhō* on the other, see Seiji Tanaka and others, *Konmentāru shō-kōi-hō* [Commentary on the Law of Comemercial Acts] (Keisō Shobō 1973) 91, 93.

1618 Endō and Matsuda (fn 1597) 11.

1619 A succinct overview over the regulations contained in each of these laws can be found in Yamamoto K, '*Vertragsrecht*' (fn 1612) 464–466. For a marginally more detailed outline, see Kitagawa, '*Contracts*' (fn 1601) § 2.01[1][c][ii] at 2-22–2-26.

1620 Kitagawa, '*Contracts*' (fn 1601) § 2.01[1][a] at 2-20.1.

1621 Dictionary of Standard Japanese Legal Terms (fn 9) 130.

1622 The first Japanese law to use the term 'consumer' explicitly was the Basic Consumer Act (*Shōhi-sha kihon-hō*, 消費者基本法, Law No 78/1968 as amended; hereinafter '*Shōhi-sha kihon-hō*'. An English translation is available online at www.japaneselawtranslation.go.jp/law/detail/?id=2040&vm=04&re=02&new=1.), which initially bore the title of Basic Consumer Protection Act (*Shōhi-sha kihon hogo-hō*, 消費者基本保護法), see Kunihiro Nakata, *Shōhi-sha-hō to ha nani ka* [What is Consumer Law?], in: ibid and Naoko Kano (eds), *Kihon kōgi shōhi-sha-hō* [Basic Lecture of Consumer Law] (2nd edn, Nihon Hyōron-sha 2016) 2, 3–4. Interestingly, the *Shōhi-sha kihon-hō* does not apply where both parties are merchants, see Nakata, ibid, 15. Note that according to the predominant academic view, mixed purpose transactions (混合目的取引, *kongō mokuteki torihiki*) are treated as consumer transactions, unless purely for business purposes, see Nakata, ibid 15.

this field is not systematic, but rather developed on a piecemeal basis from high profile cases.[1623] It is perhaps due to this unsystematic development that no uniform definition of the terms 'consumer' and 'merchant' exists; instead, some consumer laws contain their own definitions.[1624] Nevertheless, there is some accordance. Thus, a consumer can be described as an individual who does not act for business but private reasons, whereas a merchant acts in the course of their business.[1625] To complicate matters further, some laws deemed part of this field do not use the term consumer at all, such as *Tokutei shō-torihiki ni kansuru hōritsu* (hereinafter '*Tokutei shō-torihiki-hō*'[1626]), the *Shōhi-sha kihon-hō*, or the *Minpō*.[1627] Irrespective of this terminology problem, it should be noted that these consumer laws do not contain provisions that apply directly to the scope of this dissertation. This is because Japanese consumer law does not regulate the conclusion of contracts in terms of offer, acceptance, and formal requirements. And while it does foresee a range of provisions that relate to the conclusion process of a contract, these are often based on either misrepresentation

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1623 See Marc Dernauer, *§ 13 Verbraucherschutz* [Chapter 13 Consumer Protection], in: Baum and Bälz (fn 16) 567, 569 paras 3, 7. Zentarō Kitagawa, *Business Law in New Fields*, in: ibid (ed), *Doing Business in Japan* (Bender 1980, 2010 release of loose-leaf work) Vol 5 § 15.04[3][b][i] at 15-35–15-36 likewise notes that Japanese administrative consumer regulation takes a 'product-by-product approach', whereby one product may be regulated in various laws due to its different purposes. The situation is complicated further by the fact that beside national civil and administrative legislation, regulations are also adopted by local governments, so that local variations may exist that also have to be taken into account, see Kitagawa, ibid § 15.04[3][b][iii] at 15-37.

1624 For details on this situation, see Dernauer, '*Verbraucherschutz*' (fn 1623) 570 para 4.

1625 Compare, eg, art 2 para 2 Act on Special Provisions to the Civil Code Concerning Electronic Consumer Contracts and Electronic Acceptance Notice (*Denshi shōhi-sha keiyaku oyobi denshi shōdaku tsūchi ni kansuru minpō no tokurei ni kansuru hōritsu*, 電子消費者契約及び電子承諾通知に関する民法の特例に関する法律, Law No 95/2001; hereinafter '*Denshi keiyaku-hō*'; English translation is available online at www.japaneselawtranslation.go.jp/law/detail/?vm=04&id=116&lvm=02&re=02). The notions of 'consumer' and 'merchant' are explained and contrasted by Nakata, '*Shōhi-sha-hō*' (fn 1622) 14–17.

1626 Act on Specified Commercial Transactions, 特定商取引に関する法律, Law No 57/1976 as amended; English translation available online at www.japaneselawtranslation.go.jp/law/detail/?id=2065&vm=04&re=02&new=1. Note that the title of this law was formerly *Hōmon hanbai-tō ni kansuru hōritsu* (訪問販売等に関する法律, Act on Door-to-Door Sales etc) until it was amended by Law No 120/2000, Dernauer, '*Verbraucherschutz*' (fn 1623) 575 in fn 15.

1627 Nakata, '*Shōhi-sha-hō*' (fn 1622) 4–5.

by the offeror, or mistake on part of the consumer,[1628] both issues of which are not covered in the present discussion.[1629] This is in line with the general aim of Japanese consumer law, namely, to protect consumers. It would therefore be more appropriate to refer to this area of law as that of Japanese consumer protection law.[1630] One exception is the *Denshi shōhisha keiyaku oyobi denshi shōdaku tsūchi ni kansuru minpō no tokurei ni kansuru hōritsu* ('*Denshi keiyaku-hō*'[1631]), which deals with contractual declarations of intention made through electronic means and is discussed in Section IV. below.

c. Japanese Case Law: *Hanrei* (判例), Japanese Court Decisions

Legislated law in Japan — as in Germany and elsewhere — is interpreted and supplemented by court decisions.[1632] Having said this, legal academics note that there is comparatively little Japanese case law, especially in re-

1628 This is true for the *Shōhi-sha keiyaku-hō* (消費者契約法, Consumer Contract Act), Law No 61/2000 as amended. The title is misleading in that it suggests a wide field of application, whereas the content deals with a specific issue: the protection of consumers by permitting them to revoke their declaration of intention on the ground of misleading or pressurising conduct by the merchant (art 4) on the one hand, and by controlling unfair terms (arts 8–11) on the other. An English translation of this law is available online at www.japaneselawtranslation.go.jp/law/detail/?id=2036&vm=04&re=02&new=1.

1629 Interested readers are referred to Dernauer, '*Verbraucherschutz*' (fn 1623) 575–590, 597–600 and to ibid, *Verbraucherschutz und Vertragsfreiheit im japanischen Recht* [Consumer Protection and Freedom of Contract in Japanese Law] (Mohr Siebeck 2006), particularly 103–139, 252–259.

1630 Indeed, this term (*Verbraucherschutz*) is used by Dernauer, '*Verbraucherschutz*' (fn 1623), particularly at 569–574; and ibid, '*Verbraucherschutz und Vertragsfreiheit*' (fn 1629). Similarly, Kitagawa, '*Business Law*' (fn 1623) § 15.04[3][a][i] at 15-33 states the aim of Japanese consumer law to be to 'promot[e] the interests of consumers who are […] in a weaker position in relation to [a] business entity'. This helps to explain why the *Shōhi-sha kihon-hō* was initially enacted as the Basic Consumer Protection Act.

1631 See fn 1625 above.

1632 Keizō Yamamoto, *Minpō kōgi I: sōsoku* [Lectures in Civil Law I: General Provisions] (3rd edn, 2nd print, Yūhikaku 2012) 4. Hiroo Sono and others, *Contract Law in Japan* (Kluwer Law International BV 2019) 26 speak of the 'primacy of legislation over case law applications by the judiciary'.

lation to contracts.[1633] The Japanese court structure is divided into the Supreme Court (最高裁判所, *Saikō Saiban-sho*) on the one hand, and the lower instance courts (下級裁判所, *kakyū saiban-sho*) on the other (art 76 para 1 *Kenpō*; art 1 *Saiban-sho-hō*[1634]). In accordance with art 2 *Saiban-sho-hō*, the lower courts in civil matters are, in descending order: high courts (高等裁判所, *kōtō saiban-sho*), district courts (地方裁判所, *chihō saiban-sho*), family courts (家庭裁判所, *katei saiban-sho*), and, lastly, the summary courts (簡易裁判所, *kan'i saiban-sho*). The court structure differed until 1947; for present purposes, it suffices to state that the highest court under that system in civil matters was the *Dai-shin'i* (大審院, Great Court of Judicature).[1635]

Surprisingly, there is no legal hierarchical order among the courts, so that these are, theoretically, independent.[1636] Having said this, a higher court has the power to reconsider, change, or annul a lower court decision of a specific case,[1637] with the effect that a decision by a higher court is binding on lower courts (art 4 *Saiban-sho-hō*). Furthermore, the Supreme Court has jurisdiction over final appeals (上告, *jōkoku*; art 7 no i *Saiban-sho-hō*).

d. International Law: The CISG

Finally, international law in the form of international treaties (*jōyaku*, 条約) can be a source of Japanese (contract) law. Before these treaties become national law, they need to be ratified by the Diet (see art 73 no 3 *Kenpō*, which speaks of '承認' (*shōnin*), approval).[1638] The CISG (in Japanese: 国

1633 Whitmore Gray, *Use and Non-Use of Contract Law in Japan: A Preliminary Study* (1984) 17 Law in Japan 97, 101.

1634 Japanese Court Act, 裁判所法, Law No 59/1947 as amended. An English translation is available online at www.japaneselawtranslation.go.jp/law/detail/?id=3225&vm=04&re=2&new=1.

1635 For further details on this court, see Tanaka and Smith (fn 2) 53–54.

1636 Hideki Shibutani, *Kenpō* [English title: Japanese Constitutional Law] (3rd edn, Yūhikaku 2017) 669.

1637 Ibid. cf Sono and others (fn 1632) 27, stating that there is no doctrine of *stare decisis* in Japan, like there is in England (on which, see B.I.2.a.iii. above). On the jurisdiction of the high courts, see also art 16 no i *Saiban-sho-hō*.

1638 See also Kahei Rokumoto, *§ 2 Institutionen: Recht und Juristen in der Transformation* [Chapter 2 Institutions: Law and Jurists in Transformation], in: Baum and Bälz (fn 16) 1, 45 para 36. See further Shibutani (fn 1636) 656, 593.

際物品売買契約に関する国際連合条約[1639], *kokusai buppin baibai keiyaku ni kansuru kokusai rengō jōyaku*) has applied to international contracts for sale since 1 August 2009[1640] where the prerequisites for its application (discussed in Section E.I.1. below) have been met. The CISG's provisions on the formation of contract will be contrasted with Japanese law in Section E.I.2. below.

II. 'Keiyaku'(契約, Contract) Defined

Japanese legislation in general and the *Minpō* in particular contain no definition of what the term 'contract' (*keiyaku*, 契約) signifies. Put simply in lay terms, a contract arises in Japan from the 'concurrence of intention with intention' ('意思と意思の合致', '*ishi to ishi no gacchi*').[1641] Similarly, academic literature generally defines a contract as the juristic act arising from the conformity of the declarations of intention of the parties involved;[1642] or, more precisely, as the result of two or more persons exchanging declarations of intention with the purpose of creating a legal relationship.[1643] These descriptions make it clear that the central element of a contract under Japanese law is the parties' consensus, their mutual

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1639 See, eg, the official Japanese translation of the treaty, available at www.mofa.go.jp/mofaj/gaiko/treaty/treaty169_5.html (和文テキスト(訳文)(PDF)). Another denomination is 'ウィーン売買条約' (uīn baibai jōyaku, Vienna Sales Convention), see Yasutomo Sugiura and Takashi Kubota, *Uīn baibai jōyaku no jitsumu kaisetsu* [Practice Commentary on the Vienna Sales Convention] (2nd edn, Chūō Keizai-sha 2011) 8 (foreword).

1640 While ratified on 1 July 2008, the convention was proclaimed on 7 July 2008 and came into force on 1 August 2009, see Sugiura and Kubota (fn 1639) 8 (foreword). See also Hiroo Sono, *CISG ni okeru keiyaku no seiritsu to kaishaku ni kansuru kiritsu* [The Rules of the Formation and Interpretation of Contracts under the CISG] (2008) Minshō-hō zasshi 138 No 1 1, 2. On the House of Representative's approval of the CISG, see www.shugiin.go.jp/internet/itdb_gian.nsf/html/gian/keika/1DA3FDA.htm.

1641 Daimon Noriaki, *Sugu ni yakutatsu: keiyaku-sho, inkan, ryōshū-sho, tegata, kogitte no hōritsu chishiki* [Immediately Useful: Legal Knowledge on Contract Documents, Seals, Receipts, Promissory Notes, Cheques] (new revised edn, Sanshūsha 2011) 10.

1642 Yamamoto K, '*Minpō kōgi I*' (fn 1632) 103; compare Endō and Matsuda (fn 1597) 88.

1643 See Kitagawa, '*Contracts*' (fn 1601) § 2.01[2][a] at 2-27.

assent.[1644] The requirements for concluding a contract will be explored in Section IV.1.a. and contrasted with English and German law in Section D.I. below.

Under Japanese law, contracts are classified in different ways. First, according to whether the obligations are one-sided, which gives rise to a unilaterally obliging contract[1645] (片務契約, *henmu keiyaku*); or whether the obligations are mutual, which lead to a bilateral or syllagmatic contract (双務契約, *sōmu keiyaku*). The latter arises where both parties take on obligations of some value, such as is typically the case with contracts of sale (売買, *baibai*, arts 555 et seq *Minpō*, arts 524 et seq *Shōhō*) or employment (雇用, *koyō*, arts 623 et seq *Minpō*).[1646] In contrast, gifts (贈与, *zōyo*, arts 549 et seq *Minpō*) are unilaterally obliging contracts.[1647] Other classes are formal contracts (要式契約, *yōshiki keiyaku*), consensual contracts (諾成契約, *dakusei keiyaku*), and real contracts (要物契約, *yōbutsu keiyaku*). Sales are one example of a formless and consensual contract, whereas a guarantee (保証契約, *hoshō keiyaku*, arts 446 et seq *Minpō*) is one example of a formal contract, and deposits (寄託契約, *kitaku keiyaku*, arts 657 et seq *Minpō*, arts 593 et seq *Shōhō*) and loans for consumption (消費貸借, *shōhi taishaku*, arts 587 et seq *Minpō*, art 513 *Shōhō*) are examples of real contracts.[1648] Furthermore, there are onerous contracts (有償契約, *yūshō keiyaku*) and gratuitous contracts (無償契約, *mushō keiyaku*), such as sales and gifts respectively.[1649] These contracts will be discussed in further detail in Section IV.1.a. below.

1644 See ibid, who contrasts this basis with that of English contract law. On the latter, see Section B.II.1. above.

1645 Translation note: This phrase is used instead of a simpler one such as 'unilateral contract' in order to avoid confusion with the English concept, which is different from the Japanese notion, as discussed in Section D.I. below. On the English unilateral contract, see Section B.II.1. above.

1646 See Keizō Yamamoto, *Minpō kōgi IV-1: keiyaku* [Lectures in Civil Law IV-1: Contracts] (1st edn, 6th print, Yūhikaku 2012) 75, 11.

1647 This can be deduced from the effects of gifts, which only oblige one, namely, the donating party (贈与者, *zōyo-sha*), while the other party, the donee (受贈者, juzō-sha) has no obligation to do something. See on this ibid 342–343. See also art 549 *Minpō*.

1648 On consensual and formal contracts, see Yoshio Shiomi, *Shin-saiken sōron I* [New General Principles of Obligations I] (Shinzan-sha 2017) 11, 9–10. On real contracts in general, see Yamamoto K, '*Minpō kōgi I*' (fn 1632) 120. On loans for consumption, see Yamamoto K, '*Minpō kōgi IV-1*' (fn 1646) 376.

1649 See the first table in Yamamoto K, '*Minpō kōgi IV-1*' (fn 1646) 11.

III. The Historical Development of the Japanese Law of Contract

While the influences of German, French, and Anglo-American law are regularly mentioned by legal academics when sketching the development of Japanese law, references to the influence of English law are made fleetingly, if at all. In reality, there is also an English legal influence — albeit not a very strong one — on several specific matters, as will be pointed out subsequently.

This outline of the development of the law of contract in Japan begins in the Tokugawa era, a period of a little over 250 years in which the country was almost completely isolated from the rest of the world and therefore experienced no external influence.[1650] It was only after the Meiji restoration that the country was re-opened, thus enabling the country to experience foreign interaction and its effects. The legal developments during these times will be explored in Sections 1. and 2. respectively. The subsequent changes, in particular in relation to contracts, will then be outlined in Section 3.

1. Contracts in Japan's Early Modern Period, the Tokugawa Era (17th ~ 19th Century): Legal Fragmentation in Peaceful Times of Growing Commerce, the Sowing Ground for Contract Law

a. Political and Social Background

The Tokugawa era, which is sometimes referred to as the Edo period,[1651] can be roughly dated from the turn of the seventeenth to the end of the nineteenth century.[1652] It was a time of political stability after 'almost a

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1650 John Henry Wigmore, *Law and Justice in Tokugawa Japan: Materials for the history of Japanese law and justice under the Tokugawa Shogunate 1603-1857, Part I: Introduction* (UTP 1969) xii. cf other authors, who sometimes state shorter or longer durations. An example of the former is Röhl, '*Generalities*' (fn 1585) 23, who states that the end of the Japanese seclusion occurred 230 years after its initiation; for an example of the latter, see Kitagawa, '*Rezeption*' (fn 1590) 29, who describes the policy of seclusion ("*Isolationspolitik*") as having lasted 300 years.

1651 See, eg, Yutaka Yoshida, *Tetsuke no kenkyū* [A Study on Tetsuke] (Chūō University Publishing 2005) in the chapter '*Vertrag und Rechtsbewusstsein in Japan*' [Contract and Legal Consciousness in Japan] 3.

1652 Academic literature seems to be divided over the exact dates of this period. While Steenstrup dates it between 1600 and 1867/1868, see ibid (fn 1587)

century of intermittent warfare'.[1653] Despite the fact that Ieyasu Tokugawa, Nobunaga Oda, and Hideyoshi Totoyomi are regularly referred to as the unifiers of Japan,[1654] in reality, a centralised Japanese government already existed in the later Ancient as well as during the Classical era (Nara and Heian periods between the seventh and ninth centuries).[1655]

194; Yoshida (fn 1651) 3 states the period as 1603–1867. For the purposes of the present discussion, this deviation is of little importance. It can be easily explained, however, by looking at the events that occurred on these dates: Ieyasu Tokugawa won the (in)famous battle of Sekigahara in 1600 and through the defeat of his opponents factually unified Japan for the first time. Having said this, he only became *Shōgun* (general, 将軍; kanji taken from Hadamitzky and others (fn 11) 248) three years later in 1603. The end of the period arose from what is referred to as the *Meiji ishin* (Meiji restoration, 明治維新; kanji taken from Hadamitzky and others (fn 11) 1118). As with the beginning of the period, the end is also marked by two important events: The resignation of *Shōgun* Yoshinobu Tokugawa at the end of 1867 and the restauration of the Emperor at the beginning of 1868. On the historical events, see Marius B Jansen, *The Making of Modern Japan* (Harvard University Press 2000) 310–311 and 334 respectively. For further details, see, eg, Günther Distelrath, *Die Vorindustrielle Dynamik der Frühen Neuzeit* [The Pre-industrial Dynamics During Early Modern Times], in: Josef Kreiner (ed), *Geschichte Japans* [Japan's History] (4th edn, Reclam 2016) 204, especially 208–209 (table of dates), 213–218 (establishment of the state), 250–254 (*Meiji ishin*), and Jansen, ibid 294–370.

1653 Jansen, '*Making Japan*' (fn 1652) 2. See also Encyclopaedia Britannica, *Tokugawa Period* (Online Academic Edition 2017), http://academic.eb.com/levels/collegiate/article/Tokugawa-period/72774.

1654 See, eg, Josef Kreiner, *Japan und die Ostasiatische Staatenwelt an der Wende vom Mittelalter zur Frühen Neuzeit* [Japan and East Asian States at the Turn of Medieval to Early Modern Times], in: ibid (fn 1652) 149, 174–175. cf Jansen, '*Making Japan*' (fn 1652) 11, who speaks of them as better being called 'innovators whose work brought Japan its greatest institutional change since the introduction of [centralised] governance in the seventh and eighth centuries.'

1655 Jansen, '*Making Japan*' (fn 1652) 2; Maria-Verena Blümmel, *Die Dominanz des Kaiserhofs vom Ende des 7. bis zum 12. Jahrhundert* [The Dominance of the Imperial Court from the End of the 7th to the 12th Century], in: Kreiner (fn 1652) 52–54 (summary). For further details, see Blümmel, ibid 55–59 (table of dates), 60–65 (establishment of the state). Detlev Taranczewski, *Der frühe Feudalismus* [Early Feudalism], in: Kreiner (fn 1652) 94 refers to this centralised government as 'antique'. The system slowly disintegrated with the decline in power of the state, so that political turmoils led to times be(com)ing violent. For an overview of these developments, see, eg, Jansen, '*Making Japan*' (fn 1652) 2–6; Blümmel, ibid 53–55.

This period of peace brought about an increase in commerce and social changes.[1656] A new administrative system known as *bakuhan* was established, in which political power was centralised in the *bakufu* government (military government, 幕府, literally 'tent government')[1657] and derogated to feudal lords (*daimyō*, 大名 [1658]). Around the *daimyōs*' place of residence people were gathered, from which emerged the first towns beside 'the former capital cities of Nara, Kyōto, and Kamakura', including Tōkyō (then called Edo).[1659] Out of a population of approximately 12 million, 1,1 million lived in the Edo capital in the seventeenth century.[1660] Villages also formed part of the administrative framework, and while government officers were selected from among them, various aspects of the villagers' lives were regulated strictly.[1661] This was necessary in order to keep the thriving peasantry in their place inside the rigorous four-tier social hierarchy of samurai warriors (*shi*, 士), peasant farmers (*nō*, 農), artisans (*kō*, 工), and merchants (*shō*, 商);[1662] the imperial family, the nobles, and minority

1656 See Encyclopaedia Britannica, *Japan* (Online Academic Edition 2015), http:// academic.eb. com/ levels/ collegiate/ article/Japan/ 106451#23137.toc at 'Early modern Japan (1550-1850)', 'The enforcement of national seclusion'.

1657 On the meaning of the term, see, generally, ibid at 'The Heian Period (794–1185)', 'The rise of the warrior class'. See also Josef Kreiner, *Vorwort* [Foreword], in: ibid (fn 1652) 11, 14, where it is stated that the meaning of '*baku*' is the three-sided cloth surrounding the headquarters of the military commander. Compare also entry nos 1 and 3 for '幕府' in the Japanese online dictionary Goo at http://dictionary.goo.ne.jp.

1658 Hadamitzky and others (fn 11) 29. These lords were warriors who governed lands of a certain size and provided service to the *bakufu* government, see Britannica, *Japan* (fn 1656) at 'Early modern Japan (1550–1850)', 'The bakuhan system'.

1659 See Britannica, *Japan* (fn 1656) at 'Early modern Japan (1550–1850)', 'The bakuhan system'. See also Haley, '*Medieval Japan*' (fn 879) 335, noting that these 'castle towns marked the new urban centres of Japan.'

1660 Distelrath (fn 1652) 210, 224, who notes that the population more than doubled to 26 million in 120 years.

1661 See ibid.

1662 On this *shimin* (四民), see the respective entry in the Japanese online dictionary Kotobanku at https://kotobank.jp/. See also Distelrath (fn 1652) 206, who notes further at ibid and 224 that merchants were equally profiting from the rise in commerce. The ranks of the four classes are linked with Confucian philosophy, according to which samurai were deemed to have most and merchants least worth. On this, see Dan F Henderson and Preston M Torbert, *Traditional Contract Law in Japan and China*, in: David and others (fn 21) Vol VII/1 3, 6.

groups were not classified.[1663] Through this system, 7% of the population ruled the rest, of which 80% were peasants.[1664] It seems that this class system was consequently weakened, but not formally abolished until the Meiji era (on which see Section 2. below).

b. The General Structure of Law

The first unified law in Japan was the *ritsuryō*, the penal and non-penal law encoded by the Imperial government in the Ancient era.[1665] The uniformity was broken in the Middle Ages,[1666] when the *ritsuryō* became applicable to the uppermost strata of society only, ie, to the nobility of the Imperial court,[1667] the *kuge*.[1668] The warrior-class, the *buke* (武家), was governed by its own law, the *buke-hō* (武家法),[1669] but there was also the law of the *daimyō* in their district.[1670] Furthermore, despite its existence on various levels, (formal) law was used by those in power as a mere administrative tool; it therefore did not usually regulate private matters between persons,[1671] which is where local customs, the 'informal, living

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1663 Distelrath (fn 1652) 215. cf Haley, '*Medieval Japan*' (fn 879) 336, stating 'non-persons' (非人, *hinin*) to form part of the existing groups, whereas the class of nobility (*kuge,* 公家) and of priests (*sōni* (僧尼) for Buddhidts, *shinkan* (神官) for Shintōs) to have been newly-added during the Tokugawa period. It seems that *hinin*, being outcases, were outside the four-tier system, see the entry for '非人' in the Japanese online dictionary Kotobanku at https://kotobank.jp/.

1664 Britannica, *Japan* (fn 1656) at 'Early modern Japan (1550-1850)', 'The Tokugawa status system'.

1665 See Ishii and Chambliss (fn 1597) 37 and 6. Yamamoto K, '*Rechtsverständnis*' (fn 1583) 88 notes that *ryō* denoted provisions of administrative character.

1666 See Steenstrup (fn 1587) 66.

1667 Röhl, '*Jōri*' (fn 1599) 43.

1668 Steenstrup (fn 1587) 127 and 154. For further details, see Wigmore, '*Introduction*' (fn 1650) 8. It should be noted that Wigmore uses the term *kōke*, which is an alternative reading of the kanji '公家', see the entry for 'くげ' and 'こうけ' in, eg, the Japanese online dictionary Goo at http://dictionary.goo.ne.jp.

1669 See Steenstrup (fn 1587) 83. This class included the *daimyō* across the whole of the country, see Wigmore, '*Introduction*' (fn 1650) 3. Kanji taken from the Japanese online dictionary Goo at http://dictionary.goo.ne.jp.

1670 Compare Haley, '*Medieval Japan*' (fn 879) 336, stating that *daimyō* had judicial authority.

1671 Henderson and Torbert (fn 1662) 17 note that the Tokugawa government did not concern itself much with private issues and concentrated on matters such as crimes and taxation.

law', came in.[1672] We therefore find a fragmented legal order focused on administration.

c. The Law of Contracts

The transformations occurring in the Tokugawa era not only began to reorganise Japanese society, but also had an impact on contracts. As the rigidity of the class system and social hierarchy lessened, contracts gained significance: contractual obligations supplanted hereditary ones.[1673] These changes affected the notion of contract (Section i.), its law and forms (Sections ii. and iii.), but also the further requirements on contracts (Section iv.).

i. Definition and Types of Contracts

During this period, a distinction seems to have been drawn between a 'contract', meaning a promise enforceable in court, and an 'agreement', which was a promise that was not so enforceable.[1674] Under neo-Confucianism, promises were seen as mutual voluntary acts (*aitai*, 相対) that were supported by interpersonal trust (*jitsu'i*, 実意) and therefore had strong moral overtones.[1675] It has been argued that two distinct sorts of contracts existed: those which arose in villages and usually had a more administrative character, and those in towns, which were of a commercial

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1672 Yamamoto K, '*Rechtsverständnis*' (fn 1583) 89, 88, 99. See also Ronald Frank, *Civil Code: General Provisions*, in: Röhl (fn 1584) 166, 168.

1673 Compare Jansen, '*Making Japan*' (fn 1652) 60–61.

1674 Compare the distinction drawn by Henderson and Torbert (fn 1662) 4. Indeed, as it is argued that such enforcement did not exist during this period (ibid 4, 7), only the term 'agreement' is used during their subsequent discussion, see ibid at, eg, 9.

1675 See Henderson and Torbert (fn 1662) 18. Kanji and transcription adapted from the entries for '相対' and '実意' in the Japanese online dictionary Goo at http://dictionary.goo.ne.jp. In accordance with the former term, private documents as in a contract between the parties are sometimes referred to as *aitai shōsho*, 相対証書, compare John Henry Wigmore, *Law and Justice in Tokugawa Japan: Materials for the history of Japanese law and justice under the Tokugawa Shogunate 1603-1857*, *Part II: Contract*, *Civil Customary Law* (UTP 1967) 36; kanji taken from Götze, '*Rechtswörterbuch*' (fn 10) 2 and 503.

nature.[1676] While this may be true, 'commercial' contracts were also to be found in villages in the form of sales and loans, or uses.[1677] Similarly, 'administrative' arrangements were also found in cities like Ōsaka.[1678] The distinction was thus not a strict one.

ii. Contract Law

While the law in general was fragmented, so too were the rules on contracts: These were governed by a multitude of customs, largely on a very local — village — level,[1679] and morals during this period.[1680] Having said this, commercial practices in large cities of commerce, like Edo and Ōsaka also played a role.[1681] Furthermore, a kind of contract law seems to have existed on an overarching cross-regional level, arising from one standardised type of contract claim known as a 'money suit' (*kane-kuji*, 金公事) in the cities of Ōsaka and Edo,[1682] which began to become visible in the early nineteenth century.[1683] Nevertheless, a framework for a law of contract(s) seems not to have existed yet. This may be due to the fact that the private law rules were only developed during this period from judicial decisions on, *inter alia*, the *kane-kuji*, which is comparable to the legal development in England of a theoretical basis from procedural actions during the Early Modern period.[1684]

1676 See Dan F Henderson, *Village 'Contracts' in Tokugawa Japan: 50 Specimens with English Translation and Comments* (University of Washington Press, 1975) 10; Henderson and Torbert (fn 1662) 6.

1677 Compare Henderson and Torbert (fn 1662) 9, 10.

1678 Compare ibid 12.

1679 Compare Henderson (fn 1676) 3.

1680 Henderson and Torbert (fn 1662) 4.

1681 See ibid 6. While Edo is said to have been a 'city of consumption', Ōsaka was its supplier and thus a thriving commercial centre, see ibid 12.

1682 Compare ibid 13, 16. There was also another claim, a 'main suit' (*hon-kuji*, 本公事), ibid 16. For more on these suits, their distinction and remedies, see ibid 14–16, 17. Kanji and transcription adapted from the entries for '金公事' and '本公事' in the Japanese online dictionary Goo at http://dictionary.goo.ne.jp.

1683 Henderson and Torbert (fn 1662) 30.

1684 On this, see Haley, '*Medieval Japan*' (fn 879) 348. On the development of English contract law, see Section B.II.2. above.

iii. Contract Forms

Forms were required for some contracts during the Tokugawa era. In the nineteenth century, money suits (*kane-kuji*) required a written document that was witnessed and sealed as a basis of claim.[1685] This requirement may be the explanation for the large volume of written contracts in this period; however, whether contractual documents established rights, or whether they were merely a means of enforcement is not clear.[1686] Moreover, important contracts were expressly fixed in writing, eg, in commerce or in relation to the administration of villages.[1687] Even family arrangements were thus formalised, such as adoptions or marriages.[1688] For this purpose, standardised contract forms were often employed.[1689]

As early as the Ancient era (Nara period), common people would sometimes sign important documents such as sale contracts by hand (*shimei wo jisho suru*, 氏名を自署する); illiterate people resorted to other forms of signing, such as fingernail-stamps ('爪印', *tsume'in*) or thumb prints (*bo'in*, 拇印).[1690] Nevertheless, it generally seems to have been more common for documents to be sealed.[1691] This appears to be a development of this era, since it is here that the exclusivity of seals for the upper strata of the Tokugawa society was reduced by merchants beginning to use seals for their activities.[1692] In contrast, other commoners would resort to signatures or other authentication methods, unless they were in official positions, like the chief of the village-groups (known as *kumi* or 'five-men companies',

1685 See Henderson and Torbert (fn 1662) 30 14, 17.
1686 See ibid 17.
1687 Wigmore, '*Introduction*' (fn 1650) 92 and Steenstrup (fn 1587) 149–150 respectively. On the latter, see also Henderson and Torbert (fn 1662) 8, 9, giving the examples of the selection process of the village headman or of the definition of the villagers' duties.
1688 Henderson and Torbert (fn 1662) 10.
1689 Ibid 9, 10.
1690 *Nihon ni okeru hanko no rekishi: hanko mame-jiten* [Japan's Seal History: Dictionary of Seal Trivia] (Mori'in-bō Hanko Mame Jiten), www.moriin-bo.com/mame/rekisi.html at '*Inkan Seido no Hajimari*' [The Origins of the Seal System]. These methods will be discussed further in Section D.III.2.c. below.
1691 Details of the (historical) sealing practices will be discussed in Section D.III.2.b.i. below.
1692 Details of this development are discussed in Section D.III.2.b.i.cc) below.

gonin-gumi), who wielded the seal of the group in matters relating to its members.[1693]

Local custom would usually require some form of sealing of a written document, especially with sales or transactions involving land, although the kind of documents and seal impressions that were necessary varied.[1694] An example from the area of Bizen (in today's Okayama prefecture) would be the sale of horses or cattle, whereby the document of sale had to be sealed by the village headman.[1695] Due to local variations, there were references to 'attesting seals' ('証印',[1696] *shō'in*), 'counterseals' ('連判',[1697] *renban*), and 'divided seals' ('割判', *warihan* or '割印', *wari'in*[1698])[1699].[1700] An example of counterseals having been employed was in the (commercial) sale of land in towns, whereby the written document was first sealed by the primary parties (buyer, seller); their relatives and companies (guilds) then countersealed the instrument before the transaction was completed at the local authority, this in turn being marked with a seal impression of the authority's official seal.[1701] A divided seal might have been used on

1693 See Steenstrup (fn 1587) 150; Wigmore, '*Introduction*' (fn 1650) 18–19. For other examples of when the seal of the *kumi* was employed, eg, sale of buildings, see Wigmore, '*Customary Law*' (fn 1675) 1 (referring to the chief as 'company chief', *kumigashira*) and 4 (referring to the 'seal of the […] companies'). An explanation for commoners not using seals may lie in the fact that commoners did not have surnames until the nineteenth century, see the table showing the 'selected chronology for the 1870s', in Marius B Jansen, *Introduction*, in: ibid (ed), *The Cambridge History of Japan Volume 5: The Nineteenth Century* (repr, CUP 2007) 1, 28. See also Section D.III.2.b. below.

1694 See, generally, Wigmore, '*Customary Law*' (fn 1675) 1–5. See further Section D.III.2.b.i. below.

1695 Wigmore, '*Customary Law*' (fn 1675) 38.

1696 Kanji taken from Götze, '*Rechtswörterbuch*' (fn 10) 491.

1697 Kanji taken from the entry for '連判' in the Japanese online dictionary Goo at http://dictionary.goo.ne.jp.

1698 Wigmore, '*Customary Law*' (fn 1675) 37.

1699 Kanji taken from the entry for '割判' in the Japanese online dictionary Goo at http://dictionary.goo.ne.jp and from Kei Ishii, *Japanische Unterschriftsstempel: Gegenwart und Geschichte* [Japanese Name-seals: Present and History] (Expert Opinion, Technische Universität Berlin 2000, available online at http://europa.ig.cs.tu-berlin.de/ma/ehemalige/ki/ap/2000-09/Ishii2000-Hanko.pdf/publication_view) 14 respectively.

1700 See Wigmore, '*Customary Law*' (fn 1675) 1–5 for further details.

1701 Ibid 11.

a contract of sale of land and the relevant entry in the land register, to evidence their connection and enhance security.[1702]

At the same time, local customs endeavoured to facilitate transactions by keeping requirements simple. In this way, in Kaga (today's Ishikawa prefecture) for example, the sale of ships could be effected by the simple exchange of the ship's receipts (*kenjō*, 券状, literally 'bond document', contract in writing).[1703]

Oral agreements were not generally seen as binding during the Tokugawa era.[1704] Thus, if a man were to orally agree with the owner of a brothel on the terms to purchase the freedom of a lady of the night, the owner was not deemed to be bound unless he had received the agreed sum from the other party. If this were not the case, the owner could revoke his agreement (*kuyamigaeshi*, 悔み返し) and contract with another person who paid first.[1705] This risk could be averted by effecting the payment in whole upon conclusion of the agreement.

This thinking notwithstanding, there seems to have existed a certain duality in contracting practice. On the one hand, oral agreements followed by touching or clapping of the other parties' hands would be sufficient to make a contract binding where the parties were part of a merchant guild (*kabu-nakama*, 株仲間 [1706]),[1707] although a simple receipt or sealed entry in a ledger were also seen as sufficient.[1708] In contrast, trade outside these

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1702 This was the custom in Iwami (in today's Shimane prefecture) for example, see ibid 37.

1703 See ibid 30. Kanji and transcription adapted from the entry for '券状' in the Japanese online dictionary Goo at http://dictionary.goo.ne.jp.

1704 Yoshida (fn 1651) 7 goes so far as to say that it was out of question for contractual parties of that period that a naked agreement be sufficient to make it binding.

1705 See ibid 3. He explains the meaning of the words as 'to regret the conclusion of the contract and so to revoke it', ibid. See also ibid in the chapter '*Keiyaku to hō-ishiki*' [Contract and Legal Consciousness] at 639–640. Kanji taken from the latter reference at 640.

1706 Term used by, eg, Henderson and Torbert (fn 1662) 12; Steenstrup (fn 1587) 138. Kanji and transcription adapted from the entry for '株仲間' in the Japanese online dictionary Goo at http:// dictionary.goo.ne.jp. Other terms used include *nakama* (Steenstrup ibid 148), *kumi* or *kumi'ai* (Wigmore, '*Introduction*' (fn 1650) 97). Another designation was '*ko*', see Takeshi Toyoda, *Japanese Guilds* [1954] 5 No 1 The Annals of the Hitotsubashi Academy 72, 80. Guilds were not officially recognised as forms of organisation by the government until the 1721, see Wigmore, ibid, and Toyoda, ibid.

1707 See Yoshida (fn 1651) 8–9.

1708 See Henderson and Torbert (fn 1662) 13, 30.

guilds was conducted with more formal contracts.[1709] The reason for this different treatment was presumably a difference in the level of trust.[1710]

Witnesses would sometimes be present during the transaction; however, if the matter was of less importance, contracts were made orally and between the parties only.[1711] An example of an oral contract (*kuchi-yaku-soku*, 口約束, literally 'mouth-promise') might be the sale of personal property.[1712] Persons other than the parties were also often involved in other ways, namely, as supervisors, record keepers, or as custodians of the document.[1713] Another function of local authorities was the attestation of or permission for a contract, evidenced through the authority's seal impression on the document.[1714]

iv. The Further Requirement of Giving *Tetsuke* (Earnest)

Another method to bind a party to an oral agreement during the Tokugawa period other than through full performance was to pay a part of the agreed amount upon contracting, namely, a sum ranging between a quarter and up to half of the contract price.[1715] This would normally constitute part-payment of the contract and was known as *tetsuke* (手付, earnest money).[1716] In accordance with two commercial customs existing in the Tokugawa era known as '*tetsuke nagashi baimodoshi*' ('手付 流し 倍戻し', literally 'forteiting tetsuke, paying back double') and '*tetsuke son*

1709 See Yoshida (fn 1651) 8–9.

1710 Ibid describes it as a consciousness of keeping a promise existing or not; the former was the case within the guild but not outside.

1711 The latter was true in some regions at least, see Wigmore, '*Customary Law*' (fn 1675) 6. In some regions, like in Iwashiro, 'witnesses' were sometimes not only observers but were treated as guarantors, bearing responsibility in case of default of payment, see ibid 7–8. See further Henderson (fn 1676) 13.

1712 See Wigmore, '*Customary Law*' (fn 1675) 36 and 40, who uses the term 'personalty'.

1713 Henderson and Torbert (fn 1662) 30.

1714 On the former, see Wigmore, '*Customary Law*' (fn 1675) 1. On the latter situation, see ibid 35, 39, where it is noted that the seller had to produce several copies of the sale instrument and the buyer's copy would be handed out to him by the officials if permission was granted.

1715 See ibid 5.

1716 Ibid 4, 3; he uses the German term '*Draufgabe*' (earnest money). This concept will be discussed further in Section IV.1.b.vi. below. For the German historical concept, see Section B.III.2.a.iii.ee) above.

baigaeshi' ('手付 損 倍返し'), the buyer forfeits the *tetsuke* that they paid, whereas the seller has to pay back twice the amount of *tetsuke* they received when a contract is cancelled before completion.[1717] This practice seems to have been used in sale transactions of goods before this period, namely, since the time of the *risturyō* laws,[1718] ie, since the Ancient era,[1719] and its application merely increased during the Tokugawa era.[1720] One could even venture to argue that *tetsuke* formed an essential part of contracting in that period, as naked agreements were not seen as binding.[1721] As this practice still exists today, more will be said on *tetsuke* in Section IV.1.c.iii. below.

2. Political and Legal Change during the Meiji Era: The Creation of the First Great Japanese Private Law Codifications (Turn of the 19th Century)

The end of the Tokugawa period and of Japan's seclusion from foreign interventions came about through the Meiji restoration after the collapse of the *bakufu* government.[1722] The political situation was not resolved thereafter, as will be seen in Section a. below. After this political turnaround, efforts were concentrated on reforming the country. This eventually led to

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1717 See Yoshida (fn 1651) 606, 610. Word segmentation of customs altered by this author, originally reading '*tezukenagashi-baimodoshi*' and '*tezukezon-baigaeshi*'; kanji taken from ibid 641. On the meaning of the first custom, see, eg, Yūgen Kaisha Atago Sangyō at www.025-377-6150.com/1fudousantorihiki/23. For the latter see, eg, the entry for '手付損倍返し' in the Japanese online dictionary Kotobanku at https://kotobank.jp/.

1718 See Kaoru Yunoki and Takio Takagi, *Tetsuke*: *dai-557-jō* ['*Tetsuke*: Art 557'], in: ibid (eds), *Shinhan chūshaku minpō (14) saiken (5)* [Japanese Civil Law Annotated Vol 14 Obligations Part 5] (1st edn, Yūhikaku 1993) 168, 170, who note that it was initially termed '*akisasu*' ('アキサス') and differed in nature.

1719 See Ishii and Chambliss (fn 1597) 6. They refer to this period as 'Recent Antiquity'.

1720 Yunoki and Takagi (fn 1718) 170, who refer to this period as *edo jidai* ('江戸時代', Edo period).

1721 See Yoshida (fn 1651) 7, who states that contractual parties did not regard keeping a promise as important. This mentality was reflected in all forms of *tetsuke*, ibid 7–8. The issue of bare agreements being deemed enforceable or not was already discussed in Section III.1.c.iv. above.

1722 For details on the historical events unfolding, see Jansen, '*Making Japan*' (fn 1652), in particular 257–332, who provides an in-depth description of the incidents, also with respect to the relationships formed with the Western powers.

the emergence of the two great codes that are relevant to the topic of this dissertation: the *Minpō* for private and the *Shōhō* for commercial law. As this was not achieved in one single process, the progress will be examined in three phases: the initial projects (Section b.), the first real codification attempts (Section c.), and, finally, the successful creation of the *Minpō* and of the *Shōhō* (Section d.). As will be seen, influences from a range of sources were incorporated throughout the course of development.[1723]

a. Political and Social Background

During the fall of the Tokugawa regime, beginning in 1854, Japan entered into bilateral treaties with several powerful nations, *inter alia* the USA, the UK, Prussia, and Russia.[1724] These contracts were viewed as unequal and the desire to renegotiate their terms was one of the driving forces behind the Meiji government modernising the Japanese legal system in general.[1725] This was because a revision of the contracts required Japan to be recognised as a World Power, which in turn required the country to be reformed, including its legal system.[1726] It seems that this political

1723 According to Kitagawa, '*Rezeption*' (fn 1590) 51, it was 'more than thirty statutory laws, draft laws or legal systems'. See also ibid 43, where a partial list of the referred laws is given.

1724 See Kitagawa, '*Rezeption*' (fn 1590) 29, 44, who names a few more out of the fifteen States involved. cf Nobushige Hozumi, *Lectures on the New Japanese Civil Code as Material for the Study of Comparative Jurisprudence* (Maruzen Kabushiki-kaisha 1912) 10, who speaks of 'sixteen Treaty Powers of Europe and America'.

1725 See Frank, '*Civil Code*' (fn 1672) 169. See also Kitagawa, '*Rezeption*' (fn 1590) 47, who speaks of Japan's sovereignty having been partially lost. Similar: Baum and Takahashi (fn 1584) 336. Stronger: Jansen, '*Introduction*' (fn 1693) 31, 'galling inequality'. For further details on these treaties, see, eg, Anja Eckey-Rieger, *Der Kodifikationsstreit zum japanischen Bürgerlichen Gesetzbuch* [The Codification Dispute Concerning the Japanese Civil Code] (Master thesis, University of Bonn 1993, Bonn 1994) 15–16 (summarised overview); Kitagawa, '*Rezeption*' (fn 1590) 47–49 (details on the three central aspects of the treaties: freedom of foreigners to settle, consular jurisdiction, and custom tariffs).

1726 See Ishii and Chambliss (fn 1597) 16; compare Eckey-Rieger (fn 1725) 16, who identifies the existence of a modern legal system as being imperative for Japan obtaining the consular jurisdiction over foreigners. Similar: Baum and Takahashi (fn 1584) 336–337. Also including the aspect of custom tariffs: Kitagawa, '*Rezeption*' (fn 1590) 49. A rather circumspect view is given by a contemporary of these events, Hozumi (fn 1724) 3–4, 10–12.

motivation lessened subsequently; however, it remained an influencing factor for modernisation.[1727]

Further impetus for the reform of Japanese law stemmed from sudden developments in Japan, particularly political, but also social and economic changes.[1728] Accordingly, a new framework was seen as necessary for the modernisation and strengthening of the Japanese economy.[1729] Furthermore, the new governmental structure and the re-instatement of the Emperor made a legal regime necessary that reflected this centralised power.[1730] In connection with the aim to garner support for the new government, an oath consisting of five articles (*Gokajō no go-seimon*, 五箇条の御誓文, literally 'Oath in Five Articles') was promulgated.[1731] It outlined the main aims and course of action for the new era and reads as follows:

> 1. Deliberative assemblies shall be established and all measures of government shall be decided by public opinion.
> 2. All classes, high and low, shall unite in vigorously carrying out the plan of the government.
> 3. Officials, civil and military, and all the common people shall, as far as possible, be allowed to fulfill their just desires, so that there may not be any discontent among them.
> 4. Uncivilized customs of former times shall be broken through, and everything shall be based upon just and equitable principles of nature.
> 5. Knowledge shall be sought throughout the world, so that the welfare of the Empire may be promoted.
> Desiring to carry out a reform without parallel in the annals of Our country, We Ourselves here take the initiative and swear to the Deities of Heaven and Earth to adopt these fundamental principles of national government, so as to establish thereby the security and prosperity of

1727 Kitagawa, '*Rezeption*' (fn 1590) 49.

1728 Hozumi (fn 1724) 10. Kitagawa, '*Rezeption*' (fn 1590) 51–52 describes culture as one further factor. See also Ch'en (fn 1587) ix.

1729 Baum and Takahashi (fn 1584) 337. The evolution of this framework is described in ibid 340.

1730 See Kitagawa, '*Rezeption*' (fn 1590) 44. See also Ishii and Chambliss (fn 1597) 577: what was needed was 'a uniform corpus of law that would have a unifying effect upon the country [...]'. Compare the motivation of the nineteenth-century codification of German private law, discussed in Section B.III.2.b.ii. above.

1731 It is also often referred to as the 'Charter Oath of Five Articles', see, eg, Ishii and Chambliss (fn 1597) 144.

the people. We call you all to make combined and strenuous effort to carry them out.[1732]

Article five of this Oath is often cited as (further) explanation for the resort to 'Western' rather than traditional Japanese law as a basis for the reforms.[1733]

While doubts have been voiced by academics as to the strength of the government's desire to truly do so,[1734] the fact remains that the Japanese government sent out a large party of its members to countries of the 'West',[1735] notably England, but also France and the USA, to study foreign legal systems.[1736] Having said this, interest in foreign (Western) culture had arisen prior to the Meiji restoration; in fact, an Institute for the Study of Western Books (*Bansho Shirabe-sho*, 蕃書調所) had already been estab-

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1732 The original text reads: — 広く会議を興し、万機公論に決すべし
上下心を一にして、盛んに経綸を行ふべし
官武一途庶民に至る迄、各其志を遂げ、人心をして倦ざらしめんことを要す
旧来の陋習を破り、天地の公道に基くべし
智識を世界に求め、大に皇紀基を振起すべし
我国未曽有の変革を為さんとし、朕躬を以て衆に先んじ、天地神明に誓ひ、大いに斯国是を定め、万保全の道を立んとす。衆亦此旨趣に基き協心努力せよ
(— *Hiroku kōgi wo kōshi, manki kōron ni kessubeshi*
Jōka kokoro wo hitotsu ni shite, sakan ni keirin wo okonabeshi
Kanbu itto shomin ni itaru made, ono sono kokorozashi wo toge, jinshin wo shite umazarashimen koto wo yōsu
Kyūrai no rōshū wo yaburi, tenchi no kōdō ni motodzukubeshi
Chishiki wo sekai ni motome, ōi ni kōki wo shinkisubeshi
Wagakuni mizo'u no henkaku wo nasantoshi, chinmi wo mote shū ni sakinji, tenchi shinmei ni chikahi, ōi ni kono kokuze wo sadame, banmin hozen no michi wo tatentosu. Shū mata kono shishu motodzuki kyōshin doryoku seyo). Kanji and furigana taken from www.meijijingu.or.jp/about/3-3.html; translation by Hozumi (fn 1724) 5–7; transcription by this author. Compare the slightly deviating translation found in Ishii and Chambliss (fn 1597) 145.

1733 See, eg, Kitagawa, '*Rezeption*' (fn 1590) 45. Weaker: Frank, '*Civil Code*' (fn 1672) 166.

1734 See, eg, Kitagawa, '*Rezeption*' (fn 1590) 45, *inter alia* naming a law prohibiting Christianity that was enacted at the same time as the Charter Oath.

1735 Jansen, '*Introduction*' (fn 1693) 26; see also Kitagawa, '*Rezeption*' (fn 1590) 29.

1736 Ch'en (fn 1587) 22. Among the academics that were sent out, Tamotsu Murata (to England, see Ch'en (fn 1587) 23) and Rinshō Mitsukuri (to France, see Frank, '*Civil Code*' (fn 1672) 171) can be highlighted, as they would later influence the reform endeavours greatly.

lished in the Tokugawa era.[1737] It was created to study foreign languages, including Dutch, English, French, and German, and science,[1738] including social sciences, thus forming a first basis for the knowledge necessary for the later reforms.[1739]

As the Meiji government aimed to modernise the country, the feudal system and the distinction between the four classes of Japanese society was abolished;[1740] however, other, even more traditional aspects that were not seen as being crucial to the reforms, like the family structure under the 'house system' (*ie seido*, 家制度), were maintained.[1741] It was a time of industrialisation, in which agriculture was commercialised, and the population and towns both grew in size.[1742]

b. Initial Reform Projects in Japanese Private and Commercial Law

In accordance with the Charter Oath and its agenda, the Meiji government soon began to reorganise the country's legal system. Before turning to Western ideas, there appears to have been a movement back to before the state of the Tokugawa era, and influence from Chinese law also seems to have been strong, particularly in criminal law.[1743] In contrast, private law resorted to customs laid down in the Tokugawa era, which were gradually replaced by specific statutory laws.[1744] The laws of that period were also

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1737 See the entry for '蕃書調所' in the Japanese online dictionary Goo at http://dictionary.goo.ne.jp. Cf the transcription and translation of the institute's name as given by Kitagawa, '*Rezeption*' (fn 1590) 29. It was initially created under the name *Yōsho Shirabe-sho* (洋書調所) and later renamed, see the entry in Goo, ibid. There were other endeavours that served as forerunners, see Jansen, '*Making Japan*' (fn 1652) 265–266.

1738 See the entry for '開成所' (*Kaisei-jo*, the name that was later adopted for the Institute) in the Japanese online dictionary Goo at http://dictionary.goo.ne.jp.

1739 Compare Kitagawa, '*Rezeption*' (fn 1590) 29.

1740 Hozumi (fn 1724) 7.

1741 Kitagawa, '*Rezeption*' (fn 1590) 46. Readers interested in the development of this house system in the Meiji era and beyond are referred to, eg, Jörn Westhoff, *Das Echo des Ie: Nachwirkungen des Haussystems im modernen japanischen Familienrecht* [The Echo of the Ie: Repercussions of the House System in Modern Japanese Family Law] (Munich 1999).

1742 See Britannica, *Japan* (fn 1656) at 'Demographic Trends', where it says that the population exceeded 42 million in 1897.

1743 See Ishii and Chambliss (fn 1597) 17. For a more in-depth analysis of the influence of Chinese law, see Ch'en (fn 1587).

1744 Ishii and Chambliss (fn 1597) 17.

examined and a compilation created in order to better understand the development of Japanese law.[1745] Drawing on the knowledge acquired of Western laws and languages, the government then turned towards modernising its laws. The development of the two chief pieces of legislation in private and commercial law will be explored subsequently.

In the Bureau for the Investigation of Institutions (*Seido Torishirabesho*),[1746] and through the work led by Rinshō Mizukuri, a translation of the French civil code was put forward as a first step in the reform of Japanese private law in the 1870s.[1747] Based on this translation, several preparatory works were elaborated, but all were abandoned before being transformed into law.[1748] While the compositions were not to last, the Japanese legal vocabulary that resulted, especially the term 'right' from the French *droit* as *kenri* (権利), would persist.[1749] It would take almost another twenty years until the new Japanese Civil Code was completed (see Sections c.–d. below).

In contrast to the civil code project, the first efforts towards modifying Japanese commercial law were not orientated towards a single code, but rather seemed to concentrate on different aspects, in particular company law, which was based exclusively on English law,[1750] and maritime com-

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1745 See Ch'en (fn 1587) 11.

1746 Hozumi (fn 1724) 12; Kitagawa, '*Rezeption*' (fn 1590) 30. Transcription based on latter source.

1747 See Frank, '*Civil Code*' (fn 1672) 171; see also Ishii and Chambliss (fn 1597) 578–579. On the reasons for the choice of French law, see Frank, ibid 171, 172, and Marutschke, '*Einführung*' (fn 1603) 84.

1748 Ishii and Chambliss (fn 1597) 579–580 speak of three works. The first of these seems to have been the *Minpō ketsugi* (Civil Code Resolution, 1871), see Frank, '*Civil Code*' (fn 1672) 173. Kitagawa, '*Rezeption*' (fn 1590) 30 names the other two as the *Kōkoku minpō kari-kisoku* (1872) and the *Minpō so'an* (1873/1874).

1749 The kanji mean 'authority' or 'power' and 'benefit' or 'advantage' respectively, see Frank, '*Civil Code*' (fn 1672) 171 and Hadamitzky and others (fn 11) 1061, 1372. This was not true for all new vocabulary, so that the term *minken* (民権) as 'civil right' from the French *droit civil* for example, which faced strong criticism, would not be used in this sense in legislation later on. Compare on this Ishii and Chambliss (fn 1597) 579; Marutschke, '*Einführung*' (fn 1603) 85–86. Having said this, there are other combined words, such as citizenship (市民権, *shimin-ken*) which was used in, eg, art 5 para 2 Immigration Control and Refugee Recognition Act (*Shutsu'nyū-koku kanri oyobi nanmin nintei-hō*, Cabinet Order No 319/1951; a tentative English translation is available online at www.japaneselawtranslation.go.jp/law/detail/?id=2647&vm=04&re=02&new=1).

1750 See Baum and Takahashi (fn 1584) 350–351.

merce.[1751] The legislation thus enacted was not deemed satisfactory to achieve the underlying political aim of sufficiently modernising the country to re-negotiate the treaties with the Western powers, thus strengthening the desire for a comprehensive commercial code.[1752] Any individual legislative projects were thus abandoned in favour of creating a unified commercial code.[1753]

c. First Codification Attempts and the Codification Dispute

i. First Codification Attempt of a Civil Code

After the first attempts to create a basis for a Japanese private law (civil code) had failed, a committee was established for the drafting of a civil code in 1875 and a first draft closely resembling the French code was completed in 1878.[1754] Like the preceding works, it was not enacted,[1755] as it was perceived too foreign (French).[1756] A new start saw the French lawyer Gustave Émile Biossonade de Fontarabie employed in 1880 to draft provisions in relation to the law of property (*zaisan-hō*, 財産法).[1757] He drafted several parts: Property, Acquisition of Property (in two parts), Securities (of claims), Proof, and Persons.[1758] While based on the French Civil Code, the product of his labours was an 'independent codification',[1759] as it took into account Belgian and Italian law.[1760] Nevertheless, there was still a

1751 See Ishii and Chambliss (fn 1597) 593–594.
1752 Compare ibid. In fact, representatives from Germany and Great Britain demanded a commercial code in a joint proposal for a possible renegotiation of the treaties, see Baum and Takahashi (fn 1584) 352.
1753 This was also, in fact, due to the demand just mentioned, see Baum and Takahashi (fn 1584) 352.
1754 Hozumi (fn 1724) 13; see also Ishii and Chambliss (fn 1597) 580.
1755 See Kitagawa, '*Rezeption*' (fn 1590) 30; Hozumi (fn 1724) 13.
1756 Baum and Bälz (fn 1583) 8 para 16. Marutschke, '*Einführung*' (fn 1603) 86 even calls it 'nothing more than an imitation of the *Code civil*' ('*nichts mehr als eine Imitation des Code civil*').
1757 Baum and Bälz (fn 1583) 8 para 16; Yamamoto K, '*Minpō kōgi I*' (fn 1632) 24. Note that the elaboration of family and succession law was left to Japanese lawyers, see Baum and Bälz, ibid. For further details, see Marutschke, '*Einführung*' (fn 1603) 87.
1758 Marutschke, '*Einführung*' (fn 1603) 87, naming, in German: *Vermögen*, *Vermögenserwerb*, *Forderungssicherung*, *Beweis*, *Personen*.
1759 Baum and Bälz (fn 1583) 8 para 16: '*eigenständige Kodifikation*'.
1760 Marutschke, '*Einführung*' (fn 1603) 87.

strong French influence, both in terms of the structure and vocabulary, as well as in the legal concepts.[1761]

After a revision of the composition by Japanese lawyers,[1762] a civil code was adopted in 1890, which was to come into force three years later; however, a dispute that had arisen in relation to the government's codification projects, known as the 'codification dispute' (法典論争, *hōten ronsō*), put a stop to this, so that the codification has become known as the 'old *Minpō*' (旧民法, *kyū-minpō*).[1763] While it goes beyond the scope of this dissertation to go into details of the dispute, a brief overview will be given in Section iii. below,[1764] preceded by an outline of the first endeavour to create a Japanese commercial code.

ii. First Codification Attempt of a Commercial Code

At around the time that the Meiji Government commissioned the drafting of a Japanese civil code by Boissonade, the German lawyer Carl Friedrich Hermann Roesler was similarly employed to draw up a plan for a commercial code:[1765] Between 1881 and 1884, French, German, and Egyptian law,[1766] as well as the Classified Collection of Japanese Commercial Practices (*Nihon shōji kanrei ruishū*, 日本商事慣例類集), which had been especially compiled for this purpose, were considered throughout the completion of the draft.[1767] Due to political reasons, Roesler, while drafter of the code, was not privy to the discussions, and seemed to have no influence on any further modifications.[1768]

1761 Ibid.

1762 Baum and Bälz (fn 1583) 8 para 16.

1763 Compare ibid 8–9, paras 16, 18; Yamamoto K, '*Minpō kōgi I*' (fn 1632) 24–25. Transcriptions and kanji taken from these sources respectively.

1764 Readers interested in further details are referred to Christoph Sokolowski, *Der so genannte Kodifikationenstreit in Japan* [What is Known as the Codification Dispute in Japan] (Iudicium 2010).

1765 See Baum and Bälz (fn 1583) 8 para 17.

1766 Baum and Takahashi (fn 1584) 356.

1767 Compare Ishii and Chambliss (fn 1597) 593–595. The collection was published, see Sei'ichi Takimoto, *Nihon shōji kanrei ruishū* [Classified Collection of Japanese Commercial Practices] (Hakutō-sha 1932). cf Baum and Bälz (fn 1583) 8 para 17, who note that Roesler did not bear in mind commercial customs, since he deemed them to be out of date.

1768 It is said that he strongly disagreed with these alterations, compare Baum and Takahashi (fn 1584) 353.

The draft was promulgated in March 1890 under the title '*Shōhō*'[1769] (to avoid confusion, this code will hereinafter be referred to as '*Kyū-shōhō*', 'former Commercial Code', 旧商法).[1770] Despite its promulgation, the *Kyū-shōhō*'s effective date, which was originally to be 1 January 1891, was delayed repeatedly for around seven years; however, those portions that were becoming urgently necessary due to increasing commercial development came into force two years later,[1771] with a few critical amendments.[1772] The reasons for the delay came down to a strong opposition, similar to that which the *Kyū-minpō* faced, in the form of the codification dispute.[1773]

iii. The Codification Dispute

The codification dispute began in the 1880s during the time of completion of the *Kyū-minpō*[1774] and peaked in 1889 when a highly critical paper was published on the *Kyū-minpō* and on the *Kyū-shōhō*.[1775] In essence, therefore, it was a criticism of the new codifications, whereby several schools of thought were involved: On the one hand, there was the French school of legal thought, which strongly related to natural law; on the other hand, there was the English school of thought, which placed more importance on legal history.[1776]

1769 Law No 32/1890.

1770 See Ichirō Kobashi, *Wagakuni ni okeru kaisha-hō-sei no keisei* [The Formation of Corporate Legislation in our Country] (Kokusai Rengō Daigaku 1981) 6.

1771 These effective parts concerned legal persons (companies and partnerships), bills, and bankruptcy, see Ishii and Chambliss (fn 1597) 596. For further details, see Baum and Takahashi (fn 1584) 353–354; and Kobashi (fn 1770) 6–7, who also notes that the chapters on the commercial register (*shōgyō tōkibo*, 商業登記簿) and commercial books (*shōgyō chōbo*, 商業帳簿) came into force at the same time.

1772 As foreseen by Law No 9/1893, Kobashi (fn 1770) 7. Details can be found in ibid 48–50.

1773 Compare Baum and Bälz (fn 1583) 8 para 18.

1774 Compare Marutschke, '*Einführung*' (fn 1603) 87.

1775 See Baum and Bälz (fn 1583) 8–9 para 18.

1776 For a succinct summary of the two schools of thought, see Yamamoto K, '*Minpō kōgi I*' (fn 1632) 25. It has been noted that there were other factions, namely, the German school, which was gaining popularity, while the French school was said to be losing popularity, see Rahn, '*Rechtsauffassung*' (fn 1600) 105 and Tanaka and Smith (fn 2) 181 respectively. Furthermore, several au-

The criticism levelled against both the *Kyū-shōhō* and the *Kyū-minpō* related to the content of the codes, which were seen as (too) foreign, and furthermore did not respect Japanese (commercial) language and practices.[1777] Similarly, the quality of the commercial stipulations was sometimes seen as unsatisfactory.[1778] Another ground for delay of the coming into effect of the *Kyū-shōhō* was the concern that the law meant such a great change that the affected parties would not be able to handle the new situation in the slim period of time between publication and coming into force of the code.[1779] Furthermore, there were concerns that the *Kyū-shōhō* and the *Kyū-minpō* were not well-matched,[1780] as they were influenced by different legal traditions and were thus deemed to be incompatible.[1781] Beside these technical aspects, emotions also played an important role. These were grounded in a strengthening feeling of Japanese nationality and pride in the same.[1782]

Irrespective of the reasons, the consequence of the dispute was that the coming into effect of both codes was delayed in 1892 until 1896.[1783] It was seemingly by accident, although it was certainly against the will of the government, that the parts of the *Kyū-shōhō* that had not yet become law came into force in 1898.[1784] This may have been another factor motivating the government to commence new legislative action.

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thors note a particularly strong role of the English school in the dispute: Kitagawa, '*Rezeption*' (fn 1590) 27; Marutschke, '*Einführung*' (fn 1603) 87.

1777 For criticism on the *Kyū-shōhō*, see Baum and Takahashi (fn 1584) 353; for the *Kyū-minpō*, see Marutschke, '*Einführung*' (fn 1603) 87.

1778 Corporate law: Baum and Takahashi (fn 1584) 358–359.

1779 Moderate expression of this concern is made by Baum and Takahashi (fn 1584) 353; it is more drastically described as likely 'throw[ing] Japanese commerce into chaos' by Ishii and Chambliss (fn 1597) 596; similar phrasing is also used by Kobashi (fn 1770) 6.

1780 More precisely, the two were not deemed to be 'harmonius' (*chōwa*, 調和), see Kobashi (fn 1770) 6.

1781 See Marutschke, '*Einführung*' (fn 1603) 87.

1782 See ibid 88; see also Baum and Bälz (fn 1583) 9 para 19.

1783 Marutschke, '*Einführung*' (fn 1603) 87–88; see also Baum and Bälz (fn 1583) 9 para 19.

1784 See Ishii and Chambliss (fn 1597) 597.

d. The Creation of the *Minpō* (Civil Code) and of the *Shōhō* (Commercial Code)

The Japanese government moved swiftly: Two commissions were established in 1892 in order to draft a new civil code and a new commercial code.[1785] Both commissions were directed by three Japanese academics. Nobushige Hozumi, Masaaki Tomii, and Kenjirō Ume were in charge of civil law, whereas the last of the three also worked on the commercial code, together with Keijirō Okano and Yoshi Tabe.[1786] Members of the commercial commission also included influential merchants.[1787] Both commissions worked swiftly: The first three books of the new civil code, the *Minpō*, were enacted in 1896[1788] and a new commercial code, based on revisions that had been previously foreseen for the *Kyū-shōhō*, was completed three years later.[1789] This was the current *Shōhō*, which came into force on 9 March 1899, only a couple of months after its promulgation.[1790]

The revision of the *Kyū-minpō* was made on the basis of the French draft, but was inspired greatly by the first draft of the German *Bürgerliche Gesetzbuch* ('BGB').[1791] The legal provisions were thus mainly of French and German origin, although twenty other laws were also considered.[1792] One important difference between the *Minpō* and the *Kyū-minpō* was that the former introduced the concept of a 'juridical act' (*hōritsu kōi*, 法律行為), based on the German notion of *Rechtsgeschäft*.[1793] It was conceived as

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1785 Baum and Bälz (fn 1583) 9 para 19. See also Ishii and Chambliss (fn 1597) 597.

1786 Baum and Bälz (fn 1583) 9–10, paras 19, 21. See also Ishii and Chambliss (fn 1597) 597. Note that while Ume had studied in France, thus following the 'French school', Okano belonged to the 'English school', see Baum and Takahashi (fn 1584) 359.

1787 One example being the entrepreneur Shibusawa, see Baum and Takahashi (fn 1584) 359.

1788 Marutschke, '*Einführung*' (fn 1603) 91, who notes that the books on family and succession law were enacted two years later.

1789 See Ishii and Chambliss (fn 1597) 597.

1790 Only the part on bankruptcy remained in force, see Ishii and Chambliss (fn 1597) 597.

1791 Marutschke, '*Einführung*' (fn 1603) 90.

1792 See ibid 91, 90. See further Yamamoto K, '*Rechtsverständnis*' (fn 1583) 90; Kitagawa, '*Rezeption*' (fn 1590) 27, 32–34. Thus, Swiss law influenced the provisions on the rescission of contracts, while the English case of *Hadley v Baxendale* (1854) 9 Exchequer 341 was the inspiration for the provisions on damages. See Kitagawa, ibid 39–40.

1793 See Yoshio Hirai, *Zenchū (§§ 90–98 [hōritsu kōi])* [Preliminary Note (Arts 90–98 [Juridical Acts])], in: Takeyoshi Kawashima and ibid (eds), *Shinhan chūshaku*

a 'legal act by virtue of law' (*hōritsu-jō no kōi*, 法律上の行為).[1794] Anticipating the discussion in Section IV. below, where details on this notion are given, a juridical act is today defined as centring around declarations of intention aimed at bringing about particular legal effects.[1795]

One response to the criticism voiced against the *Kyū-shōhō* is found in art 1, which now expressly included commercial customs as a source (para 2), albeit only coming second after the provisions of the *Shōhō*.[1796] In this way, two points were addressed simultaneously: the 'foreignness' of the *Shōhō* was decreased, or rather, its 'Japaneseness' increased; and a historically important source, custom,[1797] was acknowledged explicitly. Similarly, several changes were also made in the area of corporate law in order to improve the legal situation.[1798] The revisions were based on the revised 1884-version of the *Allgemeines Deutsches Handelsgesetzbuch* ('ADHGB'), disregarding the German *Handelsgesetzbuch* ('HGB').[1799]

3. The Subsequent Development of Japanese Contract Law during the Taishō, Shōwa, and Heisei Eras (20th Century~)

The historical periods following the Meiji era each had their own distinct character, which was due to the political and social background of the time in question (see Section a. below). In comparison to the socio-cultural changes that came about in the twentieth century, particularly in the Taishō era, Japanese private law, even more so Japanese contract law, was modified little (Section b.). While there have been amendments to the legal framework, the scale of these modifications pales in comparison with

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minpō (3) sōsoku (3) [Japanese Civil Law Annotated Vol 3 General Provisions Part 3] (2nd edn, Yūhikaku 2003) 1, 2, 4. On the German notion, see Section B.III.3.a.i. above.

1794 Hirai (fn 1793) 3.

1795 See Kunihiro Nakata, *Dai-1-hen dai-5-chō hōritsu kōi [zenchū]–[dai-98-jō no 2]* [Part 1 Chapter 5 Juridical Acts (Preliminary Note)–(Article 98-2)], in: Matsuoka and ibid (fn 1602) 61.

1796 The order of application of the different sources of Japanese law was already explained in Section I.2.a. above.

1797 This was true especially in the Japanese Middle Ages, a period during which the central piece of the Japanese legal system was *kanshū*, not law, see Röhl, '*Jōri*' (fn 1599) 43.

1798 Interested readers are referred to Baum and Takahashi (fn 1584) 360–362 for details.

1799 See Baum and Bälz (fn 1583) 10 para 21.

the recent reform of the law of obligations, discussed in detail in Section V. below.

a. Overview of Political and Social Developments

As indicated above, the periods following the Meiji era were diverse in terms of their social and political events: The Taishō era was a time in which the modernisation efforts that had been begun in the Meiji era were realised. The industrialisation was advanced so far that Japan advanced to place two in terms of its GNP by the 1970s.[1800] Cities were rebuilt and their infrastructures, including public transport and public utilities, developed, so that the image of cities became one of a modern life role-model, thus moving beyond their existence as centres of commerce or administration.[1801] Despite, or rather, because of the first World War, Japan's economy grew, especially the secondary sector, as the production of various everyday articles fulfilled the needs of the country's neighbours.[1802] New kinds of jobs were created for men and especially women.[1803] With these improvements came social change. Most importantly, social status was now identified by one's occupation, not one's origins.[1804] Changes in the newly emerging middle-class people's circumstances also meant that the traditional family structure under the house system, while formally

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1800 Peter Duus (ed), *The Cambridge History of Japan Volume 6: The Twentieth Century* (8th edn, CUP 2005) 14–15.

1801 On the changes in infrastructure, see Regine Mathias, *Das Entstehen einer modernen städtischen Gesellschaft und Kultur, 1900/1905–1932* [The Creation of a Modern Urban Society and Culture, 1900/1905–1932], in: Kreiner (fn 1652) 332, 355–356, 373. For further details, see Duus (fn 1800) 391–421, who notes that not only such modern aspects, but also traditional parts of the Japanese economy, like agriculture and manufacture, were part of the reforms. On the image change and the remodelling of the large cities, particularly Tōkyō after the earthquake in 1923, see Mathias, ibid 352, 354–356, 360–363.

1802 See Mathias (fn 1801) 342–343, noting that the volume of workers in the secondary sector almost tripled between 1905 and 1920. The time during this war has been called 'Japan's "second industrial revolution"' by Duus (fn 1800) 20, who goes on to note at 387 that the 'nonagricultural work force', including both secondary and tertiary sector work, 'doubled'.

1803 Beside in production, service jobs ranging from receptionist over conductress to doctor opened up new possibilities for women, although many only worked until they got married or their first child was born. On this, see Mathias (fn 1801) 333, 357–358; see also ibid 343.

1804 Mathias (fn 1801) 333.

enshrined in the *Minpō*, was replaced by smaller, independent families with different life rhythms.[1805]

In terms of political developments, the authoritarian Meiji regime was liberalised through reforms towards democracy, although imperialism gained strength at the same time, and the expansion and ensuing battles of which would mount in the radical nationalism of the early years of the Shōwa era.[1806]

b. Overview of (Contractual) Legal Developments

The rules on the formation of contracts contained in the *Minpō* were not amended until around 120 years after the Code came into force (this reform will be considered in Section V. below). Of course, other changes were made after the twentieth century. This was done through special laws, which were used to amend regulation contained in the *Minpō*, one example being the *Denshi keiyaku-hō* from 2001.[1807] Apart from this, the content of the *Minpō* has remained almost the same. The only changes that were made before the major reform of the 2010s occurred under a reform in 2004, in which the *Minpō*'s language was changed from the original to modern Japanese.[1808] Japanese private law was furthermore developed through case decisions and academic work.[1809]

In contrast with the *Minpō*, Japanese commercial law was amended after the Meiji period. This was because the drafting of the *Shōhō*, which was to replace the highly-criticised *Kyū-shōhō*, had been somewhat rushed. As a consequence, it was deemed unrefined and underwent several major revisions after its promulgation. The first became law in 1911 and affected all parts of the Code, in particular the one on company law.[1810] In this respect, it is interesting to note the influence of English law in this amend-

1805 On this change, see Mathias (fn 1801) 365, 366, 369. On the house system, see fn 1741 above.

1806 Mathias (fn 1801) 378–379, 332, 349. For details of the political movements, see ibid 337–350. The Japanese (colonial) empire developed between 1895 and 1945, see Duus (fn 1800) 2; for a detailed account of the political development in Japan from the Meiji period, see ibid 55–382.

1807 See Yamamoto K, '*Minpō kōgi I*' (fn 1632) 26. For a list of all the special laws amending the *Minpō*, see the table provided in ibid 30–31.

1808 For further details on this reform, see ibid 27–29.

1809 See on this ibid 26.

1810 Ishii and Chambliss (fn 1597) 597–598.

ment.[1811] Other major modifications were made in 1938 and 1950,[1812] which were followed by further key amendments approximately every six years.[1813] The recession of the Japanese economy at the beginning of the Heisei era necessitated further reforms in the area of corporate law.[1814] Another great amendment occurred in 2004–2006, which saw the regulation of corporate entities being taken out of the *Shōhō* and re-promulgated in the form of a new piece of legislation, the Japanese Companies Act (*Kaisha-hō*, 会社法 [1815]).[1816] During all this time, no amendments were made to the provisions concerning the conclusion of contracts contained in the *Minpō*.

IV. Contracts in Current Japanese Law and Legal Practice[1817]

1. The Current Legal Background

The Japanese layman's view of the conclusion of contracts differs from the legal reality: Contrary to the popular belief that contracts must be made in writing, thus seemingly making it a complicated process,[1818] Japanese contract law greatly facilitates contracting. Despite the multitude of sources (see Section I. above), the principles of the legal framework are relatively straight forward (Section a.) and the level of formality required

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1811 Baum and Takahashi (fn 1584) 376.

1812 Again, both of these revisions concerned corporate law, see Baum and Takahashi (fn 1584) 360. Interested readers are referred to ibid 375–379 and 391–395 for details.

1813 See the list of major amendments to the *Shōhō* (mostly concerning corporate law) until 1981 in Kobashi (fn 1770) 8. Details can be found in Baum and Takahashi (fn 1584) 396–398.

1814 A brief outline can be found in Baum and Takahashi (fn 1584) 398–400.

1815 Law No 86/2005 as amended. An English translation is available online at www.japaneselawtranslation.go.jp/law/detail/?id=2455&vm=04&re=02&new=1 (Parts I–IV), and www.japaneselawtranslation.go.jp/law/detail/?id=2456&vm=04&re=02&new=1 (Parts V–VIII).

1816 On this, see the succinct description by Hiroyuki Kansaku and Moritz Bälz, *§ 3 Gesellschaftsrecht* [Chapter 3 Corporate Law], in: Baum and Bälz (fn 16) 67, 79–80 paras 40–44.

1817 The following discussion is based on the law as of December 2019. The changes that have come about under the reform on 1 April 2020 are discussed in Section V. below.

1818 See Noriaki (fn 1641) 10. This belief will be explored in further detail in Section 2.b. below.

is kept surprisingly low (Section b.). Furthermore, the rules relating to the formation process are dispositive (*nin'i kitei*, 任意規定),[1819] acting as default rules. Consequently, the parties can make their own stipulations, allowing a great degree of flexibility. This should be borne in mind for the subsequent discussion.

a. Basic Principles: Contracts as Matching *Ishi Hyōji* (意思表示, Declarations of Intention)

As was seen from the definition of the term 'contract' given in Section II. above, the theoretical basis of Japanese contracts is the existence of matching declarations of intention (*ishi hyōji*, 意思表示). These give rise to a juridical act (法律行為, *hōritsu kōi*), out of which contracts are one prominent example of bilateral juridical acts.[1820] This doctrine has been adapted from German legal theory.[1821] A contractual agreement therefore regularly necessitates declarations of offer and acceptance (*mōshikomi*, 申込み, Section ii. below; and *shōdaku*, 承諾, Section iii. below).[1822] These declarations of intention are normally sufficient to constitute a contract, as the freedom of contract (*keiyaku no jiyū*, 契約の自由) and the freedom of form (*hōshiki jiyū*, 方式自由) are important principles of Japanese private law.[1823] As a consequence, there are form requirements in exceptional cases only (considered in Section b. below). It ought to be noted further that there is no separate requirement of an intention to create legal relations,

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1819 Tsuneo Matsumoto, *Denshi shakai no keiyaku-hō* [Contract Law in the Digital Society], in: Tomohei Taniguchi and Kiyoshi Igarashi (eds), *Shinhan chūshaku minpō (13) saiken (4)* [Japanese Civil Law Annotated Vol 13 Obligations Part 4] (2nd revised edn, Yūhikaku 2006) 288, 293. This is not only true for the *Minpō*'s rules on formation, but contract law in general, see Ueda, '*Keiyaku (zenshū)*' (fn 1602) 756. In relation to the rules contained in the *Shōhō*, see Tanaka and others (fn 1617) 90, 94. For further details on dispositiveness in general, see, eg, Toshio Tsubaki, *Minpō ni okeru kyōkō-hō, nin'i-hō* [Mandatory and Dispositive Law in the Minpō] (Nihon Hyōron-sha 2015).

1820 See Yamamoto K, '*Minpō kōgi I*' (fn 1632) 103; Sono and others (fn 1632) 39.

1821 Sono and others (fn 1632) 39. On the German theory of the legal transaction and declarations of intention, see Section B.III.3.a.i. above.

1822 See Sono and others (fn 1632) 51.

1823 See Shiomi, '*Shin-saiken*' (fn 1648) 3 et seq, in particular 7; see also Kitagawa, '*Contracts*' (fn 1601) § 2.01[2][b] at 2-27.

like in English law.[1824] Instead, the notion forms part of the requirements for *mōshikomi* and *shōdaku*,[1825] which is similar to German law.[1826]

i. Contracts as *Ishi Hyōji*

At its most basic level, a bi- or multilateral agreement is formed under Japanese law when it is the intention of all of the parties to enter into a contract; in other words, when it is their intention to create a legal (obligatory) relationship.[1827] This is the case where a *mōshikomi* and *shōdaku*[1828] are made that correspond in terms of their content.[1829] A simple example might be a seller having the intention to sell a product for ¥10,000 (approx. €80) and the buyer intending to purchase the product at that value.[1830] The contract is formed at the point in time when the declarations of intention (*ishi hyōji*, 意思表示) of the parties clearly coincide.[1831] As this is seen as a matter of course, the *Minpō* currently has no explicit stipulation on this point; however, as will be revealed in the subsequent analysis, it is contained implicitly in the rules regarding the declarations of

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1824 See Section B.II.3.a.iv. above on the English requirement.

1825 On this, see Sono and others (fn 1632) 55–56.

1826 On which see Section B.III.3.a.iv. above.

1827 See Kitagawa, '*Contracts*' (fn 1601) § 2.01[2][a] at 2-27.

1828 The term '*shōdaku*' can also mean 'consent' or 'approval', see Dictionary of Standard Japanese Legal Terms (fn 9) 149.

1829 Yamamoto K, '*Vertragsrecht*' (fn 1612) 469 paras 20, 22; Yamamoto K, '*Minpō kōgi IV-1*' (fn 1646) 25–26. Kitagawa, '*Contracts*' (fn 1601) § 2.01[3][i][ii] at 2-38 refers to the declarations of intention as necessarily being 'complementary'.

1830 See Tsuneo Matsumoto, *Keiyaku no seiritsu* [The Formation of Contracts], in: ibid and Masahiro Saitō and Yasutaka Machimura (eds), *Denshi shō-torihiki-hō* [The Law on Electronic Commercial Transactions] (Keisō Shobō 2013) 3, 18.

1831 See Shōji Kawakami, *"Keiyaku no seiritsu" wo megutte (1)* [Concerning the "Formation of Contracts" (1)] (1988) 665 Hanrei Taimuzu 11, 14. In relation to (changes to) real rights, it is the point in time at which all the validity conditions (*yūkō yōken*, 有効要件) are fulfilled, see Shin'ichi Yamamoto, *Dai-2-hen dai-1-chō sōsoku: § 176* [Part 2 Chapter 1 General Provisions: § 176], in: Jun'ichi Funahashi and Mamoru Tokumoto (eds), *Shinhan chūshaku minpō (6) bukken (1)* [Japanese Civil Law Annotated Vol 6 Real Rights Part 1] (2nd revised ed, Yūhikaku 2009) 224, 257–258; whereby, according to the recent trend among Japanese legal academics, any requirements stipulated by the parties (payment of purchase price or handing over and registration, etc) in a contract act as suspensive conditions (*teishi jōken*, 停止条件), see Yamamoto S, ibid, 258. This latter aspect will be discussed further in Section b. below.

intention (arts 521 et seq *Minpō*).[1832] In this respect, it ought to be noted that 'declaration of intention' generally means that there is an outward act showing the person's will to effect a legal consequence.[1833]

This principle is not only true for bilaterally obliging contracts. Even in the case of the unilaterally-obliging contract of a gift, the contract is formed once the required intention has been declared by the donor and the donee has accepted the donation offer (art 549 *Minpō*). Conversely, a contract for a loan for consumption (*shōhi taishaku*, 消費貸借, art 587 *Minpō*) arises when the borrower receives some thing (money or otherwise) and declares their intention to return a thing of 'the same in kind, quality and quantity' ('種類、品質及び数量の同じ物', '*shurui, hinshitsu oyobi sūryō no onaji mono*', art 587 *Minpō*). Thus, while acts by both parties are required, only one party undertakes to do something. In fact, although the handing over of the object is a requirement for the loan to arise, there is no obligation on the lender (貸主, *kashinushi*) to do so.[1834]

The clear identification of two separate declarations of offer and acceptance is not always necessary, such as in cases where negotiations lead to the conclusion of a contract through a series of communications between the parties.[1835] Under such circumstances, it is sufficient that all parties confirm the contract's contents.[1836]

1832 See Sei'ichirō Ueda, *Dai-3-hen dai-2-chō dai-1-setsu dai-1-kan keiyaku no seiritsu* [Part 3 Chapter 2 Section 1 Subsection 1 Formation of Contracts], in: Matsuoka and Nakata (fn 1602) 760. Previously, the *Kyū-minpō* contained an explicit statement to this purpose in arts 296, 304, 306. In future, this will be the case again, as the reform of the *Minpō* concerning the law of obligations contains such an articulation. This matter will be discussed in Section V.b. below.

1833 See Nakata, '*hōritsu kōi*' (fn 1795) on [*zenchū*] (preliminary note) at 61.

1834 Yamamoto K, '*Minpō kōgi IV-1*' (fn 1646) 376.

1835 Ibid 26. Note that in the example given by Yamamoto, the parties fix their agreement in writing. Anticipating the discussion of the contractual formalities in Japanese law in Section b. below, it is noteworthy at this point that a written contract triggers the legal presumption that both parties agreed on concluding a contract, Kunihiro Nakata, *Shōhi-sha-hō kōgi kyōzai 2* [Consumer Law Teaching Materials 2] (document date 15 April 2016) 3; compare also the legal presumption of a signed or sealed private document being authentic, as explained in Section b.ii. below. These legal presumptions would therefore normally make the identification of offer and acceptance in the example irrelevant.

1836 See Matsumoto, '*Keiyaku*' (fn 1830) 18.

Where the declarations of intention do not conform, no contract arises.[1837] This issue is assessed on both an objective and a subjective standard.[1838] This correspondence requirement seems to echo the certainty requirement of English contract law, since a contract of vague stipulation, which leads the parties to have different understandings of the contract's content, does not meet the standard in Japan.[1839] Having said this, the basic terms of the contract (object, price) do not have to be precisely fixed, as long as they can be determined: for the object, through interpretation of the contract's terms,[1840] ie, from specifications like colour or model;[1841] for the price, by looking at the current market price.[1842] This is thus no strict requirement, so that a simple 'please give me one of those' by a customer when indicating an article in a shop and a 'yes' by the shop clerk in response are sufficient to create a sales contract.[1843] Other terms such as

1837 See Kitagawa, '*Contracts*' (fn 1601) § 2.01[3][i][ii] at 2-38, who goes on to explain that this is true for 'substantial', ie, major non-conformity, whereas minor divergences only lead to partial voidness of the contract.

1838 See ibid § 2.01[3][i][ii] at 2-39, who speaks of the 'conformity as to the objective contents of the declarations of intention' and the 'subjective conformity'.

1839 This rule is deduced from the decision of the Great Court of Judicature (*Dai-shin'i*, 大審院) of 28 June 1944 (Shōwa 19), 23 Minshū 387. In this case of a sale of the right to produce silk thread, the contract failed to stipulate whether the contract price included a certain compensation money payable to the seller, equivalent to over ten percent of the purchase price. The court found that since the seller and the buyer held conflicting understandings on this point, there was no conformity between their declarations of intention and thus no contract. A summary of the case and a short commentary can be found in Arinobu Ōnaka, *Naishin no ishi no fu-icchi* ['Dissonance of the Real Intention'], in: Yoshio Shiomi and Hiroto Dōgauchi (eds), *Minpō hanrei hyakusen I: sōsoku, bukken* [One Hundred Selected Cases on the Civil Code I: General Part, Property Law] (Yūhikaku 2015) 38–39. See also Kitagawa, '*Contracts*' (fn 1601) § 2.01[3][i][ii] at 2-39. The connection to English law is not completely far-fetched, as some Japanese legal academics refer to both English and US-American law in discussing the issue of non-conformity of declarations of intention, see, eg, Tsuyoshi Kinoshita, *Eibei keiyaku-hō ni okeru ishi hyōji no fu-icchi* [Dissonance of Declarations of Intention in Anglo-American Contract Law] (1972) 11 Shakai Gaku Jānaru 99–120.

1840 Kawakami (fn 1831) 15.

1841 Matsumoto, '*Keiyaku*' (fn 1830) 18.

1842 Ibid; Kawakami (fn 1831) 15.

1843 See Kawakami (fn 1831) 15. Compare Kenjirō Egashira, *Shō-torihiki-hō* [The Law of Commercial Transactions] (7th edn, Kōbundō 2013) 8, who states that commercial sale contracts will normally contain stipulations as to the object of sale, the price, delivery, and payment.

the time and place of performance are seen as being merely incidental.[1844] It can thus be concluded that Japanese law does not know a requirement like that of certainty in English law.[1845]

Anticipating the discussion below, may it be briefly stated at this point that no additional acts, like the handing over of the contractual object, are required for the contract to come into existence, since contracts under Japanese law are largely consensual (*dakusei*, 諾成).[1846] This matter will be discussed again in Section b. below, together with exceptions to this principle.

Naturally, a contract will only arise where the declarations of intention have come into effect.[1847] In relation to this, Japanese law distinguishes between two different situations: where the contracting parties are 'present', or where they are 'at distance' from one another. The question of the effectiveness of the declarations is a fundamental issue, as it has a bearing on the point in time at which a contract is formed. This question is addressed with each declaration of intention (offers in Section ii., acceptance in Section iii. below). It is noteworthy that while the formation rules contained in the *Minpō* currently only deal with contracts concluded while the parties are not in each other's presence,[1848] the *Shōhō* contains stipulations relating to both situations.

1844 See Matsumoto, '*Keiyaku*' (fn 1830) 18.

1845 On which see Section B.II.3.a.ii.cc) above.

1846 See Tomohei Taniguchi and Shūsei Ono, *Zenchū (§§ 521–532) II: keiyaku no hōshiki* [Preliminary Note (Articles 521–532) II: Contract Form], in: Taniguchi and Igarashi (fn 1819) 393. An example is the sales contract (art 555 *Minpō*), see Mika Yokoyama, *Fudō-san baibai no purosesu* [The Sale Process for Immovable Property] (2007) *Juristo zōkan: Minpō no sōten* [Jurist special edition: Points at issue in Civil Law] 91 and Egashira (fn 1843) 6. The inspiration for the consensuality principle seems to be rooted in French law, see Frederike Zufall, *Das Abstraktionsprinzip im japanischen Zivilrecht* [The Abstraction Principle in Japanese Civil Law] (2010) 29 ZJapanR / JJapanL 201, 204, 206; Yokoyama, ibid 93; cf Taniguchi and Ono (fn 1846) 393, who contrast Japanese and German contract laws as (purely) consensual with French and English contract laws as requiring some form of consideration (*isshu no taika*, 一種の対価). On the principles of the transfer of rights *in rem*, see the summary contained in Hans-Peter Marutschke, *Übertragung dinglicher Rechte und gutgläubiger Erwerb im japansichen Immobiliarsachenrecht* [The Transfer of Rights in Rem and Bona Fide Acquisition in Japanese Land Law] (Mohr Siebeck 1997) 1–6.

1847 Kitagawa, '*Contracts*' (fn 1601) § 2.01[2][a] at 2-27.

1848 This will change under the amendment of the *Minpō*, as discussed in Section V. below.

ii. *Mōshikomi* (申込み, Offer)

Japanese law differentiates between the declarations of intention made by one party to initiate a contract. Accordingly, there can be an offer (*mōshikomi*, 申込み), or a mere invitation to make an offer (*mōshikomi no yūin*, 申込みの誘引).[1849] First, the meaning of 'offer' will be set out in Section aa) below, before the distinction between these two statements is explored further in Section bb). Finally, the duration of the effectiveness of an offer is discussed in Section cc).

aa) *'Mōshikomi'* Defined

A *mōshikomi* is a one-sided declaration of intention of one party's willingness to enter into a contract of specific content (a proposal) with another party.[1850] This means that the offer will often be directed at a specific person, although this does not necessarily have to be the case.[1851] The offer has to be declared while having the intention to make an offer.[1852] Furthermore, the proposal must be definite; otherwise an 'invitation to make an offer' is made instead.[1853]

1849 English term for '*mōshikomi no yūin*' taken from Kitagawa, '*Contracts*' (fn 1601) § 2.01[3][d][ii] at 2-30.

1850 See Shin'ichi Tōda, *Keiyaku no seiritsu: dai-521-jō–dai-528-jō* [Formation of Contracts: Articles 521–528], in: Taniguchi and Igarashi (fn 1819) on *dai-521-jō* [article 521] at 436.

1851 See Tōda (fn 1850) on *dai-521-jō* [article 521] at 436.

1852 See Matsumoto, '*Keiyaku*' (fn 1830) 18. He gives the negative example of someone only intending to obtain some information from a website and mistakenly clicking on a button, leading them to a page showing the purchase is complete. If the button did not show clearly that clicking it would mean making an offer, no contract is formed, because there was no declaration of intention to make an offer.

1853 Kitagawa, '*Contracts*' (fn 1601) § 2.01[3][d][ii] at 2-30.

bb) *Mōshikomi and Mōshikomi no Yūin*(申込みの誘引, Invitation to Make an Offer)

While *mōshikomi* are intended to bring about a contract, as just explained, *mōshikomi no yūin* are meant to make the other person make an offer.[1854] The differentiation between these two types of statement is therefore not merely of theoretical, but of practical importance, as no legal obligations arise from an invitation to treat. Instead, the formation process as such only begins when an offer is made.

Examples of an invitation to make an offer are 'help wanted' advertisements, 'house for rent' signs, or cost estimates.[1855] These declarations are considered to constitute invitations to make an offer because a contract will not automatically arise when a person responds to the advertisement by applying for the job or the house.[1856] Rather, the other party will first consider the person and their qualities before deciding on whether to contract.[1857] Thus, it is the application that will be deemed to be an offer, since it contains sufficient intention on the part of the applicant to enter into a contract with the advertiser.[1858] Similarly, product advertisements are regularly deemed to be invitations to make an offer.[1859] This must also be true for distance selling, including online shopping, for the very

1854 See Yamamoto K, '*Minpō kōgi IV-1*' (fn 1646) 26–27. See also Ueda, '*Keiyaku (zenshū)*' (fn 1602) 760.

1855 See Kawakami (fn 1831) 14 and Kitagawa, '*Contracts*' (fn 1601) § 2.01[3][d][ii] at 2-30.

1856 Kawakami (fn 1831) 14.

1857 See Matsumoto, '*Keiyaku*' (fn 1830) 19.

1858 cf Kawakami (fn 1831) 14–15, who states that the intention of a person making an invitation to make an offer is 'overly insufficient' ('極めて不十分', *kiwamete fu-jūbun*) in that the person does not give enough thought to the process or relationship leading to the formation of a contract. Compare Yamamoto K, '*Minpō kōgi IV-1*' (fn 1646) 27, who speaks of cases as invitations to make an offer where 'the necessity of reserving the decision whether to contract or not is high' ('契約するかどうかの決定を留保する必要性が高い', *keiyakusuru ka dou ka no kettei wo ryūhosuru hitsuyō-sei ga takai*). He goes on to note at ibid 27 that this necessity may be due to: firstly, the main content of the contract not being specified; secondly, the importance placed by the invitor on the person who is to become the contracting party; or thirdly, the possibility of performance by the invitor. Similar: Matsumoto, '*Keiyaku*' (fn 1830) 19.

1859 See Matsumoto, '*Keiyaku*' (fn 1830) 19.

practical reason that a seller must first check whether the product is still in stock before being able to enter into a contract.[1860]

There are cases where the personal qualities of the potential contracting party are irrelevant, and yet, a statement or act will not be an offer. This is true for the display of bus or train timetables, or the sending of product samples, both cases of which are deemed to be mere invitations to make an offer.[1861] Although not discussed in Japanese academic literature, it would follow from this in the former situation that the purchase of a ticket for public transport will give rise to a contract, as might the mere act of getting onto the vehicle.[1862] At least where the customer purchases the ticket beforehand, eg, online, it seems that it is the customer who makes an offer, which is then accepted by the train or bus company.[1863] Similarly, with product samples, it seems logical that an enquiry by the sample receiver to the sender regarding a purchase of the product would be an offer.

There are yet other instances where the difference between an offer and an invitation to make an offer is not always clear-cut and highly depends on the circumstances. Thus, in the case of a shop, like a supermarket, goods being displayed with set prices are considered to be offers; however, when goods are merely displayed in the shop window (with no price), this generally constitutes an invitation to make an offer.[1864] The 'offer' (the displayed goods) is incomplete in the latter case, as no price is set. Consequently, even if a potential customer stated their intention to purchase the item, this would not automatically lead to a contract being concluded.[1865] On this basis, it might be argued that where prices are displayed for goods in shop windows, these might constitute offers; however, the seller may still have an interest in reserving themselves the decision of whether to contract with a potential customer with regard to a particular good displayed, for, eg, not wanting to have to destroy the shop display if it is the last item in stock. Therefore, the result might still be the same if a price were shown for the goods in shop windows.

1860 See ibid.

1861 See Tōda (fn 1850) on *dai-521-jō* [article 521] at 437.

1862 See on this the arguments advanced with respect to English law in Section B.II.3.a.ii.bb) above.

1863 See the terminology used, eg, in the online reservation portal of Japan Rail at www.eki-net.com; or the explanations given in the user guide at www.eki-net.com/top/jrticket/guide/?src=reservetop_main.

1864 See Kawakami (fn 1831) 13, 14. See also Noriaki (fn 1641) 10.

1865 Compare Kawakami (fn 1831) 14.

Another case is a vacant taxi, which is considered to constitute either an 'invitation to make an offer' or a concrete offer: When the taxi is circulating in traffic while displaying the 'vacant' sign, this conduct will be deemed to be merely an 'invitation to make an offer'; however, when a taxi is parked in a taxi rank, this will be an offer.[1866] The difference seems to lie in the state of mind of the offeror. In the former situation, the taxi driver may reject the customer by simply driving past so that no obligation to contract arises; however, in the latter situation, it is clearly more difficult for the driver to prevent a customer from entering the taxi, giving the driver an obligation to contract.[1867] In other words, the contract is incomplete until the customer boards the taxi, since the intention of the parties to enter into a contract with each other only forms at that point.[1868]

cc) Coming into Effect of *Mōshikomi: Tōtatsu Shugi* (到達主義, Arrival Rule)

An offer always comes into effect upon its arrival, irrespective of whether the persons are physically in the same location or not.[1869] Offers therefore follow what is known as the 'arrival rule' (*tōtatsu shugi*, 到達主義)[1870], the general rule contained in art 97 para 1 *Minpō*:[1871] 'A manifestation of intention to a person at a distance shall become effective at the time of the arrival of the notice to the other party'.[1872] 'Arrival' (*tōtatsu*, 到達) is interpreted to mean that the recipient should objectively be able to have knowledge of the declaration of intention (*ryūchushi ubeki kyakkanteki jōtai*, 了知し得べき客観的状態, literally 'objective state of being able to notice').[1873] According to the Japanese court:

1866 Ibid.
1867 See ibid. See also the discussion of job advertisements above.
1868 Compare ibid.
1869 Tōda (fn 1850) on *dai-521-jō* [article 521] at 438.
1870 The term is used by, eg, Kawakami (fn 1831) 14.
1871 Yamamoto K, '*Vertragsrecht*' (fn 1612) 469 para 21.
1872 The original provision states: '隔地者に対する意思表示は、その通知が相手方に到達した時からその効力を生ずる。' (*Kakuchi-sha ni taisuru ishi hyōji ha, sono tsūchi ga aite-kata ni tōtatsu shita toki kara sono kōryoku wo shōzuru*.) Emphasis added.
1873 See Keizai Sangyō-shō ('METI'), *Denshi shō-torihiki oyobi jōhō zai-torihiki tō ni kansuru junsoku* [Interpretative Guidelines on Electronic Commerce and Information Property Trading] (Guideline, April 2015) i.3; available online at www.meti.go.jp/press/2015/04/20150427001/20150427001-3.pdf. This

> it is not required that the other party personally receives or has knowledge of the declaration of intention or of the document recording the same; it is sufficient if either enters what is known as the other party's sphere of control' (shihai-ken, 支配圏).[1874]

This has been interpreted to mean that neither knowledge of the contents of the declaration, nor even of its existence is required,[1875] as this would mean that the person had actual knowledge,[1876] which is precisely what is not required. The underlying logic of the court's reasoning is that the recipient is placed in a position where it is possible for them to know of the declaration, because the declaration of intention has entered the recipient's sphere of influence.[1877]

Applied to letters, this means that a letter can be handed over to the recipient's relatives or to people living together with them instead of to the recipient and still be deemed to have arrived.[1878] In fact, the declaration of intention already comes into effect when the letter containing it is delivered into the mailbox at the recipient's address.[1879] With declarations transmitted electronically, 'arrival' means the point in time at which the recipient is able to access the electromagnetic record.[1880] This will be the

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Guideline will hereinafter be referred to as 'E-Commerce Interpretation Guideline'; a (tentative) English translation of the Guideline can be found online at www.meti.go.jp/english/press/2015/0427_01.html.

1874 *Saikō Saiban-sho* decision of 17 December 1968 (Shōwa 43), Minshū Vol 22 No 13 2998: '[...]相手方によつて直接受領され、または了知されることを要するものではなく、意思表示または通知を記載した書面が、それらの者のいわゆる支配圏内におかれることをもつて足りるものと解すべきである' ('*aitekata ni yotte chokusetsu juryōsare, mata ha ryōchisareru koto wo yōsuru mono de ha naku, ishi hyōji mata ha tsūchi wo kisaishita shomen ga, sorera no mono no iwayuru shihai-ken-nai ni okareru koto wo motte tariru mono to kaisubeki de aru*'). See further *Saikō Saiban-sho* decision of 20 April 1961 (Shōwa 36), Minshū Vol 15 No 4 744.

1875 Nakata, '*Hōritsu kōi*' (fn 1795) on *dai-97-jō* (article 97) at 131.

1876 Compare Hōsei Shingi-kai Minpō (Saiken Kankei) Bukai, *Minpō (saiken kankei) no kaisei in kansuru chūkan shi'an no hosoku setsumei* [Supplementary Explanations with Regard to the Interim Tentative Plan for the Reform of the Civil Code (Law of Obligations)] (last amendment July 2013) 355, available online at www.moj.go.jp/shingi1/shingi04900184.html (hereinafter 'Chūkan shi'an Explanations') 31.

1877 See E-Commerce Interpretation Guideline (fn 1873) i.3 and *Saikō Saiban-sho* decision of 20 April 1961 (fn 1874).

1878 Compare Nakata, '*Hōritsu kōi*' (fn 1795) on *dai-97-jō* (article 97) at 131.

1879 See ibid.

1880 See E-Commerce Interpretation Guideline (fn 1873) i.3.

case where the declaration is sent to either the designated recipient's e-mail address, or to the e-mail address that can reasonably be believed to be used by the recipient in situations like the one in question.[1881]

Similarly, with online transactions in web-browsers, the declaration is received once the information has been saved on the recipient's web server.[1882] Note that in cases where the declaration is — by way of exception — deemed to have arrived upon the message being downloaded, the recipient does not have to have actual knowledge of the declaration (its content); the ability to access the declaration's notice and thus of being able to read it is sufficient.[1883] Consequently, the message will not be deemed to have arrived where it is lost before being recorded at the recipient's end; however, if it is first recorded and consequently lost, the notice is deemed to have reached the recipient nonetheless.[1884] Similarly, if the message is not in a 'state where reading [it] is possible' (*yomitori kanōna jōtai*, '読み取り可能な状態'), ie, is illegible (*moji bake*, 文字化け, literally 'corrupted'), it will be deemed to not have reached the recipient, whereby the onus is on the sender to ensure the notice is legible for the recipient.[1885]

1881 See ibid. cf *Tōkyō Chihō Saiban-sho* decision of 13 April 2019 (Heisei 29), in which the court found that the recipient of an e-mail had not received the convocation notice of a board meeting although the e-mail had entered the recipient's e-mail server. The reasons given were that the recipient used a personal computer and an e-mail-address that the sender's company had provided, but that the sender did not handle the equipment himself and his secretary had also not accessed the account after the e-mail had been sent. Furthermore, the court saw no reason to hold that the recipient ought to have had knowledge of the e-mail. As a consequence, the recording on the recipient's e-mail server may, by way of exception, not be equal to 'receipt' of a declaration. The case concerned the annulment of a board meeting in which the plaintiff, the managing director, was dismissed. The plaintiff's claim was based on the fact that the convocation notice for the board meeting in question, which had been sent late at night before the morning on which the meeting took place, was invalid. The court found for the plaintiff.

1882 Compare E-Commerce Interpretation Guideline (fn 1873) i.4.

1883 See ibid i.3, i.2.

1884 See ibid.

1885 See ibid i.4.

dd) Loss of Effect of *Mōshikomi:* The Distinction Between *Taiwa-sha-kan* (対話者間, Between Present Persons) and *Kakuchi-sha-kan* (隔地者間, Between Persons at Distance)

Mōshikomi can lose their effect in two ways, namely, by expiring or by being revoked. There are two instances for each of these ways. The first situation for expiry is an offer made to a present person (between present persons, *taiwa-sha-kan*, 対話者間)[1886]: an offer thus made is only valid while the parties remain together; once they separate, the offer expires.[1887] In this regard, it ought to be noted that the term 'persons present' (*taiwa-sha*, 対話者) is interpreted in several ways. First, it means that the parties are in each other's physical presence.[1888] This becomes apparent from the words itself, which literally translate as 'between interlocutors',[1889] whereby '*taiwa*' on its own signifies 'dialogue', 'conversation', or 'interaction'. In this sense, the English phrase chosen by Kitagawa, 'during a conversation',[1890] is perhaps closest to the literal Japanese meaning. The translation as 'in direct communication' (eg, art 507 *Shōhō*), supports the understanding that a declaration of intention made by one party is 'immediately' (*tadachi ni*, 直ちに) perceived by the other party.[1891] This is because there is no time interval between transmission and receipt of the declaration of intention, so that an immediate response can be anticipated.[1892] With regard to the methods of communication associated with this situation, *taiwa* is understood to include a telephone call.[1893] Following from this, it could be

1886 English translation by this author.

1887 While an explicit rule exists for commercial cases (art 507 *Shōhō*), there is only a general non-written rule for situations in which the *Minpō* is applicable. See on this Yamamoto K, '*Vertragsrecht*' (fn 1612) 471 para 30; see further Ueda, '*Keiyaku seiritsu*' (fn 1832) on *dai-524-jō* at 765. According to the majority view in Japanese academic literature, art 507 *Shōhō* is applicable as long as the act is of a commercial nature for at least one of the parties; a partially dissenting view is that the commercial rule should be applicable only if the offeror is a merchant, see Ōtsuki (fn 1614) 98.

1888 Matsumoto, '*Denshi shakai*' (fn 1819) 298 gives the example of direct contract negotiations.

1889 Götze, '*Rechtswörterbuch*' (fn 10) 541 uses the German translation '*Anwesender*'.

1890 Kitagawa, '*Contracts*' (fn 1601) § 2.01[3][d][iii][A] at 2-30 and [B] at 2-31.

1891 See the definition of the term '*taiwa-sha-kan*' given by Endō and Matsuda (fn 1597) 88.

1892 See Ueda, '*Keiyaku seiritsu*' (fn 1832) on *dai-524-jo* [article 524] at 765.

1893 See Matsumoto, '*Keiyaku*' (fn 1830) 14; see further Kitagawa, '*Contracts*' (fn 1601) § 2.01[3][d][iii][A] at 2-30. This differentiation was already contem-

argued that parties to a direct conversation via the internet, eg, in a video conference, might also be regarded as being 'in each other's presence'.[1894] This is supported by the fact that instant messaging and chatting on the internet (but not e-mails) are deemed equivalent to being 'in conversation' (*taiwa*).[1895]

On the other hand, if an offer specifies a period in which it can be accepted, it will naturally expire if the offeree does not accept it within that period (see art 521 para 2 *Minpō*). This 'automatic expiration' of the offer is not absolute, however, since arts 522–523 *Minpō* and art 508 paragraph 2 *Shōhō* provide some flexibility with regard to late acceptances: if the offeror does not give notice to the offeree that the declaration of acceptance arrived too late when the offeror ought to know that it was dispatched in a way so that it would normally have arrived on time, acceptance is treated as having been made on an effective offer (art 522 paras 2, 1 *Minpō*). Furthermore, art 523 *Minpō* and art 508 para 2 *Shōhō* give the offeror the discretionary power to consider a late acceptance as a new offer. If this is the case, the contract process begins anew with the original offeree now as the offeror and vice versa.

As for the offer being revoked, this can be done with an offer made between present persons at any time before the offer is accepted by the offeree.[1896] This is not true where the offer specifies a period of acceptance, as it then becomes irrevocable (art 521 para 1 *Minpō*). This provision notwithstanding, an offeror may always, ie, independently of whether a period for acceptance has been stipulated, revoke an offer before it reaches the offeree.[1897]

In contrast to art 521 para 1, art 524 *Minpō* allows for the revocation of an offer not specifying a period of acceptance made to an offeree not in the presence of the offeror (ie, between persons at distance, *kakuchi-sha-kan*, 隔地者間); however, this is only possible after a 'reasonable period' of time has elapsed, ie, a time during which the offeror should normally have re-

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plated at the time of creation of both the *Minpō* and the *Shōhō*, compare Matsumoto, ibid.

1894 Indeed, it has been argued that a video chat is similar to a telephone call so that parties in such situations are treated as being 'in conversation', see Matsumoto, '*Keiyaku*' (fn 1835) 14.

1895 See Matsumoto, '*Denshi shakai*' (fn 1819) 299 and Matsumoto, '*Keiyaku*' (fn 1830) 15.

1896 Yamamoto K, '*Vertragsrecht*' (fn 1612) 471 para 30.

1897 Ueda, '*Keiyaku seiritsu*' (fn 1832) on *dai-524-jō* [article 524] at 765; Yamamoto K, '*Minpō kōgi I*' (fn 1632) 129.

ceived the offeree's declaration of acceptance.[1898] The length of this period depends on the circumstances of the case in question, whereby factors such as the method of making the declaration, the importance of the contract's object or the customary practices in question have an influence on the time frame.[1899] Having said this, it seems that three factors ought to be borne in mind when assessing the period: first, the time it takes for an offer to reach an offeree; secondly, the time an offeree would need to consider whether to accept or reject the offer, including the time needed to draft a reply; and thirdly, the time a declaration of acceptance would need in order to reach the offeror.[1900]

The term 'at distance' (*kakuchi*, 隔地) simply means that the parties are not in each other's physical presence, as is evidenced by the literal meaning of the kanji '*kaku*' as 'division', 'separation', 'interval', and '*chi*' as 'position' or 'location'.[1901] Translations into German as '*Abwesenheit*' (absence) and '*anderer Ort*' (different place) reflect this meaning.[1902] Letters are traditionally linked with this situation.[1903] Furthermore, while it has been stated that telegrams, telex, and fax could spatially be seen as equivalent to the situation of being 'in conversation'; however, that these methods better resemble a letter in terms of the uncertainty of the other party being at the place these were sent.[1904] It could therefore not be known if the fax has actually been read by the recipient, which is an argument also put forward in relation to e-mails.[1905] Consequently, an immediate response cannot be expected, so that fax and e-mails are associated with the *kakuchi* situation.[1906]

An exception to art 524 is laid down in art 530 para 1 *Minpō* regarding offers of prizes in advertisements (*kenshō kōku*, 懸賞広告): the offeror may

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1898 See Kitagawa, '*Contracts*' (fn 1601) § 2.01[3][d][iii][A] at 2-30, who phrases it as the time 'reasonably necessary' for the declaration of acceptance to arrive.

1899 Tōda (fn 1850) on *dai-524-jō* [article 524] at 469.

1900 See ibid 469–670. This is similar to German law, see Section B.III.3.a.ii.ee) above.

1901 Hadamitzky and others (fn 11) 275 at 2d10.2 and 604 at 3b4.9 respectively.

1902 Götze, '*Rechtswörterbuch*' (fn fn 10) 234.

1903 See Matsumoto, '*Keiyaku*' (fn 1830) 14. See further Kitagawa, '*Contracts*' (fn 1601) § 2.01[3][d][iii] [A] at 2-30. This differentiation was already contemplated at the time of creation of both the *Minpō* and the *Shōhō*, compare Matsumoto ibid.

1904 See Matsumoto, '*Denshi shakai*' (fn 1819) 298 and Matsumoto, '*Keiyaku*' (fn 1830) 14.

1905 See Matsumoto, '*Denshi shakai*' (fn 1819) 299.

1906 See Ueda, '*Keiyaku seiritsu*' (fn 1832) on *dai-524-jō* [article 524] at 765.

revoke the offer so long as no offeree has completed the act.[1907] It seems that any act of preparation or of actual performance by the offeree is irrelevant; it is only from the moment that the performance has been completed that the offer may no longer be withdrawn, whereby it is irrelevant whether the offeror has had notice of the completed performance.[1908] This does not apply where the offer specifies a period for performance by those seeing the advertisement, since art 530 para 3 *Minpō* presumes the advertiser's waiver to revoke in this situation.

Where a revocation is possible and it is sent out by the offeror so that it reaches the offeree before the declaration of acceptance is dispatched, the offer is revoked effectively.[1909] The situation becomes complicated if the revocation only arrives after the dispatch of the offeree's acceptance. Normally, acceptance would have rendered the revocation ineffective; however, art 527 *Minpō* provides that if the offeree knows or ought to have known that the notice would normally have arrived before the dispatch of their acceptance, and if the offeree does not give notice of this late arrival without undue delay, the revocation is deemed to be effective so that no contract is formed.[1910] Where the contract in question is made through electronic means, like e-mail, art 527 *Minpō* does not apply (art 4 *Denshi keiyaku-hō*).[1911]

The non-revocability of an offer can be circumvented by the offeror reserving their right to withdraw the offer at the time of its making.[1912] In this case, the offeror can revoke the offer at any point in time, even if the offer specifies a period of acceptance.[1913] Another exception to the

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1907 See ibid on *dai-530-jō* [article 530] at 770.

1908 For further details, see Hiroshi Uebayashi and Kiyoshi Igarashi, *Keiyaku no seiritsu: dai-529-jō–dai-532-jō* [Formation of Contracts: Articles 529–532], in: Taniguchi and Igarashi (fn 1819) on *dai-530-jō* [article 530] at 514–515.

1909 Cf *Kappu hanbai-hō* (Installment Sales Act, 割賦販売法, Law No 159/1961 as amended; English translation available online at www.japaneselawtranslation.go.jp/law/detail/?id=2334&vm=04&re=02&new=1), which provides explicitly that withdrawals of offers are effective upon dispatch of the document containing the declaration of intention: *inter alia*, arts 35-3-10 paras 2 and 5, 35-3-11 para 4. Note that contradicting contractual stipulations are void, see paras 15 of arts 35-3-10 and 35-3-11 ibid. The same is true for retractions relating to both buildings or building lots (art 37-2 para 2 *Takuchi-gyō-hō* (fn 1915)) and in relation to door-to-door sales (art 9 para 2 *Tokutei shō-torihiki-hō*), both of which become effective upon sending ('発した時に', *hasshita toki ni*).

1910 See Yamamoto K, '*Vertragsrecht*' (fn 1612) 470–471 para 28.

1911 Ibid 470 para 25.

1912 See Kitagawa, '*Contracts*' (fn 1601) § 2.01[3][d][iii][A] at 2-30.

1913 Yamamoto K, '*Vertragsrecht*' (fn 1612) 470 para 27.

irrevocability of an offer is provided in consumer law by what has been called a 'cooling off period':[1914] in door-to-door sales, the consumer has the right to withdraw their offer within eight days from the time that the document containing the details of the seller's offer was received (see arts 9 para 1, 4 *Tokutei shō-torihiki-hō*). A similar provision is found in connection to sale transactions of buildings and building lots: Article 37-2 para 1 no i *Takuchi tatemono torihiki-gyō-hō* (hereinafter '*Takuchi-gyō-hō*'[1915]) stipulates an eight-day revocation period for a person who makes a purchase offer on a building or a building lot, so that the prospective purchaser is given the right to retract their offer; however, this is only possible until the contract has been performed (ibid no ii). The provision is mandatory so that any agreement between the parties stipulating otherwise is 'invalidated' ('無効とする', *mukō to suru*, art 37-2 para 4 ibid).

If an offer made to a person at distance that does not stipulate a period for acceptance is not subsequently revoked, it will remain effective, but only for a limited time.[1916] The time-limit is a 'reasonable period',[1917] in which the declaration of acceptance should have been dispatched, as provided in art 508 para 1 *Shōhō*.[1918] After this period, the offer will 'cease to be effective' ('効力を失う', *kōryoku wo ushinau*, ibid). Although this rule is set out in the *Shōhō*, legal academics and practitioners alike admit its applicability to contracts falling under the *Minpō*.[1919]

iii. *Shōdaku* (承諾, Acceptance)

Under Japanese law, a *mōshikomi* has to be accepted before a contract can form, as 'mutual assent' between the contracting parties is the essence of a Japanese contract.[1920] This is even true for gifts (*zōyo*, 贈与): the donor's

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1914 Kitagawa, '*Contracts*' (fn 1601) § 2.1[3][d][iv][D] at 2-31.

1915 Real Estate Brokerage Act, 宅地建物取引業法, Law No 10/1952 as amended; English translation available online at www.japaneselawtranslation.go.jp/law/detail/?id=2320&vm=04&re=02&new=1.

1916 Kitagawa, '*Contracts*' (fn 1601) § 2.01[3][d][iii][A] at 2-30.

1917 Ueda, '*Keiyaku seiritsu*' (fn 1832) on *dai-524-jō* [article 524] at 765. See the explanation above.

1918 See Kitagawa, '*Contracts*' (fn 1601) § 2.01[3][d][iii][B] at 2-302-31, who uses the term 'acceptability' to indicate that an offer is effective and can be accepted by the offeree so that a contract is formed.

1919 See ibid 2-31. See also fn 1887: what Ōtsuki states regarding art 507 *Shōhō* is also true for art 508.

1920 See Kitagawa, '*Contracts*' (fn 1601) § 2.01[3][a] at 2-27.

(*zōyo-sha*, 贈与者) intention to give something has to be accepted by the donee (*juzō-sha*, 受贈者) before the act becomes effective (art 549 *Minpō*). The addressee of a *mōshikomi* can react in different ways: They may reject the offer, or do nothing, in which case the offer will eventually expire (but see Section bb) below). They may, of course, accept (*shōdaku suru*, 承諾する; see the definition in Section aa) below). This requires a particular conduct or statement to be made (Section bb)). The issue of when *shōdaku* comes into effect and how it may lose its effectiveness must also be considered (Sections cc)–dd)).

aa) '*Shōdaku*' Defined

Shōdaku can be defined as 'a declaration of intention made in reply to a specific offer to make a contract',[1921] the content of which has to correspond with that of the offer.[1922] Put more simply, it is the 'OK' given without reservations by the offeree to the proposed content of the *mōshikomi*.[1923] Using the example of a supermarket again, the customer (buyer) accepts the seller's offer when handing the basket containing the goods over to the shop assistant at the register, since it is at this point that the intention to purchase becomes definite.[1924] Again, it is the concurrence of the buyer's intention to purchase and that of the seller to sell the product that gives rise to the contract.[1925] In this way, a mere confirmation of having received an offer is not acceptance.[1926]

Where the content of the declaration of acceptance does not correspond to the content of the offer, the ostensible declaration of acceptance is treated as a 'new offer' made by the offeree ('新たな申込み', *aratana mōshikomi*, art 528 *Minpō*). This is true where the offeree changes the conditions of the offer, eg, the price,[1927] or where acceptance is made conditionally; however, minor modifications are tolerated in practice.[1928] Similarly, in sit-

1921 Ibid § 2.01[3][e][ii] at 2-32.
1922 Yamamoto K, '*Vertragsrecht*' (fn 1612) 469 para 22. See also Tōda (fn 1850) on *dai-526-jō* [article 526] at 482.
1923 Kawakami (fn 1831) 14.
1924 See ibid 13, 14. Another example is the insertion of a coin into a vending machine, ibid 14.
1925 Noriaki (fn 1641) 13.
1926 E-Commerce Interpretation Guideline (fn 1873) i.3.
1927 Tōda (fn 1850) on *dai-528-jō* [article 528] at 506.
1928 Kitagawa, '*Contracts*' (fn 1601) § 2.01[3][e][iii][B] at 2-33.

uations where the declaration of acceptance is made too late to be effective (see the subsequent section),[1929] it is within the discretion of the offeror to treat the declaration as a new offer (art 523 *Minpō*; art 508 para 2 *Shōhō*). In this way, a contract may still be concluded despite the original offer having expired. The ostensible declaration of acceptance can be treated as an offer, because the declaration contains the intention to conclude a contract.[1930] There is nevertheless a caveat: if the offeror is or should have been aware that the late arrival of the declaration of acceptance is due to unusual circumstances and it would normally have been received on time, they are obliged to give notice of the late arrival ('延着の通知', *enchaku no tsūchi*) to the offeree (art 522 para 1 *Minpō*). A failure to do so will result in the declaration of acceptance being deemed as having arrived on time (art 522 para 2 *Minpō*), so that a contract is then formed.[1931] This does not apply where the offeror has sent the offeree a 'notice of delay' ('遅延の通知', *chi'en no tsūchi*), ie, a notification that no acceptance reached the offeror before the expiration of the set time period, before the late acceptance arrives (art 522 para 1 *Minpō*).[1932]

bb) Method of *Shōdaku*

Acceptance does not always have to be express; acceptance-like behaviour by the offeree can be sufficient in particular circumstances.[1933] Thus, art 526 para 2 *Minpō* provides that a notice of acceptance is not necessary where either the way in which the offeror has made the offer or a trade custom does not require it. The contract is then deemed to be formed when the offeree acts in a way that can be interpreted as acceptance (art 526 para 2 *Minpō*). This might constitute commencing with preparations

1929 To be precise, the declaration of acceptance cannot become effective, because the bindingness of the offer expires after the specified time-limit ends, see art 521 para 2 *Minpō*.

1930 Compare Ueda, '*Keiyaku seiritsu*' (fn 1832) on *dai-523-jō* [article 523] at 765.

1931 Yamamoto K, '*Vertragsrecht*' (fn 1612) 469–470 para 24.

1932 See also Kitagawa, '*Contracts*' (fn 1601) § 2.01[3][e][iii][A] at 2-33. It should be noted that while art 522 *Minpō* uses the term 'notice of late arrival' (*enchaku no tsūchi*) to describe the notice that the offeror has to give where they are aware that acceptance would normally have reached them on time, the term 'notice of delay' (*chi'en no tsūchi*) is used to distinguish the notice the offeror can send out where they have received no declaration of acceptance within the specified period.

1933 Kawakami (fn 1831) 14.

for performing their contractual obligations,[1934] or exercising a right that the offeree would only obtain through the conclusion of the contract.[1935] Advertisements that offer a prize are an example of legislation implying acceptance: where a person seeing the advertisement has acted (performed) according to the advertisement, the advertiser must hand over the reward to that person (art 529 *Minpō*). Irrespective of these situations, the parties can agree to dispense with (express) acceptance.[1936]

Due to the nature of commerce, the rule applicable to merchants deviates from the general principles on acceptance: where the offeree receives an offer from a regular business partner, acceptance will be implied if the offeree does not respond without delay (art 509 paras 1–2 *Shōhō*).[1937] Academic opinion is divided on the question whether this rule also applies to 'civil' contracts.[1938] Arguably, it should be applicable to 'semi-commercial' contracts, ie, B2C transactions in which one of the parties is a merchant. This is due to art 3 *Shōhō*, which provides that the *Shōhō* is applicable to all parties if an act is commercial for at least one of them. Exceptions to this rule include the right to claim interest on a loan for consumption (art 513 *Shōhō*) or the chapter on sales (arts 524–528 ibid),[1939] but seem not to encompass art 508 *Shōhō*.

cc) Coming into Effect of *Shōdaku: Hasshin Shug*i (発信主義, Dispatch Rule) and *Tōtatsu Shugi* (到達主義, Arrival Rule)

The coming into effect of *shōdaku* is not governed by one rule, like *mōshikomi*, but by two doctrines: Beside the *tōtatsu shugi* (see Section ii.cc) above), what is known as the dispatch rule (*hasshin shugi*, 発信主

1934 Kitagawa, '*Contracts*' (fn 1601) § 2.01[3][e][ii] at 2-32.
1935 Yamamoto K, '*Vertragsrecht*' (fn 1612) 471 para 31.
1936 See Masao Yanaga, *A Bill Regarding the Electronic Declaration of Intention in Japan* (2001) 11 ZJapanR / JJapanL 255, making this statement in relation to the formation rules in general. See also Kitagawa, '*Contracts*' (fn 1601) § 2.01[3][e][ii] at 2-32.
1937 See Kitagawa, '*Contracts*' (fn 1601) § 2.01[3][e][ii] at 2-32.
1938 Marutschke, '*Einführung*' (fn 1603) 153.
1939 See Endō and Matsuda (fn 1597) on *dai-3-jō* [article 3] at 11.

義)[1940] will often apply.[1941] The latter is a special rule[1942] that becomes evident from the provision contained in art 526 para 1 *Minpō*: 'A contract between persons at a distance shall be formed upon dispatch of the notice of acceptance'.[1943] It can be deduced from this that acceptance becomes effective upon its dispatch,[1944] since a contract can only be formed when acceptance, made on a valid offer, is effected.[1945] Although phrased in the negative and not stating the effectiveness of a declaration of acceptance as clearly as the *Minpō*, the dispatch doctrine is said to be contained in art 508 para 1 *Shōhō*:[1946]

> Where merchants are at distance from each other, if the party who has received an offer of a contract that was made without specifying a period for acceptance does not dispatch a notice of acceptance within a reasonable period of time, such offer shall cease to be effective.[1947]

'Dispatch' (*hassin*, 発信) simply means being sent out, so that, if, for example, the notification is delayed or gets lost on the way and so does not

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1940 The term is used by, eg, Kawakami (fn 1831) 14. Sometimes the term 'dispatch doctrine' is used instead of 'dispatch rule', see, eg, Kitagawa, '*Contracts*' (fn 1601) § 2.01[3][e][iv] at 2-33.

1941 Note that the situation has been simplified under the recent reform of the *Minpō*, as discussed in Section V.a. below.

1942 Chūkan shi'an Explanations (fn 1876) 355. See also Ueda, '*Keiyaku seiritsu*' (fn 1832) on *dai-526-jō* [article 526] at 767.

1943 The original reads: '隔地者間の契約は、承諾の通知を発した時に成立する' (*Kakuchi-sha-kan no keiyaku ha, shōdaku no tsūchi wo hasshita toki ni seiritsu suru*); emphasis added.

1944 Ueda, '*Keiyaku seiritsu*' (fn 1832) on *dai-526-jō* [article 526] at 767. See also Kazuo Shinomiya and Yoshihisa Nōmi, *Minpō sōsoku* [Civil Code General Provisions] (9th edn, Kōbundō 2018) 290. See further Chūkan shi'an Explanations (fn 1876) 355.

1945 See Yamamoto K, '*Vertragsrecht*' (fn 1612) 469 para 23. See also Ueda, '*Keiyaku seiritsu*' (fn 1832) on *dai-526-jō* [article 526] at 767; Yamamoto K, '*Minpō kōgi IV-1*' (fn 1646) 29, 30.

1946 See Tanaka and others (fn 1617) 92.

1947 The original reads: '商人である隔地者の間において承諾の期間を定めないで契約の申込みを受けた者が相当の期間内に承諾の通知を発しなかったときは、その申込みは、その効力を失う' ('*Shōnin de aru kakuchi-sha no aida ni oite shōdaku no kikan wo sadamenaide keiyaku no mōshikomi wo uketa mono ga sōtō no kikan-nai ni shōdaku no tsūchi wo hashinakatta toki ha, sono mōshikomi ha, sono kōryoku wo ushinau*'), emphasis added.

reach the recipient (offeror), a contract is still formed.[1948] Where communication is made electronically, as in an e-mail or online in a web-browser, the meaning of dispatch is that the 'information [of the order] is sent'.[1949]

As mentioned above, the situation concerning the effectiveness of *shōdaku* is more complicated, as the wording of art 521 para 2 *Minpō*, which speaks of the offeror 'not having receiv[ed the] notice of acceptance' ('承諾の通知を受けなかった', *shōdaku no tsūchi wo ukenakatta*) on time, seems to suggest that acceptance of an offer that specifies a period for doing so is governed by the general rule, ie, by the 'arrival rule'.[1950] The question of which doctrine is applicable therefore seems to depend on whether an offer contains a period of acceptance. In this way, the risk of the declaration of acceptance being delayed or lost and the acceptor nevertheless being bound can be avoided by including a time frame for acceptance in the offer, since, by doing so, art 521 para 2 *Minpō* will apply, making acceptance effective only once it reaches the offeror.[1951] As a similar provision to art 521 *Minpō* is not found in the *Shōhō*, it could be argued that the *Minpō* provision and thus the arrival rule applies to B2B situations, unless some commercial custom takes precedent. This result seems to contradict the underlying intention of the commercial rules, however, since the drafters of the *Shōhō* decided against adopting the arrival rule due to the potential harm done to the (legal) certainty in commerce where a declaration of acceptance is either delayed or does not

1948 Ueda, '*Keiyaku seiritsu*' (fn 1832) on *dai-526-jō* [article 526] at 767 and 768. See also Kitagawa, '*Contracts*' (fn 1601) § 2.01[3][e][iv] at 2-34; Yamamoto K, '*Minpō kōgi IV-1*' (fn 1646) 30.

1949 See E-Commerce Interpretation Guideline (fn 1873) i.4.

1950 See Kitagawa, '*Contracts*' (fn 1601) § 2.01[3][e][iv] at 2-33–2-24. See also Yamamoto K, '*Vertragsrecht*' (fn 1612) 469 para 24. For an overview of the ongoing discussion among Japanese legal academics relating to an interpretation of the stipulation to make it consistent with art 526 *Minpō*, see Ueda, '*Keiyaku seiritsu*' (fn 1832) on *dai-526-jō* [article 526] at 767. In essence, it surrounds the issue of which provision represents the general rule and which is the exception for acceptance. While some academics are of the opinion that the arrival rule is an exception to the dispatch rule (see, eg, Kitagawa, ibid at 2-34); others see the dispatch rule as a deviation from the general rule for the effectiveness of declarations of intention (see, eg Yamamoto K, ibid para 23). Although the Japanese courts have not yet ruled on this question, it seems that deeming the dispatch rule to be the general principle for declarations of acceptance is closer to the legislator's intention, see Ueda ibid.

1951 Compare Ueda, '*Keiyaku seiritsu*' (fn 1832) on *dai-526-jō* [article 526] at 768.

arrive at all.[1952] Having said this, using the arrival rule when a period has been stipulated seems natural, and, furthermore, will give the offeror an advantage. This is because the offeror will have certainty as to whether the offeree has accepted the proposal by the deadline, since the offeree's response must have arrived by the end of the stipulated period in order to make an effective declaration of intention. In this sense, the application of the arrival rule could be said to support commerce. Nevertheless, it is not clear whether the arrival rule can be applied in B2B situations.

The dispatch rule is also not applicable to *shōdaku* made and transmitted electronically (art 4 *Denshi keiyaku-hō*), ie, those sent by e-mail, fax, or telephone.[1953] Accordingly, electronic acceptance notices (*denshi shōdaku tsūchi*, 電子承諾通知) are governed by the arrival rule contained in art 97 *Minpō*.[1954] According to the definition of the term 'electronic acceptance notices' contained in art 2 para 4 *Denshi keiyaku-hō*, the provision applies to declarations of acceptance transmitted via telephone, telex, fax, or a personal computer. And while the title of the Act suggests otherwise, this provision is deemed by Japanese legal academics to apply to electronic acceptance irrespective of whether a consumer is involved in the process.[1955] This view is supported both by the wording of the provision, which simply refers to 'a contract made between persons at a distance' ('隔地者間の契約において', *kakuchi-sha-kan no keiyaku ni oite*), as well as the generalised definition given for electronic acceptance notices (arts 4, 2 para 4 *Denshi keiyaku-hō*). In fact, the intention behind this legislation seems to have been to provide a regulation for a *lacuna*, since the *Minpō* does not currently regulate electronic declarations of intention; therefore, the stipulation modifies the rules of the *Minpō* in cases of electronic acceptance between parties at distance.[1956] Indeed, the purpose of the legislation reads:

1952 Compare Tanaka and others (fn 1617) 92. Indeed, the dispatch rule was deemed to suit the character of commerce better, ibid 93.

1953 See Sono and others (fn 1632) 55.

1954 Yamamoto K, '*Vertragsrecht*' (fn 1612) 469 para 25; E-Commerce Interpretation Guideline (fn 1873) i.2–i.3. See also Tōda (fn 1850) on *dai-526-jō* [article 526] at 493; Kunihiro Nakata, *Die Modernisierung des Willenserklärungsrechts in Japan* [The Modernisation of the Law of Declarations of Intention in Japan] (2019) 47 ZJapanR / JJapanL 247, 264–265.

1955 See, eg, Yanaga, '*Electronic Declarations Bill*' (fn 1936) 256; or Yamamoto K, '*Vertragsrecht*' (fn 1612) 470 para 25.

1956 Interview with Kunihiro Nakata, Professor, Faculty of Law, Ryūkoku University (Kyōto, 12 May 2017) and subsequent personal correspondence.

> This Act shall provide special provisions to the Civil Code (Act No. 89 of 1896) in cases where […] an electronic acceptance notice is dispatched [...] with respect to a contract made by persons at a distance.[1957]

The seeming contradiction in the rules regarding the time of coming into effect of declarations of intention can be explained on the basis that the dispatch and the arrival rules stem from different legal traditions: While the dispatch rule is a concept taken from English law,[1958] the general rule for declaration of intention, the arrival rule, was originally adopted from French law; although it is also found in German law.[1959] This case is an excellent example of the achievement of Japanese legislators to combine legal concepts of different origins. The reason for the adoption of the English dispatch rule is two-fold: to enable the offeree to begin performing the contract right away, while also making the declaration of acceptance binding for the offeree without delay; whereby both are important in legal practice.[1960] A slightly different explanation is that the dispatch rule was inserted to promote commerce: Merchants desire a speedy formation process, and giving effect to acceptance upon its dispatch rather than its arrival contributes to a smooth and swift contract conclusion.[1961] Irrespective of the reason, the rule results in contracts being concluded sooner than if the arrival rule were applied to acceptance, as a period of time usually

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1957 Article 1 *Denshi keiyaku-hō*. The original states: 'この法律は、[…] 隔地者間の契約において電子承諾通知を発する場合に関し民法（明治二十九年法律第八十九号）の特例を定めるものとする' (*Kono hōritsu ha, [...] kakuchi-sha-kan no keiyaku ni oite denshi shōdaku tsūchi wo hassuru ba'ai ni kanshi minpō (meiji 29-nen hōritsu dai-89-gō) no tokurei wo sadameru mono to suru*').

1958 Yamamoto K, '*Vertragsrecht*' (fn 1612) 469 para 23, who refers to the dispatch rule by the German term '*Abgabetheorie*' (issuance theory). On the English postal rule, see B.II.3.a.ii.ee) above.

1959 On the German *Empfangstheorie* (receipt theory), see B.III.3.a.ii.dd) above.

1960 See Yamamoto K, '*Vertragsrecht*' (fn 1612) para 23.

1961 Chūkan shi'an Explanations (fn 1876) 355. Compare also Tōda (fn 1850) on *dai-526-jō* [article 526] at 484 and 491. cf Nakata, '*Willenserklärungsrecht*' (fn 1954) 264, who notes that the dispatch rule was meant to facilitate swifter contract conclusions. Indeed, the 'time is of the essence'-principle, (in)famous in English commercial law, may be said to be of great importance in Japanese commerce as well. This is not only reflected in the dispatch rule. The short time periods foreseen in the *Shōhō*, such as in art 507 or art 508, are designed to minimise unnecessary waiting time and can thus be said to support prompt commerce. On this last note, see Tanaka and others (fn 1617) 90, who observe that art 507 is based on art 293 *Kyū-shōhō* (on which, see fn 1965 below).

passes between sending and receipt of an acceptance declaration, which depends on the dispatch method used. Thus, the need for having a special provision for electronic acceptance, as found in art 4 *Denshi keiyaku-hō*, can be explained by the fact that modern digital technologies allow for a swift transfer of information, reducing the time lag to almost zero and thus rendering the dispatch rule unnecessary.[1962]

The time span during which acceptance can be made varies: If the offer stipulates a date, then, naturally, this point in time is decisive. Where an offer does not give a time frame, acceptance must be declared within a reasonable period. While this is expressly provided for in art 508 para 1 *Shōhō*,[1963] a similar requirement can be implied from the wording of art 524 *Minpō*, which states:

> An offer made to a person at a distance without specifying a period for acceptance may not be revoked until the lapse of a reasonable period for the offeror to receive a notice of acceptance.[1964]

Although the provision seems to concern the non-revocability of an offer that does not specify a period for acceptance, it implicitly requires that acceptance be made within a reasonable amount of time. This can be deduced from the circumstance that the offeror must wait for this period to end before the offer can be revoked. Due to the nature of commerce, the *Shōhō* contains another rule for acceptances that is stricter: When a party receives an offer for a contract directly from another party in a commercial setting, ie, when they are in each other's presence, they must accept immediately ('直ちに', *tadachi ni*), otherwise the offer expires (art 507 *Shōhō*).[1965]

1962 Compare in this respect Nakata, '*Willenserklärungsrecht*' (fn 1954) 264.

1963 The provision says that acceptance must be dispatched within a reasonable period ('相当の期間内に', *sōtō no kikan-nai ni*).

1964 The original reads: '承諾の期間を定めないで隔地者に対してした申込みは、申込者が承諾の通知を受けるのに相当な期間を経過するまでは、撤回することができない' ('*Shōdaku no kikan wo sadamenaide kakuchi-sha ni taishite shita mōshikomi ha, mōshikomi-sha ga shōdaku no tsūchi wo ukeru no ni sōtōna kikan wo keikasuru made ha, tekkaisuru koto ga dekinai*'); emphasis added.

1965 Ōtsuki (fn 1614) 98 notes that this stipulation was created to anticipate the promptness of commerce. The time-period for accepting an offer between persons present has been shortened: The stipulation's predecessor, art 293 *Kyū-shōhō*, foresaw that acceptance had to be expressed 'promptly' ('即時に', *sokuji ni*), see Tanaka and others (fn 1617) 90. This meant that acceptance had to be sent by noon on the day after the offer was received (art 295 *Kyū-shōhō*), see Tanaka and others, ibid 92.

dd) Loss of Effect of *Shōdaku*

According to the majority view in Japanese academic literature, acceptance, once dispatched, cannot be revoked by the offeree.[1966] This is because, as was explained in the previous section, acceptance comes into force upon its dispatch.[1967] As acceptance of an offer specifying a time period for a response seemingly comes into force upon its arrival, these cases could be an exception and thus be revocable until they reach the offeror, namely, by the revocation reaching the offeror before the declaration of acceptance.[1968] Otherwise, *shōdaku* do not lose their effect by, say, expiring, like *mōshikomi*. This is generally due to the dispatch rule; but even where the arrival rule applies and a declaration of acceptance arrives too late, this scenario concerns the issue of the declaration's *coming into* effect, rather than loss of the same (see Section cc) above).

b. Form Requirements in Japanese Law

As has already been indicated above, generally, no formalities are required for contracts under Japanese law.[1969] Agreement between the parties is sufficient, which is a principle that existed even before the *Minpō* was enacted.[1970] According to Kitagawa, this is one aspect of the freedom of contract in Japan, which in turn is one of the three indispensable principles underlying Japanese private law.[1971] Even real rights are transferable without more, as art 176 *Minpō* expressly allows this: 'The creation and

1966 Kitagawa, '*Contracts*' (fn 1601) § 2.01[3][e][iv] at 2-34.
1967 See Yamamoto K, '*Minpō kōgi IV-1*' (fn 1646) 29.
1968 Compare Shiomi, '*Shin-saiken*' (fn 1648) 20. See also the discussion in Section cc) above.
1969 This has been an implied principle to date; however, an explicit stipulation to this effect has been introduced into the *Minpō* under the recent reform. This will be discussed in Section V. below.
1970 See Nakata, '*Hōritsu kōi*' (fn 1795) 66, who notes that formalities in general were rarely required.
1971 Kitagawa, '*Contracts*' (fn 1601) § 2.01[2][b] at 2-27. The other two principles are 'the doctrine of absolute ownership and liability for negligence', ibid. Another important principle of the modern Japanese law of contract is to keep to (*mamoru*, 守る, protect) the agreement, so that it is not easy to back out of the contract (without good reason), see Yamamoto K, '*Minpō kōgi IV-1*' (fn 1646) 222.

transfer of real rights shall take effect solely by the manifestations of intention of the relevant parties'.[1972]

It ought to be noted that the word 'intention' here means that the will must aim at effecting a change in a real right.[1973] As a consequence of the provision, the registration of the transfer of ownership with the (Real Estate) Registry Office (*tōki-sho*, 登記所),[1974] or the delivery of (im)movables[1975] are generally not constitutive acts.[1976] Instead, they are merely required to make the right enforceable against third parties.[1977] In this way, contracts over real estate are consensual in Japanese law; unlike German and English law, which require a conveyance of the property right beside a consensual contract.[1978] Having said this, the parties may agree

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1972 The original provision reads: '物権の設定及び移転は、当事者の意思表示のみによって、その効力を生ずる' (*Bukken no settei oyobi iten ha, tōji-sha no ishi hyōji nomi ni yotte, sono kōryoku wo shōzuru*). This stipulation is also an expression of the principles underlying the *Minpō*, namely, of the will theory (*ishi shugi*, 意思主義), see Yamamoto S, '*§ 176 Minpō*' (fn 1831) 224, 230.

1973 See Yamamoto S, '*§ 176 Minpō*' (fn 1831) 234–235, who also gives an overview of the academic discussion surrounding the meaning of this term. See further Yokoyama, '*Purosesu*' (fn 1846) 93; Hisakazu Matsuoka, *Dai-2-hen dai-1-chō sōsoku* [Part 2 Chapter 1 General Rules], in: ibid and Nakata (fn 1602) 285, 288.

1974 The registration of immovable property is regulated in the *Fudō-san tōki-hō* (Real Property Registration Act, 不動産登記法), Law No 123/2004 as amended; English translation available online at www.japaneselawtranslation.go.jp/law/detail/?id=2016&vm=04&re=02&new=1. This issue will be considered in further detail in Section c.i. below.

1975 The distinction between the two kinds of things will be discussed in Section i. below.

1976 On registration, see Andreas Kaiser, *§ 16 Immobilienrecht* [Chapter 16 Real Estate Law], in: Baum and Bälz (fn 16) 699 para 40. Similarly, Taniguchi and Ono (fn 1846) call registration a requirement for the enforceability against others (*taikō yōken*, 対抗要件).

1977 See the provisions contained in art 177 *Minpō* on the registration of immovable property and in art 178 ibid on the delivery of movable property. Both provisions contain what is called the publicity principle (*kōji no gensoku*, 公示の原則), on which see Matsuoka, '*Sōsoku*' (fn 1973) 285. On immovables, see further Kaiser (fn 1976) 699 para 41. Matsuoka, ibid 287 states registration and delivery as being necessary for 'perfecting the effect' ('完全な効力を発生し', *kanzenna kōryoku wo hasseishi*) of the transfer. The inspiration for this regulation is French law, see Marutschke, '*Immobiliarsachenrecht*' (fn 1846) 3; Yamamoto S, '*§ 176 Minpō*' (fn 1831) 230.

1978 On the conveyance and registration of title in English law, see Sections B.II.3.b.iii. and c.i. above. On the involvement of a notary in the conveyancing process and registration in German law, see Sections B.III.3.b.iii.dd) and c.i.

otherwise, so that a particular form or act can become constitutive for the transaction.[1979] A transfer will still have some effect even where stipulated further conditions (payment of purchase price, handing over, registration, etc) are not fully observed (*tsukusarenakereba*, 尽くされなければ).[1980] This may be due to a recent trend in Japanese legal academia, in accordance with which any such contractual stipulations by the parties are deemed to act as suspensive conditions (*teishi jōken*, 停止条件).[1981]

This is not true for cases of transfers of possessory rights (*sen'yū-ken*, 占有権, art 182 para 1 *Minpō*) or the creation of pledges (*shichiken*, 質権, art 344 ibid), as these constitute exceptions to art 176 *Minpō*.[1982] To make them enforceable, the thing that is to be possessed or pledged has to be delivered (art 182 para 1 and art 344 *Minpō* respectively).[1983] Other exceptions to this will theory (*ishi shugi*, 意思主義 [1984]) are real contracts (*yōbutsu keiyaku*, 要物契約), namely, loans for consumption (*shōhi taishaku*, 消費貸借, arts 587 et seq *Minpō*, art 513 *Shōhō*), loans for use (*shiyō taishaku*, 使用貸借, arts 593 et seq *Minpō*), and deposits (*kitaku*, 寄託, arts 657 et seq *Minpō*, arts 593 et seq *Shōhō*), among others.[1985] These contracts likewise only become effective once the money or other thing has been received by the recipient (arts 587, 593, and 657 *Minpō* respectively). The reasons are historical and will not be discussed further.[1986] Similarly, although Japanese law recognises what under Roman law was termed as a *nudum pactum* (bare or naked agreement),[1987] the giving of a token of one's earnest intention is normally observed in legal practice. This role is fulfilled by *tetsuke* (see Section c.iii. below), which, in this respect, bears similarities to the English requirement of consideration (on which, see Section B.II.3.v. above).[1988]

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above. It seems that this regulation was also inspired by French law, see Sono and others (fn 1632) 45.

1979 See Kaiser (fn 1976) 692 para 9.

1980 Compare Yamamoto S, '*§ 176 Minpō*' (fn 1831) 231.

1981 See ibid 258.

1982 Matsuoka, '*Sōsoku*' (fn 1973) 287.

1983 This is not necessary for the former where the object is already in the transferee's possession, art 182 para 2 *Minpō*.

1984 Matsuoka, '*Sōsoku*' (fn 1973) 287. Translation by this author.

1985 Yamamoto K, '*Minpō kōgi I*' (fn 1632) 120. See also Kawakami (fn 1831) 15; Taniguchi and Ono (fn 1846) 393.

1986 See Taniguchi and Ono (fn 1846) 393.

1987 Interested readers are referred to, eg, Kaufmann and Köbler (fn 944) for further details on this principle.

1988 Compare Sono and others (fn 1632) 56–57.

While this is true, there are situations in which Japanese law requires a particular form; namely, for formal juridical acts (*yōshiki kōi*, 要式行為) like contracts of guarantee (*hoshō keiyaku*, 保証契約, art 446 para 2 *Minpō*).[1989] Special requirements may also be foreseen in other areas, such as in relation to commercial instruments, real estate, or companies. It is interesting to note that some of these instances of form requirements were seemingly established due to the social and economic differences arising between the Japanese in the modern period. This was the case for, eg, collective labour agreements; however, similar provisions were not created in relation to consumers. [1990] In fact, there are no general form requirements to be found in the *Shōhi-sha keiyaku-hō*. Details on the existing form requirements will be given in the subsequent sections.

The consequences attached to these form requirements have different effects, so that not adhering to form does not necessarily lead to the contract being void or legally unenforceable; other kinds of penalties may be imposed.[1991] One prominent example of the latter is Japanese stamp tax (*inshi-zei*, see Section c.ii. below), which does not affect the legal effectiveness of the contract but gives rise to tax penalties. Thus, while these 'other' penalties may be seen to be irrelevant from a contractual-legal point of view, they are nevertheless important in contracting practice. For this reason, the subsequent discussion will focus on those requirements that have direct legal impact, but will also set out those other consequences, whereby their effect will be set out jointly with the regulation in question.

In line with the general principle, oral contracts are generally enforceable;[1992] however, they are also revocable in so far as their performance has not yet been completed.[1993] This has been laid down explicitly in

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1989 See Yamamoto K, '*Minpō kōgi I*' (fn 1632) 119–120.

1990 See Taniguchi and Ono (fn 1846) 393.

1991 See Kitagawa, '*Contracts*' (fn 1601) § 2.01[3][h][v] at 2-37–2-38.

1992 Noriaki (fn 1641) 10 (generally), 13 (sales). In relation to gifts, the Japanese courts have held that these are not enforceable by their recipient, see *Dai-shin'i* decision of 25 April 1935 (Shōwa 10), (Hōritsu) Shinbun No 3835 5. An extract can be found in Nobuhisa Segawa and Takashi Uchida, *Minpō hanrei-shū saiken kakuron* [Cases and Materials Civil Code: Specific Provisions of the Law of Obligations] (3rd edn, Yūhikaku 2008) 2–3. See also Segawa and Uchida, ibid 4–5 (retrial at district court after case had been reversed and referred back by the *Dai-shin'i*).

1993 Kitagawa, '*Contracts*' (fn 1601) § 2.01[3][h][i]. See also Kawakami (fn 1831) 15. This is not a strict requirement, however, as the courts have held that 'performance completion' in relation to a sale of immovable property (see Section 2. below) means effecting the registration of the transfer. In contrast,

relation to gifts (art 550 *Minpō*, Revocation of Gift Not in Writing, 書面によらない贈与の撤回, *shomen ni yoranai zōyo no tekkai*).[1994] Perhaps for this reason, contracts in Japan are often fixed in writing even where this is not required by law. Before turning to today's legal contract practice in Section 2. below, the exceptions to the general rule of formlessness will be examined by looking at the different kinds of requirements that exist under Japanese law in Sections ii.–viii. By way of an excursus, the classification of things into movable and immovable will be briefly set out first.

i. Excursus: The Classification of *Mono* (物, Things) in Japanese Law

Japanese law distinguishes between tangible (*yūtai-butsu*, 有体物) and intangible (*mutai-butsu*, 無体物) things, whereby only the former are regulated in the *Minpō* (in arts 85–89). Tangible things are understood to mean an object that '[n]ormally [...] has a corporeal existence occupying a part of space [...]. [It] is a part of the physical world and can be perceived by the five senses [...]'.[1995] This thus generally encompasses all kinds of solids, liquids, and gases, whereas light, electricity, and copyrights are classified as intangible things.[1996] Similarly, data (データ, *dēta*) and information (情報, *jōhō*) are intangible things, but are not capable of being the object of rights

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actual delivery of the property is not necessary. See *Saikō Saiban-sho* decision of 26 March 1965 (Shōwa 40), Minshū Vol 19 No 2 526. An extract and a short commentary can be found in Segawa and Uchida (fn 1992) 42–43.

1994 This issue will be discussed further in Section ii. below.

1995 Seiji Tanaka, *Dai-1-hen dai-3-chō mono* [Part 1 Chapter 3 Things], in: Ryōhei Hayashi and Tatsuaki Maeda (eds), *Shinhan chūshaku minpō (2) sōsoku (2)* [Japanese Civil Law Annotated Vol 2 General Provisions Part 2] (Yūhikaku 1997) 574, at § 85 II 588–589: '一般に、有体物とは空間の一部を占める有形的存在である、ととかれる。これは、外界の一部であって人の五官により知覚されうる形態を有するもので物理的考察を中心とする' (*ippan ni, yūtai-butsu to ha kūkan no ichibu wo shimeru yūkeiteki sonzai de aru, to tokareru. Kore ha, gaikai no ibibu de atte hito no gokan ni yori chikaku sareuru keitai wo yūsuru mono de butsuriteki kōsatsu wo chūshin to suru*).

1996 Kunihiro Nakata, *Dai-1-hen dai-4-chō mono*, in: Matsuoka and ibid (fn 1602) 49, on *dai-85-jō* (article 85) at 51. Nakata goes on to note at 51 that electricity has been deemed to be a 'product for sale' ('産物の売却', *sanbutsu no baikyaku*) under a supply contract and thus as a kind of sales contract by the Japanese courts in the Shōwa era (in year 12, ie, 1937).

by themselves, whereas information recorded on material such as paper or on an electronic device like a flash drive can.[1997]

Tangible things are divided further into movables and immovables. Movables (*dōsan*, 動産) are defined in art 86 para 2 *Minpō* as a residual class, namely, as all things not constituting immovables (real estate or real property, *fudō-san*, 不動産). Under art 86 para 1 *Minpō*, the latter encompasses land and its 'fixtures' ('土地の定着物', *tochi no teichaku-butsu*), so that things like buildings and standing timber (*ryūboku*, 立木)[1998] all count as immovables.[1999] More generally, irrespective of the *Minpō*'s provisions, 'things that are changed with difficulty' ('変えがたいもの', *kaegataimono*) are viewed as immovables.[2000]

While it may not be apparent from the wording of the *Minpō*, land and fixtures, particularly buildings, are seen as constituting separate things. This becomes evident from the definition of real property in art 2 para i *Fudō-san tōki-hō*, in which the separation of the two things is made clear by the insertion of the word 'or' ('又は', mata ha): '不動産 土地又は建物をいう' (*fudō-san tochi mata ha tatemono*, 'real property: land *or* building'; emphasis added). In fact, due to being separate objects, rights may exist in relation to one object independently of the other.[2001] Consequently, a plot of land in Japan might be owned by one person, while a building erected on that land may belong to another. This is also true for things such as timber. In this respect, the *Ryūboku ni kansuru hōritsu*[2002] allows the owner of timber to transfer the ownership over it or to mortgage it (see art 2 para 2). Having said this, normally, a disposal of the land or rights over it

1997 Compare Nakata, '*Mono*' (fn 1996) on *dai-87-jō* (article 87) at 56 and on *zenchū* (preliminary note) at 49.

1998 See Hisakazu Matsuoka, *Dai-2-hen bukken* [Part 2 Real Rights], in: ibid and Nakata (fn 1602) 281, 282. Article 2 para 1 *Ryūboku ni kansuru hōritsu* (Act on Standing Timber, 立木ニ関スル法律, Law No 22/1909 as amended) provides that standing timber is treated as an immovable. Note that this Law defines standing timber in art 1 para 1 as 'a group of trees and shrubs that stand on a piece of land or on one part of a piece of land' ('本法ニ於テ立木ト称スルハ一筆ノ土地又ハ一筆ノ土地ノ一部分ニ生立スル樹木ノ集団ニシテ[...]', *honbō ni oite ryūboku to shōsuru wa ippitsu no tochi mata ha ippitsu no tochi no ichi bubun ni oitasuru jumoku no shūdan ni shite* [...]; translation by this author).

1999 The whole provision reads: '不動産以外の物は、すべて動産とする' ('*Fudō-san igai no mono ha, subete dōsan to suru*' 'Land and any fixtures thereto are regarded as real estate').

2000 See Endō and Matsuda (fn 1597) 81.

2001 See Kaiser (fn 1976) 691 para 6.

2002 See fn 1998 above.

also affects the timber (art 2 para 3 ibid). This suggests that ownership of standing timber is not necessarily separate from the land. Rather, it seems that ownership will normally pass together, unless it has been separated. As a consequence, fixtures may form part of land or constitute property by itself.

This separation of land and buildings (and of timber) as independent immovables follows traditional Japanese legal thought, while other provisions relating to Japanese property law follow German or French inspirations.[2003] Tradition is also reflected in the fact that separate registers exist for land (*tochi tōki-bo*, 土地登記簿, land register), buildings (*tatemono toki-bo*, 建物登記簿, building register),[2004] and for timber (*ryūboku tōki-bo*, 立木登記簿, standing timber register)[2005]. Further details on these registers will be given in Section c.i. below.

ii. Written Form: Writing and *Shomen* (書面, Document)

As has been stated, there is no general requirement that a contract be made in any form, which includes writing. There are, however, a few — quite specific — cases acting as exceptions. Irrespective of these, the parties may choose to conclude a written contract for several reasons. After looking at a couple of these grounds, the meaning of 'writing' (in Section aa) below) and a range of examples of statutory requirements (Section bb)) will be explored.

The reason why contractual parties may choose the written form freely is simple: In Japanese law, a distinction is made between a private deed

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2003 See Bahr (fn 1590) 112, 103–106. Although the provision of the *Minpō* is referred to today as authority for the traditional Japanese view, ironically, at least some of the drafters of the provision, namely, Kenjirō Ume and Masaaki Tomī, had no intention to include this principle in the *Minpō*, see Bahr (fn 1590) 115. Rather, it seems that they merely meant to indicate what 'immovables' were and not whether land and its fixtures were one or separate things, see Makoto Nagata, *Das Japanische im japanischen Sachenrecht* [The Japanese in Japanese Property Law], in: Menkhaus (fn 1590) 123, 126, 127. Having said this, at least Tomī believed buildings and groups of standing timber — in contrast to other possible things attached to the land, such as single trees, walls, pipes, etc — to constitute property that is separate from the land itself, see Nagata, ibid 127. On the separation, see also Kaiser (fn 1976) 708 para 6.

2004 Kanji taken from Götze, '*Rechtswörterbuch*' (fn 10) 560 and 546; transcription taken from Kaiser (fn 1976) 698 para 35.

2005 Kanji taken from *Ryūboku ni kansuru hōritsu*, see, eg, art 12.

(*shisho shōsho*, 私署証書) and a public or notarial deed (*kōsei shōsho*, 公正証書). While the former denotes a document drawn up by the parties themselves, the latter refers to a document that is drawn up by a Japanese public officer, namely, the notary (*koshō-nin*, 公証人).[2006] Although both kinds of document have evidentiary value,[2007] a public document is considered to have greater weight.[2008] This notwithstanding, evidencing the agreement is surely one reason why parties may choose to formalise a contract in writing even where it is not required. Aside from this, a contractual document may aid in yet another way: when interpreting the contract.[2009]

aa) 'Writing' and 'Document' Defined

Japanese legislation does not speak of 'writing', but rather requires a 'document'. Denominations vary, so that one may often encounter references to *shomen* (書面, document) or *shōsho* (証書, deed), but also to, eg, *shi-bunsho* (私文書, private document). While the terms 'writing' and 'document' are not defined in any of the provisions foreseeing the written form (Section bb)), it can be reasonably assumed that reference is made *a priori* to a tangible paper document as opposed to an intangible electronic document. This interpretation is supported by the following two considerations:

On one hand, there is the enactment time of the legislation. Both the *Minpō* and the *Shōhō* were enacted at the end of the nineteenth century, so that the contemplated ways of contracting were either through face-to-face negotiations (*taimen kōshō*, 対面交渉) if between present persons, or by

2006 A simpler term that is sometimes used for the former is 'private document' (私文書, *shi-bunsho*), see, eg, Endō and Matsuda (fn 1597) 78. On the differentiation between the two documents, see, generally, *Kōshō-nin-hō*, Japanese Notary Act, 公証人法, Law No 53/1908 as amended; English translation available online at www.japaneselawtranslation.go.jp/law/detail/?id=2267&vm=04&re=02&new=1. The function of a notary will be explored in more detail in Section iv. below.

2007 Article 228 paras (2) and (4) *Minji soshō-hō* (Japanese Code of Civil Procedures, 民事訴訟法, Law No 109/1996 as amended, hereinafter '*Minso*') contains presumptions for the authenticity of public and private documents respectively. An English translation of the law is available online at www.japaneselawtranslation.go.jp/law/detail/?id=2053&vm=04&re=02&new=1.

2008 See Taniguchi and Ono (fn 1846) 401.

2009 The wording of the contract is one factor which is considered for its interpretation, see Ueda, '*Keiyaku (zenshū)*' (fn 1602) 756. For further details, see ibid.

letter (*tegami*, 手紙) if between 'persons at distance'.[2010] It is therefore logical that these statutes refer to physical paper documents when using the term 'writing'. Similarly, provisions found in special legislation, although enacted later, namely, between 1949 and 1952, still refer to physical paper documents, as they stem from a period in which the electronic transmission of documents, such as in the form of a fax, was not yet wide-spread and so would not, or rather could not have been contemplated by the legislator.[2011]

On the other hand, there is the wording of the provisions. While the above-mentioned norms do not contain explicit words referring to electronic forms, in contrast, the wording of special regulation has been subsequently amended to allow for the substitution of electronic documents. Thus, by virtue of the Law for Making Provisions on the Exchange of Documents etc by the use of Electronic Telecommunication Technology in Connected Laws[2012], almost fifty different special laws on topics ranging from fishery, over medicine, to trade in securities, were amended.[2013] The affected provisions included art 19 para 3 *Kensetsu-gyō-hō* (Construction Business Act[2014]), and art 3 para 2 *Shita'uke daikin shiharai chi'en-tō bōshi-hō* (Act against Delay in Payment of Subcontract Proceeds, Etc to

2010 See Matsumoto, '*Denshi shakai*' (fn 1819) 298.

2011 Although the facsimile was first invented in the nineteenth century, it wasn't until over one hundred years later, in the 1970s, that the technology became standard practice in business, see Chris Baraniuk, *Why the Fax Machine Isn't Quite Dead Yet*, BBC (25 February 2015), www.bbc.com/future/story/20150224-why-the-fax-machine-wont-die. In Japan, it remains a popular communication method, including in business contexts, see Martin Fackler, *In High-Tech Japan, the Fax Machines Roll On*, The New York Times (13 February 2013), www.nytimes.com/2013/02/14/world/asia/in-japan-the-fax-machine-is-anything-but-a-relic.html?_r=0.

2012 書面の交付等に関する情報通信の技術の利用のための関係法律の整備に関する法律, *Shomen no kōfu-tō ni kansuru jōhō tsūshin no gijutsu no riyō no tame no kankei hōritsu no seibi ni kansuru hōritsu*, Law No 126/2000, short title: ＩＴ書面一括法, *IT shomen ikkatsu-hō*, literally 'IT Documents Composite Law'.

2013 A list of the affected legislation is provided by the Kokuritsu Kokkai Tosho-kan [National Diet Library] online at http://hourei.ndl.go.jp/SearchSys/viewKaisei.do?i=spINCIstKBNdEDPEOogErw%3d%3d.

2014 建設業法, Law No 100/1949 as amended; English translation available online at www.japaneselawtranslation.go.jp/law/detail/?id=2133&vm=04&re=02&new=1.

Subcontractors; hereinafter '*Shita'uke-hō*'[2015]), both of which now expressly allow electronic transmission in lieu of a physical delivery of the contract document. In contrast, similar general amendments were not made to the *Minpō* or the *Shōhō* at that time.[2016] There is one exception: art 446 para 3 *Minpō* was inserted in 2004,[2017] deeming a guarantee (*hoshō*, 保証) made as an 'electromagnetic record' ('電磁的記録', *denjiteki jiroku*) as having been made in writing.

Apart from this distinction, there is little discussion on what exactly 'writing' constitutes. Rather than elementary aspects such as the material of the document or the writing style, etc being discussed, the focus is on what needs to be contained in a document. One general point is that the party's or, as the case may be, the parties' intention must be expressed in the written record.[2018] Consequently, it has been stated in relation to gifts that the document must clearly state the donor's firm intention to make a gift.[2019] Similarly, a contract of guarantee has to contain a clear and express statement of the intention to take on the responsibility of a guarantee.[2020] As for the content, the document must generally record the contract's terms.[2021] When making a gift, at least the recipient's name and the object that is to be gifted must be stated; although there have been instances in which the donor's name and an express statement to gift have been held as not required by the Japanese courts.[2022] In a similarly liberal manner, the subsequent drafting of the donation instrument has been admitted, while actual delivery of the instrument has been held unnecessary by the courts.[2023] It could be argued that such leniency would not always apply.

2015 下請代金支払遅延等防止法, Law No 120/1956 as amended; English translation available at www.japaneselawtranslation.go.jp/law/detail/?id=40&vm=04&re=02&new=1.

2016 On the reform of the *Minpō* that has recently been completed, see Section V. below.

2017 Matsumoto, '*Denshi shakai*' (fn 1819) 310.

2018 See Shiomi, '*Shin-saiken*' (fn 1648) 10.

2019 Hiroe Moriyama, '*Zōyo to shomen*' [Gifts and Documents] (2015) 224 Juristo bessatsu: Minpō hanrei hyakusen II saiken 98.

2020 For further details, see Shiomi, '*Shin-saiken*' (fn 1648) 10.

2021 Masayuki Yamanushi, *Keiyaku to hōshiki: dakusei keiyaku ni okeru shōsho no kinō* [Contract and Form: The Function of Formal Docments with Regard to Consensual Contracts], in: Keiyaku-hō Taikei Kankō I'in-kai [Publication Committee of the Contract Law Compendium], *Keiyaku-hō Taikei 1: keiyaku sōron* [Contract Law Compendium Vol 1: General Principles] (Yūhikaku 1962) 139, 143.

2022 For further discussion, see Moriyama (fn 2019) 98–99.

2023 See ibid 99.

Gifts may be an exceptional case, as the instrument is not constitutive for the act to have effect (see below). Conversely, more strict criteria may apply to formal contracts, such as guarantees, where the need for proof of the agreement's content is higher.[2024]

bb) Instances of the Written Form

As was mentioned above, there are only a limited number of cases in which a written form is stipulated for contracts under Japanese law. Perhaps the strictest provision relates to contracts of guarantee and provides that these will not be effective unless made in writing (art 446 para 2 *Minpō*). This stipulation was introduced in 2004 with the aim of cautioning prospective guarantors from taking on another person's debt unilaterally and without payment.[2025] This rule extends to bilateral guarantee contracts as well.[2026] Further examples of writing being required include collective labour agreements, which will likewise only come into effect once put into writing.[2027]

The delivery of a written contract is also expressly required in, eg, art 19 para 1 *Kensetsu-gyō-hō*. Moreover, the furnishing of a document containing details of the already concluded contract is required in, eg, art 3 para 1 *Shita'uke-hō*, and in arts 34-2 para 1 and 37 para 1 *Takuchi-gyō-hō*. Non-compliance with these provisions does not affect the legal validity of the contract; however, the non-compliant party will incur a monetary fine,[2028] or be faced with other administrative measures, such as a temporary suspension of its business activities.[2029]

2024 Compare Shiomi, '*Shin-saiken*' (fn 1648) 9–10, noting the different reasons why guarantees among others are formal contracts.

2025 Nobuyuki Yamamoto, *Dai-3-hen dai-1-chō dai-3-setsu dai-4-kan hoshō saimu* [Part 3 Chapter 1 Section 3 Subsection 4 Guarantee Obligations], in: Matsuoka and Nakata (fn 1602) 641, 642. He notes that unilateral declarations of guarantee constitute one-sided, non-compensatory, formal contracts. See also Sono and others (fn 1632) 220.

2026 See Yamamoto N (fn 2025) 642. cf Matsumoto, '*Denshi shakai*' (fn 1819) 310, who does not differentiate between unilateral and bilateral guarantee agreements.

2027 Article 14 *Rōdō kumi'ai-hō*, 労働組合法, Labor Union Act, Law No 174/1949 as amended; English translation available online at www.japaneselawtranslation.go.jp/law/detail/?id=17&vm=04&re=02&new=1.

2028 Article 10 no i *Shita'uke-hō*; art 83 para 1 no ii *Takuchi-gyō-hō*.

2029 Article 65 paras 2 no ii and 4 no ii *Takuchi-gyō-hō*.

There may also be instances in which a written contract is expressly optional, such as in art 737 *Shōhō* (transportation contract with regard to the whole or part of a ship). Similarly, as has already been mentioned above, gifts do not require any particular form (art 549 *Minpō*); however, unless they are contained in a written document, they will be revocable until their performance has been completed (art 550 ibid). Consequently, putting a gift in writing is at least a compelling practical reason. In this regard, the Japanese courts were satisfied that a document drafted by the donor to a judicial scrivener (*shihō shoshi*, 司法書士), in which the donor requested the registration of the transfer of a piece of land to be effected in favour of the donee fulfilled the requirements.[2030] Although it confirmed the purpose of the provision to be to protect donors from making gifts carelessly, the court deemed it satisfactory if a document's text 'allows the perception with a level of certainty' ('確実に看取しうる程度', *kakujitsu ni kanshushi'uru hodo*) that a gift is being made, thus making the donor's intention clear.[2031] This was the case here, as the wording of the document gave rise to this perception, and, as a consequence, the gift could not be retracted.

In relation to consumers, perhaps to better protect them,[2032] arts 4 and 5 para 1 (door-to-door sales), arts 18 and 19 para 1 (telemarketing Sales), and art 37 (multilevel marketing transactions) *Tokutei shō-torihiki-hō* require that a seller provide a consumer with a document containing the details of the offer or of the sales contract, as the case may be.[2033] Again, non-compliance does not affect the formation or the effectiveness of the contract,[2034]

2030 *Saikō Saiban-sho* decision of 29 November 1985 (Shōwa 60), Minshū Vol 39 No 7 1719. An extract can be found in Segawa and Uchida (fn 1992) 41–42. The function of a judicial scrivener will be described further in Section D.V.4.d. below.

2031 In contrast, a document does not have to actually state the intention as such, nor does it have to say that the act is non-compensatory. See fn 2030.

2032 This is an argument presented to explain the general rise in documentation requirements in consumer laws, by, eg, Taniguchi and Ono (fn 1846) 393.

2033 For further specifications of the necessary requirements, see arts 3–6 (door-to-door sales), 17–20 (telemarketing sales) *Tokutei shō-torihiki ni kansuru hōritsu shikō kisoku* (Regulations for Enforcement of the Act on Specified Commercial Transactions, 特定商取引に関する法律施行規則), Ordinance of the Ministry of International Trade and Industry No 89/1976 as amended; English translation available online at www.japaneselawtranslation.go.jp/law/detail/?id=165&vm=04&re=02&new=1.

2034 See Kitagawa, '*Contracts*' (fn 1601) § 2.01[3][h][v] at 2-37. Non-compliance may lead to the violator being subjected to, *inter alia*, a suspension of their business

since these are administrative provisions and as such do not have a bearing on the effect of a contract under private law.[2035] In fact, rather than a requirement of form, these regulations are better classified as information duties (*setsumei gimu*, 説明義務).[2036] Similar regulation can be found, *inter alia*, in the following provisions of the *Kappu hanbai-hō*: art 3 paras 2–3 and art 4 paras 1–2 (instalment sales, *kappu hanbai*, 割賦販売);[2037] art 29-2 paras 1–2 and art 29-3 (loan-backed sales, *rōn teikei hanbai*, ローン提携販売); and art 30 paras 1–2 and art 30-2-3 paras 1–2 (intermediation of comprehensive credit purchases, *hōkatsu shin'yō kōnyū atsusen*, 包括信用購入あつせん). The consequence of non-compliance is a monetary fine up to ¥500,000 (art 53 para iii *Kappu hanbai-hō*; approx. €4,000). Note that not only contracts, but some declarations of intention sometimes have to be made in writing, such as the withdrawal of an offer under arts 35-3-10 para 1, 35-3-11 para 1 *Kappu hanbai-hō*. This provision is not dispositive, so that contradicting contractual stipulations are void (see ibid para 15).

Although there is no legislative provision that requires a written document for the sale of immovable property, a difference of opinion seems to exist between academic literature and the judiciary in Japan on this point: While a part of the former would sometimes deny such sale contracts from arising until a formal document is drawn up where the parties agreed to make this a requirement, the latter would not deny formation on the ground of there being no (formal) contractual document. The courts thus affirm the traditional principle of formlessness. Nevertheless, it has been stated that the existence of a contractual document leads to the presumption that the parties have a 'definite intention' ('確定的な意思表示', *kakuteitekina ishi hyōji*) to enter into a contract.[2038] For this reason,

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(arts 8 para 1, 23 para 1, and 39 para 1 *Tokutei shō-torihiki-hō* for door-to-door sales, telemarketing, and multilevel marketing respectively).

2035 Dernauer, '*Verbraucherschutz*' (fn 1623) 572–573 para 9 notes that there is a general lack of interconnection between the regulations found in private law and those of administrative law; however, the latter will normally have no effect on the former.

2036 On these duties, see Dernauer, '*Verbraucherschutz und Vertragsfreiheit*' (fn 1629) 173, 305–306, 311–312, 315–316. Similar duties are found in German law as well, see Section B.III.3.b.ii.cc) above.

2037 In accordance with art 4 para 1 *Kappu hanbai-hō*, delivery of the document must be made 'without delay' ('遅滞なく', *chitai naku*), which is interpreted as a time frame of three or four days, see Egashira (fn 1843) 115.

2038 See Mika Yokoyama, *Fudō-san baibai keiyaku no seiritsu katei to seiritsu-mae no gōi no hōteki kōryoku* [The Formation Process of Contracts for the Sale of Immovable Property and the Legal Effect of Agreements Prior to Formation]

there seems to be a tendency by the judiciary to find no formation where a contract has not been made in documentary form.[2039] Conversely, there are also cases where a contract has been held not to have arisen despite a written contractual document.[2040] Nevertheless, both academia and judiciary agree that a 'definite intention' exists in the following two cases: first, where central contractual matters (ie, defining the content of the parties' performance, like the object, price, etc) have been agreed upon; secondly, where — apart from any agreement in the first case — the agreement to conclude a contract is final, such as where the coming into effect of the sale is acknowledged in the parties' intentions.[2041]

iii. *Shomei suru*(署名する, Signing) and *Ō'in suru* (押印する, Sealing)

Although normally an implicit requirement in Japanese law, documents will be expected to be either signed (*shomei suru*, 署名する)[2042] or, more commonly, sealed (*ō'in suru*, 押印する, affixing a seal)[2043] by a person.[2044] The reason is that the signature or seal impression is deemed as evidence

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(1992) 54 Shihō 193, 195. The presumption is strong but rebuttable under certain circumstances, such as where earnest money (*tetsuke*, see Section c.iii. below) has not been handed over, ibid, '*Purosesu*' (fn 1846) 92.

2039 See Yokoyama, '*Purosesu*' (fn 1846) 91; ibid, '*Seiritsu katei*' (fn 2038) 195.

2040 See Yokoyama, '*Purosesu*' (fn 1846) 92. An example is the *Tōkyō Chihō Saiban-sho* decision of 25 December 1989 (Heisei 1), Hanrei Jihō Vol 1362 63, in which the court held no contract to have arisen although it found that a document titled 'contract for the sale of land' ('土地売買契約書', *tochi baibai keiyaku-sho*) was not forged as alleged by the plaintiffs. For further details on this, see Section iii. below.

2041 See Yokoyama, '*Purosesu*' (fn 1846) 92.

2042 Outside Japanese private law, the Passport Act (*Ryoken-hō*, 旅券法, Law No 267/1951) requires in art 15 that a passport (*ryoken*, 旅券) be signed ('署名しなければならない', *shomei shinakerebanaranai*), not sealed. See also art 11 (regarding applications for the issuance of a passport) Enforcement Regulations for the Passport Act (*Ryoken-hō shikō kisoku*, 旅券法施行規則, Regulation No 11/1989). A commentary is provided in Ryoken-hō Kenkyū-kai [Passport Act Research Society], *Ryoken-hō chikujō kaisetsu* [Commentary on the Passport Act] (Nihon Hyōron-sha 2016), particularly at 222–226.

2043 Translation of the term adopted from Götze, '*Rechtswörterbuch*' (fn 10) 390.

2044 An example of such an implicit requirement is art 470 *Minpō* (examination right of obligor of debt payable to order), which gives the obligor the right 'to examine the authenticity of the [...] signature and seal' shown on the order. This presupposes that such orders are signed and sealed; however, the *Minpō* does not require this in any of the preceding provisions (but see art 365, which

of a person's intent.[2045] This legal thinking is reflected in the stipulation contained in art 228 para 4 *Minso*, according to which the signing *or* sealing ('署名又は押印', *shomei mata ha ō'in*; emphasis added) of a private document (*shi-bunsho*, 私文書) triggers the presumption, for evidentiary purposes, that it is authentic.[2046] Thus, signing and sealing are treated as equivalents in Japanese law.[2047] Having said this, more importance is placed on sealing than on signing in Japanese legal contracting practice.[2048]

The presumption of authenticity is rebuttable. One instance is where doubt as to a document's authenticity exists. Article 229 para 1 *Minso* provides for such cases that the handwriting or the seal impression will be compared. This occurred in a litigation surrounding ownership of land, in which the plaintiffs, the successors of a deceased person who had owned the land in question, used the fraud argument to dispute a transfer of own-

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requires a written endorsement of a pledge of an order to make the pledge assertable against third parties).

2045 Andrew M Pardieck, *Executing Contracts in Japan* (2015) 40 ZJapanR / JJapanL 183, 184. In particular, it evidences a person's approval of the terms of a contract and their undertaking of the responsibilities arising from it, thus making it 'the ultimate formality', see Colin PA Jones, *Making an Impression in Japan: A Hanko Primer*, The Japan Times Online (Tōkyō, 13 March 2016). This is the traditional way of thinking, Kawakami (fn 1831) 14; however, it is a belief that is still firmly embedded in Japanese society today, as is evidenced by the 'catchphrases conveying the importance and the role of *hanko*' ('ハンコの重要性と役目を伝えるキャッチフレーズ', *hanko no jūyō-sei to yakume wo tsutaeru kyacchi furēzu*), like 'one's sign: proof of one's resolution' ('自分の証 決意の証', *jibun no shirushi: ketsu'i no shirushi*), or 'confirmation of intention, apparent proof: taking on responsibility' ('意思の確認　示す証明　負う責任', *ishi no kakunin, shimesu shōmei: ou sekinin*), collected by the Zen-Nihon Inshō Gyō-kyōkai [Pan-Japan Seal Association], see www.inshou.or.jp/koryu-pege/catchphrase_h2.html.

2046 Note that the signature or the seal impression can be of the principal (contracting party) or an agent, see Kitagawa, '*Contracts*' (fn 1601) § 2.01[3][h][iii] at 2-36; Endō and Matsuda (fn 1597) 78. Interestingly, the provision does not specify a particular kind of seal, namely, the *jitsu'in* ('registered seal', see below) to be used. Rather, it simply states *ō'in* (affixing one's seal). This leads Pardieck (fn 2045) 185 to infer that Japanese law does not automatically confer greater importance to the registered seal.

2047 According to, eg, Ryōsuke Naka, *Legal Practice of the Seal and Stamp Duty in Japan* (Lecture, Heuking Kühn Lüer Wojtek, Düsseldorf, Germany, 14 November 2017), this is the interpretation given to the *Minso* provision.

2048 Interview with Mrs Mika Yokoyama, Professor, Faculty of Law, University of Kyōto (Kyōto, 7 September 2016); Sono and others (fn 1632) 60, 61. See on this also Section 2.c. below.

ership to the defendants.[2049] An expert compared the handwritten name and address, as well as the seal impression on the allegedly forged contractual document with handwriting and a seal impression on a document in relation to which the authorship was not disputed by the parties. Based on the expert's finding that the likelihood was high that the handwriting and the seal impression on both documents were the same, and as there was no proof to the contrary, the court assumed that the contractual document was signed and sealed by the deceased person. Despite this, the court voiced doubts as to the contract actually having arisen and concluded, based on the (highly contradicting and illogical progression of) facts of the case, that it had not come into effect. This case illustrates that even where a contractual document (and the signature or sealing) is not only presumed but actually found to be authentic, this is no guarantee that the contract will be held to be legally effective.

aa) 'Signing' and 'Sealing' Defined

In accordance with the general expectation, a contractual document may provide space for either a signature (*jisho*, 自署, or *shomei*, 署名), a seal impression (with the names of the parties printed next to the box, *kimei ō'in*, 記名押印, literally 'affixing one's seal to typed name'; name sealing[2050]), or both, ie, a space for a signature and for sealing (*shomei ō'in*, 署名押印).[2051] The different terms enumerated here have different connotations.

The words *jisho* (自署) and *shomei* (署名) are synonymous and both mean a handwritten signature, ie, written by the signatory themselves; however, the former seems to be wider in scope, as it apparently encompasses the use of stylised signatures (花押, *kao*), whereas *shomei* seems to mean a signature by writing one's name in Japanese script (kanji, hiragana,

2049 *Tōkyō Chihō Saiban-sho* decision of 25 December 1989 (fn 2040). The facts of the case stated above have been simplified. The relationships of the 21 (!) plaintiffs and of the six defendants were more complex. Furthermore, the claims related to ownership of land and included the negation of (provisional) registrations of transfers of ownership.

2050 Compare Götze, '*Rechtswörterbuch*' (fn 10) 292.

2051 Pardieck (fn 2045) 186. See also Sono and others (fn 1632) 62. Note that it is rare for Japanese to seal and sign (with a signature) a document; thus stated by Naka, Legal Practice Lecture 2017 (fn 2047).

katakana) or using the Latin alphabet.[2052] Similarly, a subtle difference in meaning exists between the words *kimei* (記名) and *shomei* (署名): while the latter denotes a signature made by the person themselves, the former term is used when another person makes the signature for the person in question, either by writing the name by hand, by printing the name, or otherwise.[2053]

As for the name that is used, this is usually the person's full name (*shimei*, 氏名) or, in a commercial context, the person's trade name (*shōgō*, 商号).[2054] In fact, it has been stated that in business, 'signature' normally means 'affixing one's name seal to written name' ('記名捺印', *kimei natsu'in*).[2055] This latter term has been interpreted to mean that a seal impression is affixed and one's name is either written by hand, printed, typed, stamped, or copied.[2056] In this respect, it is noteworthy that *natsu'in* (捺印) seems to mean 'a name-seal or […] proof of one's name and position', so that it displays only a 'limited legal effect' ('*begrenzte rechtliche Wirkung*').[2057] It is also important to note that there are several different types of seals that (legal) persons may own and use in Japan. An overview of these seal categories for private individuals will be given in Section cc) below.[2058]

bb) Instances of a Requirement to Sign and Seal

Both the *Minpō* and the *Shōhō* lack a requirement to sign or affix a seal to contracts.[2059] This may be because the action is seen either as so obvious that it requires no explicit mention, or because it is simply left to legal

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2052 Compare the entries for '自署' and '署名' in the Japanese online dictionary Kotobanku at https://kotobank.jp/. cf also the corresponding entries in Götze, '*Rechtswörterbuch*' (fn 10) 195 and 498. *Kao* will be discussed further in Section D.III.2.c. below.

2053 See Ryoken-hō Kenkyū-kai (fn 2042) 224.

2054 See Endō and Matsuda (fn 1597) 77.

2055 See ibid 77–78.

2056 Ibid 78. Where a legal person is concerned, one of its organs or an agent may sign or seal the document, see ibid 77.

2057 See Götze, '*Rechtswörterbuch*' (fn 10) 380: '[…] *reines Namenssiegel oder* […] *Nachweis mit Namen und Position*'.

2058 Readers interested in company seals are referred to Ishii K (fn 1699) 12–15, and Pardieck (fn 2045) 184–186.

2059 An example of an explicit non-contractual requirement is the making of a will under arts 967– 970, 980 *Minpō*.

practice. Having said this, the court may hold an agreement to be a mere pre-contract (*kari-keiyaku*, 仮契約) if it is signed but not sealed, as the earnestness expressed through a signature is deemed to be less than that for a sealed document; which is the common Japanese perception.[2060]

As mentioned above, some legal provisions treat sealing and signing as being equivalent. This is true for the *Shōhō*, which provides in art 32 that writing one's name and affixing one's seal can substitute a signature. As a result, its very own stipulations for signatures, like in art 570 (invoice for freight transport) and art 599 (deposit receipts) can be fulfilled by sealing instead. Other commercial statutes provide similar flexibility. One example is art 82 Negotiable Instrument Act (*Tegata-hō*, 手形法 [2061]), which provides that: 'In this law, where it says signature, this includes affixing one's name seal to [the written] name'.[2062]

Other provisions allowing signing and sealing to be used as alternatives include art 19 para 1 *Kensetsu-gyō-hō* for construction work contracts. Article 14 *Rōdō kumi'ai-hō* is more elaborate, as it requires that the agreement be 'either signed by or affix the names and seals of both of the parties concerned'.[2063] Similarly, art 34-2 para 1 and art 37 para 3 *Takuchi-gyō-hō* stipulate that the signature or a printed name and seal be affixed to the document (*kimei ō'in shi*, 記名押印し). In conclusion, it is therefore more common for the sealing of a document to be required, whereas a handwritten signature that is not a mere spelling of one's name is almost never required, although often permissible in commercial contexts at least.

cc) Excursus: The Different Types of Seals in Japan for Individuals

As has been mentioned above, several different seal types exist in Japan for private persons. Of most relevance for the present discussion is the *jitsu'in* (実印, literally 'real seal' or 'official seal'), as this is the seal that is commonly used in legal transactions. Its use is required for making applications for entries in registers, such as for real estate (land, buildings)

2060 Interview with Mrs Mika Yokoyama, Professor, Faculty of Law, University of Kyōto (Kyōto, 7 September 2016). More will be said on Japanese legal thinking and practice in Section 2.b. below.

2061 Law No 20/1932 as amended.

2062 The original provision reads: '本法ニ於テ署名トアルハ記名捺印ヲ含ム' (*Honhō ni oite shomei to aru ha kimei natsu'in wo fukumu*).

2063 The original provision states: '両当事者が署名し、又は記名押印する'(*ryō-tōji-sha ga shomeishi, mata ha kimei ō'in suru*).

or cars.[2064] Due to its importance and to minimise the risk of the seal being used fraudulently,[2065] the official seal has to be registered at the regional administration authority. Once completed, the official seal is linked to the person to whom it is registered.[2066] A 'proof of seal registration certificate' ('印鑑登録証明書', *inkan tōroku shōmei-sho*; or '印鑑証明', *inkan shōmei*[2067]) can be obtained for the *jitsu'in*, which may be required when the seal is employed.[2068] In this sense, a *jitsu'in* can also have the function of proving one's identity, as there are no identity cards in Japan, like the German *Personalausweis* (identity card) for example.[2069] Furthermore, an imprint of the *jitsu'in*, together with the seal's certificate, are seen as a legally binding signature of the seal's owner, and is functionally equivalent to a signature authenticated by a notary.[2070] Before giving details on the registration process, it ought to be noted that each individual can only

2064 See Pardieck (fn 2045) 185. Sono and others (fn 1632) 61 note that the official seal must be used for the registration of real property.

2065 See Pardieck (fn 2045) 185. This is a pressing issue in Japan, as is evidenced by the fact that the Japanese Criminal Code (*Keihō*, 刑法, Law No 45/1907 as amended) contains a subchapter dealing with counterfeited documents, including the (mis)use of (counterfeited or stolen) seals, see, eg, art 159 para 1 (counterfeiting of private documents). An English translation of the law is available online at http://www.japaneselawtranslation.go.jp/law/detail/?id=1960&vm=&re=02&new=1. Other forms of misuse, such as burdening someone with debt by using their seal when filling out paperwork, or, similarly, obtaining a 'divorce by agreement' ('協議上の離婚', *kyōgi-jō no rikon*, see arts 763–769 *Minpō*) by using the spouse's seal without their knowledge are also common, see Jones (fn 2045).

2066 Jones (fn 2045). Anticipating the discussion in Section D.III.2.b.ii. below, a seal may not be registered by two different persons. Moreover, even if a seal is de-registered, it cannot be registered by a different person later on.

2067 *Inkan shōmei*: Jörn Westhoff, *§ 5 Formen und Bedingungen unternehmerischer Tätigkeit* [Chapter 5 Forms and Requirements for Doing Business], in: Baum and Bälz (fn 16) 183, 190 para 8. *Inkan tōroku shōmei*-sho: Ishii K (fn 1699) 10.

2068 See Pardieck (fn 2045) 185.

2069 Interview with Mrs Mika Yokoyama, Professor, Faculty of Law, University of Kyōto (Kyōto, 7 September 2016).

2070 Ishii K (fn 1699) 11, 8. See also Westhoff (fn 2067) 190–191 para 8, who states that the notarial authentication of a signature, rather than that of a whole document signed by the person in question, is more easily accepted in Japan. As he explains, this is due to the fact that the seal's certificate is only a proof that the seal imprint on the certificate is linked to a certain person; which corresponds to the function of the notarial authentication of a person's signature.

register one official seal.[2071] As the regulation of seal registration may vary in each administrative region, the specifications will be illustrated in what follows for the city of Kyōto and the Chūo ward of Tōkyō.[2072]

Persons over the age of 15 are permitted to register a *jitsu'in*, either personally or through a representative.[2073] If a seal has already been registered with one person, it cannot be registered a second time with another family member.[2074] Accordingly, it must bear the full name (氏名, *shimei*) of the person to whom it is to be registered.[2075] Furthermore, not all kinds of seals can be registered. Instead, restrictions apply: The seal cannot be an off-the-shelf product; it has to be of particular measurements and shape, and be made of material that cannot be altered easily; and it must bear the name of the person as it is shown in the Japanese Citizens Register (*Jūmin Kihon Daichō*, 住民基本台帳).[2076] As a consequence, *jitsu'in* have to be made especially for the owner and will usually be hand-crafted from materials of relatively high value,[2077] such ebony or cherry wood, ivory, buffalo horn, amber, or titanium.[2078]

2071 See, eg, the information provided on the website of the Kyōto Shiyaku-sho [Kyōto Municipal Office], www.city.kyoto.lg.jp/bunshi/page/0000147302.html at '*Tōroku dekiru inkan no yōken*' [Important Matters Regarding Seal Registration].

2072 For a more in-depth, though generalised, analysis of the specifications, see Eido Ino'ue, *All about Japanese inkan/ hanko/ chops/ seals* (28 August 2013), www.turning-japanese.info/2013/08/all-about-japanese-inkanhankochopsseals.html at 'The "real" registered seal: {jitsuin}', 'Making and registering your seal at your local municipal office'.

2073 For Kyōto, see Kyōto Shiyaku-sho (fn 2071) at '*Taishō*' [Target] and '*Shinsei-sha*' [Applicant] respectively. For Tōkyō, see the website of the Chūō Kūyaku-sho [Chūō Ward Office], www.city.chuo.lg.jp/kurasi/toroku/zyuminhyo/inkan.html at '*Inkan tōroku*' [Seal Registration].

2074 See Kyōto Shiyaku-sho (fn 2071).

2075 See Kyōto Shiyaku-sho (fn 2071) for Kyōto. For Tōkyō, see Chūō Kūyaku-sho (fn 2073) at '*Hitsuyōna mono*' [important matters]. Jones (fn 2045) adds that it should be the legal surname, ie, the name that appears on identification documents.

2076 For Kyōto, see Kyōto Shiyaku-sho (fn 2071). For Tōkyo's Chūō Ward, see Chūō Kūyaku-sho (fn 2073), specifically at '*Hitsuyōna mono*' [Things Required], where it is also expressly stated that the seal has to be perfectly intact (no chips). Jones (fn 2045) suggests that another reason why seals with a rubber stamp-face are not allowed is because the easy degradability of the material makes comparisons of a seal imprint and the seal itself difficult after a period of time has passed.

2077 Ino'ue (fn 2072) at 'Cost of a real seal and accessories'.

2078 For a larger range of examples, see, eg, www.hankoya.com/shop/p_jituin.html.

The second and equally important seal-type is the *ginkō-in* (銀行印, literally 'bank seal', also known as *todokede-in*, 届出印, literally 'application-seal'[2079]). It is a seal that is used for bank transactions inside the bank,[2080] and the seal-imprint of which — similar to the *jitsu'in* — is registered at the bank and thus connected to the seal-owner's bank account.[2081] *Ginkō-in* are likewise made specifically for the owner.[2082]

The third category consists of the *mitome'in* (認印, also known as a *sanmon-ban*, 三文判, a 'common' or 'off-the-shelf' seal)[2083], a simple and casual seal that is used for everyday matters such as accepting deliveries or private correspondence, and can accordingly be bought ready-made in shops.[2084] As its impression will also show the owner's (sur-) name, 'common seals' can theoretically be used in contracting; in practice it will be a question of whether this possibility exists, ie, where use of the registered seal is not prescribed by law and where the parties agree to use this seal.[2085]

2079 The term *todokede-in* is given by Pardieck (fn 2092) 185. Kanji taken from Hadamitzky and others (fn 11) 986 at 3r5.1 column no 5.

2080 This can be anything from changing personal details to actually using the account, see the examples given by Pardieck (fn 2045) 185–186. For transactions made at ATMs, the bank card and a pin are required instead, which seems to lead to the *ginkō-in* being used less, see Ishii K (fn 1699) 12.

2081 Compare Westhoff (fn 2067) 190 para 8.

2082 See Ino'ue (fn 2072) at 'Cost of a real seal and accessories'.

2083 Pardieck (fn 2079) 184. Kanji and the definition of the term *sanmon-ban* are taken from Hadamitzky and others (fn 11) 19 at 0a3.1 column no 4.

2084 Westhoff (fn 2067) 190 para 8.

2085 See Pardieck (fn 2045) 185. One perhaps surprising example is the registration of marriage, made to the family register (*koseki*, 戸籍): As no specification is made as to which seal is required, even a *mitome'in* can be used. See, eg, the website of the city of Kyōto at www.city.kyoto.lg.jp/bunshi/page/0000145223.html.

iv. Contracts and *Kōshō-nin* (公証人, Japanese Notaries)

A Japanese notary (*kōshō-nin*, 公証人) is a public officer[2086] that may be involved in contracting in several ways:[2087] the issuing of a contract document (see Section aa) below); the certification of private documents (Section bb)); and the creation of execution deeds (*shikkō shōsho*, 執行証書). The latter will not be discussed further; rather, the focus will be on the other two functions instead. Suffice it to note that such execution deeds allow the obligee to enforce repayment of a debt for a particular amount of money or other fungibles against the obligor (art 22 para 5 *Minji shikkō-hō*, Japanese Civil Execution Act[2088]).[2089]

aa) Drafting of Contract Documents by Japanese Notaries (Notarial Authentication)

A *kōshō-nin* may be involved in the creation of the contract, ie, by drawing up and issuing the contractual document (*kōsei shōsho no sakusei*, 公正証書の作誠, in German: *Beurkundung*, authentication).[2090] The document

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2086 Andreas Kaiser and Sebastian Pawlita, *Das Notariat in Japan* [The Notary's Office in Japan] (2005) 20 ZJapanR / JJapanL 163, 167–168. While this is true, the notary does not receive a salary from the State but is paid by the parties, see ibid 168. For this reason, the Japanese do not view a notary as a neutral party, personal interview with Mika Yokoyama, Professor, Faculty of Law, University of Kyōto (Kyōto, 7 September 2016). Cf Kaiser and Pawlita, ibid 173, who state that 'a notary must take a neutral stance' ('[...] *der Notar eine unparteiische Position einnehmen muß*.').

2087 The involvement of a notary, in particular with regard to the content of the contract being screened in the process, is sometimes seen as a control mechanism, see Taniguchi and Ono (fn 1846) 402.

2088 Law No 4/1979 as amended; English translation available online at www.japaneselawtranslation.go.jp/law/detail/?id=70&vm=04&re=02&new=1.

2089 For this, the obligee must obtain and attach a certificate of execution (*shikkō-bun*, 執行文) to the contract and serve this to the obligor (arts 25, 29 *Minji shikkō-hō*). This certificate is obtained from the *kōshō-nin* who retains the original execution deed (art 26 para 1 ibid). A court judgement is therefore not necessary for the enforcement of the debt. Compare on this Pardieck (fn 2092) 189. A similar method existed in the Tokugawa era, although the notary's function was then fulfilled by the headman of a village as recorder, and witnesses, see Henderson and Torbert (fn 1662) 10.

2090 The Japanese and German terms were taken from Kaiser and Pawlita (fn 2086) 177. See also art 1 para 1 *Kōshō-nin-hō*.

will be considered to be a notarial deed (*kōsei shōsho*, 公正証書), and as such will have the character of a public document (*kō-bunsho* 公文書).[2091] Public documents have the advantage of being presumed to be authentic (art 228 para 2 *Minso*) and thus possess 'greater evidentiary weight' in comparison with normal contractual documents.[2092]

As Japanese law foresees only few cases of compulsory form,[2093] most contracts executed as a notarial deed will be voluntary.[2094] A relevant exception is the requirement for lease contracts of land for a term of 50 years or more without a right to renewal and not for temporary use to be made in a notarial deed (arts 22, 23 paras 1, 3 (commercial property, term of over 30 but less than 50 years), and art 25 Act on Land and Building Leases, 借地借家法, *Shakuchi shakuya-hō*[2095]).[2096] Irrespective of this provision, leases often seem to be concluded in notarial form in practice.[2097] Similarly, in cases where a gift is made of real estate, the gift contract is sometimes authenticated by a *kōshō-nin*.[2098] This method may be chosen in order to make the gift irrevocable, as formless gifts are generally revocable until executed (compare arts 549–550 *Minpō*, discussed in Section ii. above). The reverse conclusion from these provisions is that a gift will only become binding once either performed or put into writing.

Where the *kōshō-nin* is not yet acquainted with the person requesting the drawing up of the document, that person must prove their identity, prefer-

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2091 Kitagawa, '*Contracts*' (fn 1601) § 2.01[3][h][iv] and [iii]. Note that he uses the term 'notarized document' to refer to notarial deeds. The Japanese terms stem from the Dictionary of Standard Japanese Legal Terms (fn 9) 94 and 126 respectively. See also Nihon Kōshō-nin Rengō-kai [Japanese Association of Notaries], *How to make good use of Japanese Notaries* (Guide, 2015; hereinafter 'Japanese Notaries Guide') 4. The Guide is available online at www.koshonin.gr.jp/index2.html.

2092 See Pardieck (fn 2045) 188. cf the stipulation contained in art 228 para 4 *Minso*, according to which private documents are also presumed to be authentic if signed or sealed by the 'principal or an agent'.

2093 Kaiser and Pawlita (fn 2086) 178. In relation to transactions involving land, the fact that a notarial deed is not required under Japanese land law is a deviation from its original inspiration, French law, see Marutschke, '*Immobiliarsachenrecht*' (fn 1846) 3–4.

2094 Pardieck (fn 2045) 189.

2095 Law No 90/1991 as amended; English translation available online at www.japaneselawtranslation.go.jp/law/detail/?id=2302&vm=04&re=02&new=1.

2096 For an account of the Japanese law on leases, see Sono and others (fn 1632) 206–216.

2097 Compare Kaiser and Pawlita (fn 2086) 179.

2098 Ibid 178.

ably by presenting a registration certificate (*inkan shōmei*) for that person's official seal (*jitsu'in*).[2099] The drawing up can be requested by a person acting as an agent,[2100] in which case the agent must prove their authority to act (arts 31, 32 *Kōshō-nin-hō*).[2101] According to art 27 *Kōshō-nin-hō*, a notarial deed can only be drafted in Japanese. This does not preclude foreigners who do not understand Japanese, as the *Kōshō-nin-hō* provides for the possibility of an interpreter being present during the drawing up of the document (art 29; the interpreter has to be selected by the person requesting the drawing up, art 34 para 1 ibid).

While the *kōshō-nin* has the obligation to investigate or to examine the circumstances of the notarisation (*chōsa gimu*, 調査義務 or *shinsa gimu*, 審査義務) in case of doubt about the legality or validity of the transaction, there is no obligation on the notary to advise the parties.[2102] In case of doubt on either point, '[t]he notary [...] may not create [the] instrument' (art 26 *Kōshō-nin-hō*).[2103] In accordance with art 36 of that Law, in order to count as a notarial deed, the document must contain a deed number, personal details of the person commissioning the drafting, and, where applicable, their agent or interpreter, how the person's identity has been verified (known to the notary, seal registration certificate, etc), as well as the place and date of creation of the deed. The finished text is either read out to or given to the person(s) present for inspection and must be approved ('承認', *shōnin*) by them (art 39 para 1 *Kōshō-nin-hō*). Finally, the deed is 'sign[ed] and seal[ed]' ('署名捺印スル', *shomei natsu'in suru*) by the attending person(s) and the *kōshō-nin*, whereby the notary must also seal all page intersections if the document is made up of several pages or where it refers to other documents and these are attached (art 39 paras 3 and 5, art 40 paras 1–2 ibid).

2099 See art 28 paras 1, 2 *Kōshō-nin-hō*.

2100 Japanese Notaries Guide (fn 2091) 4.

2101 The document proving the agent's authority will normally be attached to the notarial deed and an impression of the notary's seal of office is placed over the joint between the deed and the annexed document (*kei-in*, 契印, art 41 paras 1, 2 *Kōshō-nin-hō*). It is interesting to note that if there is a defect in the form or even the authority of the agent that is subsequently cured, the defect does not affect the validity of the notarial deed (art 32 para 3 *Kōshō-nin-hō*).

2102 See Kaiser and Pawlita (fn 2086) 174–175.

2103 The original provision reads: '公証人ハ[...]証書ヲ作成スルコトヲ得ス' (*kōshō-nin ha* [...] *shōsho wo sakusei suru koto wo uzu*).

bb) Notarial Certification of Private Documents

Apart from authenticating documents, a *kōshō-nin* also certifies private documents (*ninshō no fuyo*, 認証の付与), the act of which may relate to the concordance of a copy and the original document (art 58 para 2 *Kōshō-nin-hō*),[2104] or the concordance between signature (or seal impression) and signatory (or seal owner).[2105] In case of the latter, the signatory (or the agent,[2106] see arts 60, 31 ibid) can either sign or seal the document in the presence of the notary (art 58 para 1 ibid), or swear an oath to the effect that the signature or seal impression is their own (art 58-2 para 1 ibid). Similar to public documents, such certified documents will be presumed to be authentically created (executed).[2107] The certification of private documents is often necessary where the documents are to be used abroad.[2108]

The certification of a contractual document has to be requested by all contracting parties, and their presence as well as the presentation of their official seals, together with its registration certificate are required.[2109] Foreign documents (*gaikoku-bun*, 外国文), which are private documents in a language other than Japanese, can be authenticated in the same way.[2110] Similar to a notarial deed, the *Kōshō-nin-hō* foresees in art 59 that specific details be contained in the certification, namely: the registry number of the certified deed, and the place and date of certification. Furthermore, it is required that a witness and the *kōshō-nin* must sign and seal the document, whereby the latter must also seal the entry in the registry for

2104 Kaiser and Pawlita (fn 2086) 177.

2105 Japanese Notaries Guide (fn 2091) 6; Nihon Kōshō-nin Rengō-kai [Japanese Association of Notaries], *Shisho shōsho no ninshō* [Authentication of Privately-signed Documents], www.koshonin.gr.jp/sini.html (hereinafter '*Shisho ninshō*'), first question under '*Ninshō no igi*' [The Meaning of Authentication]. The purpose of the authentication in this instance is to prove that the signatory is the creator of the document, Japanese Notaries Guide (fn 2091) 7.

2106 This seems to be popular practice, see Kaiser and Pawlita (fn 2086) 177.

2107 *Shisho ninshō* (fn 2105), second question under '*Ninshō no igi*' [The Meaning of Authentication]; Japanese Notaries Guide (fn 2091) 6.

2108 Japanese Notaries Guide (fn 2091) 7.

2109 Pardieck (fn 2092) 189. See also Japanese Notaries Guide (fn 2091) 7–8.

2110 Nihon Kōshō-nin Rengō-kai [Japanese Association of Notaries], *Gaikoku-bun ninshō* [Authentication of Foreign Documents], www.koshonin.gr.jp/sini.html#11, under '*igi*' [Meaning].

the certified document in a way that the seal impression is on both the register and the document.[2111]

c. Other Requirements under Japanese law

Japanese law sometimes foresees requirements other than a particular form that have no bearing on the contract's legal effectiveness but nevertheless bring about consequences of practical relevance if not observed. The nature of these is often administrative, with the objective being to monitor transactions that may be undesirable from a policy perspective.[2112] Three examples will be discussed subsequently.

i. Registration of Property

The registration of the transfer of property in the Japanese real property register is relevant when concluding a sale of real estate. Depending on whether the immovable property is land, a building, or timber, this will occur in different registers, as these are kept separate: 土地登記簿, *tochi tōki-bo*, land register; 建物登記簿, *tatemono toki-bo*, building register;立木登記簿, *ryūboku toki-bo*, standing timber register. Nevertheless, the Registration Office (登記所, *tōki-sho*)[2113] and the procedure (set out in arts 16 et seq *Fudō-san tōki-hō* and arts 3 et seq *Ryūboku tōki kisoku*[2114]) remain the same.[2115] While the registration of a change in property is not constitutive for the sale of land or building in order for it to be legally effective between the parties,[2116] it is required in order to make the transfer enforce-

2111 The registry and what must be entered into it is regulated in arts 61–62 *Kōshō-nin-hō*.

2112 Any other, more specific policies, as in relation to ethical, moral, or criminal considerations are not discussed. Interested readers are referred to, eg, Yamamoto K, '*Vertragsrecht*' (fn 1612) 486–490.

2113 These offices are run by the (District) Legal Affairs Bureau ((*chihō*) *hōmu-kyoku*, (地方)法務局; see art 6 para 1 *Fudō-san tōki-hō*) and are under the control of the *Hōmu-sho*, see Kaiser (fn 1976) 698 para 35 in fn 38.

2114 Regulation for the Registration of Timber, 立木登記規則, Order (Hōmu-sho) No 206/2005 (Heisei 17) as amended.

2115 For further details on the registration process, see Kaiser (fn 1976) 698–699 paras 37–39.

2116 Ibid 699 para 40. See also art 1 *Fudō-san tōki-hō*, which provides: 'この法律は、不動産の表示及び不動産に関する権利を公示するための登記に関する

able against third parties (art 177 *Minpō*).[2117] It could therefore be argued that the registration does not affect the contract or its validity; however, it protects the purchaser's property right and is therefore of practical relevance. In a similar manner, art 1 para 1 *Ryūboku ni kansuru hōritsu* provides that the registration of the ownership of timber will protect that right. Accordingly, particular types of timber have to be registered and linked to the land on which they stand by indication of the name or number of the part of land on which the timber is located (arts 1 para 2, para 1 *Ryūboku ni kansuru hōritsu*).[2118]

ii. *Inshi-zei*(印紙税, Stamp Tax)

One Japanese formality that has no bearing on the effectiveness of the formation of a contract but is nevertheless of practical relevance is stamp tax (*inshi-zei*, 印紙税). This is similar to the English stamp duty land tax, discussed in Section B.II.3.c.ii. above. As its name suggests, stamp tax is paid by purchasing a tax or revenue stamp (*shū'nyū inshi*, 収入印紙), a stamp-like piece of adhesive paper, of appropriate value from, eg, the local post office,[2119] affixing it to the document, and validating it through the seal impression of the document's author, who is the person liable to pay

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制度について定めることにより、国民の権利の保全を図り、もって取引の安全と円滑に資することを目的とする' (*Kono hōritsu ha, fudō-san no hyōji oyobi fudō-san ni kansuru kenri wo kōjisuru tame no tōki ni kansuru seido ni tsuite sadameru koto ni yori, kokumin no kenri no hozen wo hakari, motte torihiki no anzen to enkatsu ni shisuru koto wo mokuteki to suru*. 'The purpose of this Act is to secure the rights of citizens by providing for a system concerning registrations to notify the public of descriptions of real property and rights relating to real property, thereby contributing to the safe and smooth conduct of transactions.'). Translation by this author.

2117 It ought to be noted that the effect of the register is not absolute. Rather, an entry in the register will trigger a presumption that it is correct; however, this presumption can be rebutted by proof to the contrary. See on this Kaiser (fn 1976) 699–700 para 43. On the effect of the register, see Hibiku Shimizu, *§ 177 I* [Article 177 I], in: Funahashi and Tokumoto (fn 1831) 264, 351–352. cf English law, where the registration of title does not affect the contract, but its legal effect, namely, the transfer or property, see Section B.II.3.c.i. above. cf, again, German law, under which the (non-) registration of the transfer affects the *Verfügungsgeschäft* (conveyance), see Section B.III.3.c.i. above.

2118 On the types of timber which have to be registered, see Imperial Edict (*Chokurei*, 勅令) No 12/1932 (Shōwa 7).

2119 Pardieck (fn 2092) 187.

the tax (arts 8, 2 para 1 *Inshi-zei-hō*, 印紙税法, Stamp Tax Act[2120]).[2121] This payment method of fees is used not only in relation to contracts, but for other acts in public offices, such as applications in relation to a visa, or in relation to registrations.[2122] Where a *kōshō-nin* is involved in contracting, the notary is obliged to ensure that the stamp tax is paid by affixing sufficient stamps on the document (art 43 *Kōshō-nin-hō*).

Stamp tax is levied depending on two factors, namely, the contract type and its value; and is payable for each document that is drawn up ('作成した課税文書につき', *sakuseishita kazei bunsho ni tsuki*, art 3 para 1 *Inshi-zei-hō*), ie, each (original) copy of the contract document ('一通につき' '*ittsū ni tsuki*', table in annex 1 *Inshi-zei-hō*), is taxed. It is sometimes difficult to classify a contract type using the given criteria and, vice versa, there are contractual situations which may fall within or outside of the Act's scope depending on the terms of the contract. By way of example, a contract for work, ie, a contract under which the payment is related to the work's completion, is taxable, while a service agreement, according to which the work's completion and payment are not related, is not.[2123] The amount of payable tax can be illustrated by a simple example. In the case of a sale of real estate, the amount of stamp tax due for two original contract documents and a sale price of ¥20 million (approx. €165,000) would be two times ¥20,000 (approx. €165), thus totalling ¥40,000 (approx. €300).[2124] This tax being an expense related to the contract,[2125] both parties will automatically bear an equal share of the tax (art 558 *Minpō*) if no other stipulation has been made.[2126]

Not only the contractual document itself, but other documents relating to contracts, such as order acknowledgement receipts or contract modifica-

2120 Law No 23/1967 as amended.

2121 Also see Koku-Zeichō, *Inshi-zei no tebiki* [A Guide to Stamp Tax] (September 2015) 12, available online at www.nta.go.jp/shiraberu/ippanjoho/pamph/inshi/tebiki/01.htm (hereinafter '*Inshi-zei* Guide').

2122 For the latter, see Hōmu-shō Minji-kyoku, *Tōki inshi no tori'atsukai ni tsuite* [Regarding the Handling of Registration Stamps] (1 April 2011), available at www.moj.go.jp/content/000072037.pdf.

2123 Naka, Legal Practice Lecture 2017 (fn 2047).

2124 See the fourth column of category 1 of the table in annex 1 to the *Inshi-zei-hō*.

2125 Yamamoto K, '*Minpō kōgi IV-1*' (fn 1646) 235, who calls it '印紙代' (*inshi-dai*, stamp fee).

2126 Compare Kaiser (fn 1976) 708 para 81. Note further that the parties are jointly and severally liable for the stamp tax, Naka, Legal Practice Lecture 2017 (fn 2047).

tion agreements fall within the scope of the *Inshi-zei-hō*.[2127] If the contract is drafted outside Japan, no tax will be levied, even if the place of contractual performance is in Japan.[2128] In this sense, if the document is prepared and signed by one party and afterwards by the other party outside Japan, the document is not taxable.[2129] Tax is also not levied in cases where the contract is made in the form of an electronic document.[2130]

While a contract on which stamp tax has not been paid will still be legally valid, there are other legal consequences in the form of penalties.[2131] These are of two kinds: a monetary fine (*bakkin*, 罰金) or a penal servitude with hard labour (*chōeki*, 懲役), whereby the amount of the fine or the length of imprisonment depends on the severity of the contravening act, including whether the act was committed fraudulently. In all cases, the highest penalty is a fine of ¥1 million (approx. €8,000) or three years of imprisonment (art 21 *Inshi-zei-hō*).

2127 For details on the different document categories and the applicable stamp tax, see the table in annex 1 to the *Inshi-zei-hō*. For modification agreements, see also *Inshi-zei* Guide (fn 2121) 5.

2128 Kitagawa, '*Contracts*' (fn 1601) § 2.01[3][h][vi] at 2-38.

2129 Naka, Legal Practice Lecture 2017 (fn 2047). This is different in England, see Section B.II.3.c.ii. above.

2130 In its Q&A section, the Japanese National Tax Agency (*Kokuzei-chō*, 国税庁) has stated that at least an order acknowledgement (*chūmon ukesho*, 注文請書) that is not delivered in paper form but through electronic means, such as e-mail or fax, is exempt from stamp tax, see www.nta.go.jp/fukuoka/shiraberu/bunshokaito/inshi_sonota/081024/02.htm#a01. As this document would normally fall within the wide meaning of 'contract' under the *Inshi-zei-hō*, it is submitted that an actual contractual document that is only contained in electronic form would be equally exempt. In contrast, it is unclear whether a contract that was concluded electronically and subsequently printed and signed by both parties is taxable, interview with Mr Ryōsuke Naka, Attorney at law, Associate, Kitahama Hōritsu Jimu-sho (Kitahama Partners) (Düsseldorf, 17 November 2017).

2131 See Pardieck (fn 2092) 188. The penalties are regulated in arts 21 et seq *Inshi-zei-hō*.

iii. *Tetsuke*(手付, Earnest Money)

Article 557 para 1 *Minpō*[2132] contains a stipulation that seems to echo the Roman *arr(h)a* (earnest),[2133] in that it provides that where a purchaser has effected *tetsuke* (literally 'hand-touch' money,[2134] earnest money, 手付) to the seller, this can be used by either party to cancel (rescind) the contract:

> When the buyer delivers earnest money to the seller, the buyer may cancel the contract by forfeiting his/her earnest money or the seller may cancel the contract by reimbursing twice its amount, until either party commences performance of the contract.[2135]

This earnest money for the cancellation of a contract (*kaiyaku tetsuke*, 解約手付, 'cancellation tetsuke') is only one — albeit perhaps the predominant[2136] — form of Japanese earnest money.[2137] Before turning to the other

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2132 In fact, an almost identical provision is contained in art 39 para 2 *Takuchi-gyō-hō*. As its content does not differ significantly from art 557 para 1 *Minpō*, the provision will not be discussed further.

2133 For further details on the Roman *arra*, see George Long, *Arra*, in: William Smith, *A Dictionary of Greek and Roman Antiquities* (John Murray, London 1873) 137. On the Roman denomination, see also fn 983 above.

2134 Wigmore, '*Customary Law*' (fn 1675) 14 explains in fn 7 that this term originates in the former practice of the contracting parties touching their hands at the beginning of a transaction.

2135 The original provision reads: '買主が売主に手付を交付したときは、当事者の一方が契約の履行に着手するまでは、買主はその手付を放棄し、売主はその倍額を償還して、契約の解除をすることができる' (*Kainushi ga urinushi ni tetsuke wo kōfushita toki ha, tōji-sha no ippō ga keiyaku no kōi ni chakushusuru made ha, kainushi ha sono tetsuke wo hōkishi, urinushi ha sono baigaku wo shōkanshite, keiyaku no kaijō wo suru koto ga dekiru*). Note that the wording of this provision will change once the reformed *Minpō* will come into force. This will be discussed in Section V. below.

2136 See Kitagawa, '*Contracts*' (fn 1601) § 2.01[3][j] at 2-43, who states it having 'a practical and far more important effect' than *shōyaku tetsuke* (on which see Section cc) below). For a historical example of this from the former province of Suruga (in today's Shizuoka prefecture), see Wigmore, '*Customary Law*' (fn 1675) 18. This practice also existed in, eg, the former province of Shinano (today's Nagano), see Wigmore, ibid 22–23.

2137 See Naoko Kano, *Dai-3-hen dai-2-chō dai-3-setsu dai-1-kan sōsoku* [Part 3 Chapter 2 Section 3 Subsection 1 General Provisions], in: Matsuoka and Nakata (fn 1602) 806, on *dai-557-jō* [article 557] at 810. See also the summary table provided by Yamamoto K, '*Minpō kōgi IV-1*' (fn 1646) 220. English translation of the term by this author.

two types (in Section cc) below), a note needs to be made on the meaning of *tetsuke* (Section aa)) and the way of effecting it (Section bb)).

Despite the resemblance with the Roman *arr(h)a*, the origin of article 557 *Minpō* can be argued to be commercial customs existing in the Tokugawa era known as '*tetsuke nagashi baimodoshi*' ('手付 流し 倍戻し') and '*tetsuke son baigaeshi*' ('手付 損 倍返し').[2138] The terms are still used today to explain the two application methods of art 557 *Minpō*.[2139] Perhaps due to the resemblance with the Roman *arrha*, it has been argued that the existence of the provision on *tetsuke* means that contracts under the *Minpō* are not consensual, but real, because the mere agreement of the parties is not sufficient; rather, that contracts are not fully effective until performance has been commenced, since the contract may still be cancelled by using *tetsuke*.[2140] This argument is not convincing. While it is true that *tetsuke* has the effect of reducing legal certainty about the contract's effect until performance is begun, this fact does not turn consensual into real contracts. The effect and function of *tetsuke* are too different from elements of a real contract, as will become evident from the subsequent discussion.[2141] Most importantly, transactions in which *tetsuke* is paid do not constitute an exchange of the subject matter in question and *tetsuke*. Unlike a deposit, which only comes into existence when the thing in question is handed over (see art 657 *Minpō*), the coming into existence of the contract in relation to which *tetsuke* is paid, like a sale, does not depend on *tetsuke*. Indeed, the phrasing of art 557 para 1 *Minpō* — '*When* the buyer delivery earnest money…' (emphasis added) — clearly indicates that *tetsuke* is not a mandatory part of sale or other onerous contracts. While it would be true to say that the *tetsuke*-contract (see Section aa) below) arising from the payment of *tetsuke* is a real contract, the base-contract is not.

2138 These customs were discussed in Section III.1.c.iv. above. Compare Yoshida (fn 1651) 4, who states that the notion of *tetsuke* was associated with these customs. See also Ronald Frank, *Law of Obligations*, in: Röhl (fn 1584) 227, 249. cf Kitagawa, '*Contracts*' (fn 1601) § 2.01[3][j] at 2-42, who states that *tetsuke* originated from the Roman *arra* (earnest) but goes on to say at 2-43 that art 557 *Minpō* 'reflects [an] old Japanese trade practice' from before the existence of the *Minpō*.

2139 For the former, see, eg, Yūgen Kaisha Atago Sangyō at www.025-377-6150.com/1fudousantorihiki/23. For the latter see, eg, the entry for '手付損倍返し' in the Japanese online dictionary Kotobanku at https://kotobank.jp/.

2140 Marutschke, '*Immobiliarsachenrecht*' (fn 1846) 3. cf Yokoyama, '*Purosesu*' (fn 1846) 91, who states that this perception is at least the practical reality.

2141 Real contracts have been discussed in Section b. above.

The importance of *tetsuke* today, compared to that in history, has diminished.[2142] While being 'commonplace' before,[2143] it is now only used in particular transactions. Thus, although art 559 *Minpō* allows the application of art 557 to all 'contracts for value other than contracts for sale' ('売買以外の有償契約', *baibai igai no yūshō keiyaku*), in practice, it is most commonly paid in relation to sale transactions involving real estate (land, buildings),[2144] but is also used with leases, employment, and work contracts. [2145] At least in former times, *tetsuke* was also paid in 'sale by sample' transactions.[2146] The reason for adhering to the practice of paying *tetsuke*, at least in transactions involving immovable property, is to strengthen the bindingness of the contract: According to the majority view in Japanese legal academia, the notion of a formless agreement being binding is weak; however, where *tetsuke* is paid, the party's (buyer's) declaration of intention is deemed to be a lot stronger.[2147] Conversely, where no *tetsuke* is paid, the buyer's agreement is not seen as 'final' ('終局的', *shūkyokuteki*),

2142 See Yoshida (fn 1651) 13.

2143 Frank, '*Obligations*' (fn 2138) 249.

2144 Kitagawa, '*Contracts*' (fn 1601) § 2.01[3][j] at 2-43; Marutschke, '*Einführung*' (fn 1603) 153–154. For an example from Japanese customary law, particularly from the former province of Settsu (today's Ōsaka), see Wigmore, '*Customary Law*' (fn 1675) 14 and 32.

2145 Yunoki and Takagi (fn 1718) 171; Tōkō Aihara, *Tetsuke to uchikin* [Tetsuke and Deposits], in: Keiyaku-hō Taikei Kankō I'in-kai (fn 2021) Vol 2: *zōyō, baibai* [Gifts, Sales] 58.

2146 See Wigmore, '*Customary Law*' (fn 1675) 30–31.

2147 See Mika Yokoyama, *Tetsuke no seiritsu: shōgaku no kinsen no juju* [The Coming into Existence of Earnest Money: The Giving and Receiving of Small Sums of Money] (2008) 192 Juristo bessatsu: Fudō-san torihiki hanrei hyakusen 42, 43; Yoshida (fn 1651) 12. This is particularly true where the building in question is new. In contrast, with old buildings, *tetsuke* is often used as a kind of insurance against defects in the building, interview with Mrs Mika Yokoyama, Professor, Faculty of Law, University of Kyōto (Kyōto, 7 September 2016). A declaration of intention is thought to have most strength if contained in a written document and is supported by *tetsuke*, interview with Prof. Yokoyama (ibid).

negating the formation of a contract.[2148] Its role is also seen as ensuring performance.[2149]

aa) *'Tetsuke'* Defined

There is no statutory definition of the meaning of *tetsuke*. It is commonly understood, however, that *tetsuke* can be either money or 'other valuables' ('他の有価物', *hoka no yūka-butsu*).[2150] The Japanese courts have generally ruled that a 'valuable other than money' ('金銭以外の有価物', *kinsen igai no yūka-butsu*) can be delivered instead of money where the parties have agreed on this.[2151] It can be deduced from this that money will normally be given, unless the parties agree otherwise. One example of such an 'other valuable' is standing timber (*ryūboku*, 立木), which has been found to be sufficient by the courts.[2152]

One important point to note is that where *tetsuke* is handed over in a transaction, what is known as a *tetsuke*-contract (*tetsuke keiyaku*, 手付契約) is concluded.[2153] This is a distinct, subordinated agreement from the contract concerning the transaction itself, eg, in a sale, the sales contract.[2154] As a consequence, two contracts arise: a main contract and the *tetsuke*-con-

2148 See Yokoyama, '*Purosesu*' (fn 1846) 92. In this sense, *tetsuke* is similar to consideration; however, a vital difference between them is that the latter is legally constitutive for a contract to be concluded, whereas the former is not. On consideration, see Section B.II.3.a.v. above. cf current German legal practice as discussed in Section B.III.3.c.ii. above, where *Draufgabe* plays no role nowadays.

2149 Aihara (fn 2145) 63. Although he also admits that the contract's bindingness is strengthened by *tetsuke*, he ascribes this property to *iyaku* but not to *kaiyaku tetsuke* (both discussed in Section cc) below), which he says weakens the binding force, see ibid. This may be true, since the former protects the party innocent of breaching it and thus endorses the contract, while the latter supports the contract's resolution.

2150 See Yunoki and Takagi (fn 1718) 171.

2151 See the decision of the *Dai-shin'i* of 8 May 1901 (Meiji 34), Minroku 7 Vol 5 52. The case concerned the sale of a mountain forest (*sanrin*, 山林). See on this further Aihara (fn 2145) 61 fn 3.

2152 See *Dai-shin'i* of 8 May 1901 (fn 2151).

2153 On this, see Yamamoto K, '*Minpō kōgi IV-1*' (fn 1646) 220–221. See also Sei'ichi Yamada, *Tetsuke keiyaku no kaishaku* [Interpretation of the *Tetsuke*-Contract] (2008) 192 Juristo bessatsu: Fudō-san torihiki hanrei hyakusen 38–39. See also Aihara (fn 2145) 38.

2154 See Aihara (fn 2145) 60–61 in fn 1.

tract; however, the effect of *tetsuke* concerns only the *tetsuke*-contract and has no bearing on the other — main — contract. For this reason, *tetsuke* is not a formation requirement for Japanese contracts.[2155] Having said this, *tetsuke* is not irrelevant to the main contract, since, where a *tetsuke*-contract arises, this is evidence of a main transaction, in relation to which *tetsuke* is paid, thus proving the existence of that (main) contract. Then again, where the parties agree, *tetsuke* can become a formation requirement for the contact that is to be concluded.[2156]

bb) Method of Effecting *Tetsuke*

The way to effect *tetsuke* concerns two issues: the method and the timing. With respect to the former, *tetsuke* is usually effected by being 'delivered' (交付した, *kōfushita*, see art 557 para 1 *Minpō*). Nevertheless, *tetsuke* does not always have to be actually delivered. Thus, one alternative is that the value is set off with the seller's claim.[2157] As for the appropriate moment of time, this will usually be the moment of concluding the contract;[2158]

2155 To be precise, *tetsuke* is no formation requirement for the main contract. Whether it and its delivery are required for the formation of the *tetsuke*-contract is an on-going debate, see fn 2153. The reason for it not being a constitutive requirement as pointed out in Yunoki and Takagi (fn 1718) 171 is that there is '[...] practically no place for a "contract conclusion *tetsuke*" as a contract formation requirement in a contemporary legal regime under which most contracts have been concensualised [...]' ('[...]契約成立要件としてのいわゆる「成約手付」なるものは、ほとんどの契約が諾成契約化した現代法のもとでは、ほとんど存在の余地がない[...]'; *keiyaku seiritsu yōken to shite no iwayuru 'seiyaku tetsuke' naru mono ha, hotondo no keiyaku ga dakusei keiyaku-kashita gendai-hō no moto de ha, hotondo sonzai no yochi ga nai*).

2156 See Yunoki and Takagi (fn 1718) 171; Aihara (fn 2145) 60. During the Tokugawa era, what was known as *seiyaku tetsuke* ('成約手付', *tetsuke* for concluding a contract) existed beside the other forms explored in Section cc) below. Without this *tetsuke*, a contract was not considered to be formed. See Yoshida (fn 1651) 640. It seems that this type no longer exists today.

2157 Aihara (fn 2145) 61 in fn 2: '手付の交付は、現実に行われるのが普通だが、売主の債権との相殺によって現実の交付にかえることも妨げない' (*tetsuke no kōfu ha, genjitsu ni okonawareru no ga futsū da ga, urinushi no saiken to no sōsai ni yotte genjitsu no kōfu ni kaeru koto mo samatagenai*; '*Tetsuke* will normally be handed over in practice; however, this does not impede a change to actual delivery by off-setting with the seller's claim').

2158 *Dai-shin'i* decision of 14 January 1933 (Shōwa 8), Dai-shin'i Saiban-rei Vol 7 min 4.

although it has also been noted that any time between formation of the agreement and commencement of performance is possible.[2159]

The question is therefore — also with respect to the possibility of cancelling the contract under art 557 para 1 *Minpō* — what the words 'commence[ing] performance' ('履行に着手する', *rikō ni chakushu suru*) mean. They have been interpreted to signify that while actual performance is not necessary, it is sufficient if the party having paid *tetsuke* is in a position to perform at any moment. Accordingly, it is sufficient if a buyer of real estate can demand its transfer from the seller due to being in the position of being able to pay the purchase price at any time.[2160] Furthermore, it is important to note that the party who has not begun to perform cannot cancel the contract once the other party has done so; conversely, the party that has commenced performance may still cancel the contract.[2161] The provision aims to protect the party who commences performance from incurring expenses only to have the contract cancelled by the other party, thus suffering unexpected damage; however, if it is the party who has initiated performance that cancels the contract, any losses will not be unexpected and so protection is not required.[2162]

2159 See Kitagawa, '*Contracts*' (fn 1601) § 2.01[3][j] at 2-42.

2160 See Aihara (fn 2145) 62. Cf *Saikō Saiban-sho* decision of 4 October 1965 (Shōwa 40), Minshū Vol 19 No 8 2019 (contained in Segawa and Uchida (fn 1992) 50–53), in which the court held that commencing performance occurs when it is objectively possible for an outsider to deem the conduct as one part of performance. It found that simply paying *tetsuke* did not constitute 'commencing performance', but that payment of the price to the third-party owner and effecting the transfer of ownership from this party to the seller was sufficient. For a commentary with a more detailed explanation on the differentiation between 'mere preparation' and actual commencing of performance, see Shu'ichi Miyashita, *Tetsuke to rikō no chakushu* [Tetsuke and Commencement of Performance] (2008) 192 Juristo bessatsu: Fudō-san torihiki hanrei hyakusen 40–41.

2161 See *Saikō Saiban-sho* decision of 4 October 1965 (fn 2160), in which the court held that not only the party who had not yet commenced performance, but also the party which had commenced could cancel, since it was only the performing party that incurred expenses and was willing to bear this loss.

2162 Compare *Saikō Saiban-sho* decision of 4 October 1965 (fn 2160) and fn 2161.

cc) Types and Functions of *Tetsuke*

There are three different types of *Tetsuke*. Beside the 'cancellation *tetsuke*', the other two types of *tetsuke* are 'earnest money for breach of contract' (*iyaku tetsuke*, 違約手付),[2163] and 'earnest money as proof of contract' (*shōyaku tetsuke*, 証約手付).[2164] *Iyaku tetsuke* is similar to *kaiyaku tetsuke* in that the money is forfeited by the giver if they do not perform and, vice versa, the receiver must pay back twice the amount to the giver if they do not perform.[2165] Normally, between ten and twenty per cent of the purchase price are paid as *tetsuke*; however, *shōyaku tetsuke* usually arises when only a small sum of money (less than ten per cent) is handed over.[2166] The latter therefore constitutes the *tetsuke*'s basic function, so that where *tetsuke* has been delivered by a contracting party, it will at least have the effect of evidencing the contractual agreement.[2167] Whether it

2163 Perhaps the purpose of this function of *tetsuke* was to provide the contracting parties with further incentive to perform, a function which is generally suggested for *Pfand* (securities) by Kötz, '*Europäisches Vertragsrecht*' (fn 17) 9 (1996 edn). For examples from Japanese customary law, see Wigmore, '*Customary Law*' (fn 1675) 19 (former province of Suruga, today Yamanashi), 27 (former province of Uzen, today's Yamagata), 32 (former province of Kaga, today's Ishikawa).

2164 See fn 2137. This form is apparently of particular importance for contracts concluded orally, compare fn 2172 below.

2165 See Yunoki and Takagi (fn 1718) 172.

2166 See Yokoyama, '*Tetsuke*' (fn 2147) 43, who is sceptical of a payment of less than ten per cent of the purchase price being sufficient in order to constitute *tetsuke* and to lead to the conclusion of a sale contract according to current business practice. Aihara (fn 2145) 58 also states the usual amount to be around ten per cent. A range of 10%–20% is also stated by Masaaki Muramoto, *Mōshikomi shōko-kin to tetsuke no chigai ha?* [What is the Difference Between Application Earnest Money and Earnest Money?] (1 August 2007), http://allabout.co.jp/gm/gc/10297/.

2167 See Aihara (fn 2145) 58–59. See also Yunoki and Takagi (fn 1718) 171, stating that all kinds of *tetsuke* share this common feature of proving the existence of a contract. This was confirmed in the *Dai-shin'i* decision of 14 January 1933 (fn 2158), in which the court found that 'tetsuke is something that is handed over for various purposes; [the understanding that] of these purposes [...] all serve also to prove the formation of a contract is common' ('手附ハ種々ノ目的ノ為ニ交付セラルルモノニシテ其ノ目的[...] 孰レモ契約ノ成立ヲ証明スル目的ヲ兼有スルヲ通常トスル', *tetsuke ha juju no mokuteki no tame ni kōfuseraruru mono ni shite sono mokuteki* [...] *izuremo keiyaku no seiritsu wo shōmeisuru mokuteki wo ken'yūsuru wo tsūjō to suru*).

also displays the other effects is another question.[2168] This issue depends on several things: First, whether a *tetsuke*-contract has been formed at all, and, secondly, what effects were intended for *tetsuke* by the parties.[2169] Moreover, it has been stated that where the intention of the parties as to the effect (type) of *tetsuke* is unclear, art 557 *Minpō* will apply; which thus seems to make *kaiyaku tetsuke* the default type.[2170] Irrespective of this discussion, there seems to be no conflict between the functions of *shōyaku* and *kaiyaku tetsuke*. While the former is a very basic function that goes to the heart of the matter, namely, to the existence of a contract, the latter is more advanced in that it establishes a right. In a way, the latter thus implies the former, as — speaking in very general terms — the existence of an agreement is a preliminary condition for rights to come into existence in private law. Consequently, the *Minpō* explicitly endorses the stronger function.

Apart from these three functions, *tetsuke* can also be linked to liquidated damages, in that the contracting parties sometimes stipulate that the two-fold of *tetsuke* is to be paid as damages in case of non-performance.[2171] These functions existed already in the Tokugawa era, whereby their application differed: While *kaiyaku tetsuke* seems to have been widely used in commercial contracts, something resembling *iyaku tetsuke* seems to have been used for what we would today term consumer contracts.[2172]

While *tetsuke* is paid prior to the contract being performed and will be considered to have been paid as part of the purchase price after the

2168 See Yamamoto K, '*Minpō kōgi IV-1*' (fn 1646) 220, 221.

2169 In other words, the parties have to agree on the type of *tetsuke*, see Aihara (fn 2145) 59 (for *iyaku tetsuke*). For a discussion of these issues, see Yamamoto K, '*Minpō kōgi IV-1*' (fn 1646) 221–225.

2170 See Yamada (fn 2153) 60, 61–62.

2171 See Kitagawa, '*Contracts*' (fn 1601) § 2.01[3][j] at 2-43. Compare the historical examples given by Wigmore, see fn 2163. Contrast Aihara (fn 2145) 59, who states that *iyaku tetsuke* and damages are often linked in practice, although the two are not in fact the same. See also Yunoki and Takagi (fn 1718) 172, who explain the difference in the two applications.

2172 See Yoshida (fn 1651) 5–6, who uses the German terms '*Reugeld*' and '*Anzahlungsdraufgabe und Vertragsstrafe*' respectively; the Japanese terms being '*kaiyaku tetsuke*' (解約手付) and '*uchikin tetsuke, iyaku tetsuke*' (内金手付, 違約手付) respectively, see ibid 642. He defines *uchikin tetsuke* as *tetsuke* that is paid in order to bind the other party to the (oral) agreement, see ibid 4, 3, and 640.

commencement of performance,[2173] it ought not to be confused with other payments made prior to or at contracting, particularly a down payment (*uchikin*, 内金).[2174] As the latter is paid in order to settle part of the purchase price, it is not the same as *tetsuke*, particularly not *kaiyaku tetsuke*.[2175] Confusion may also arise with what is known as 'application earnest money' ('申込証拠金', *mōshikomi shōko-kin*, literal translation), a sum of money ranging between ¥5,000 and ¥10,000 (approx. €40–€80) that is paid by the prospective buyer of real estate to show that their interest is serious, or, more often, to gain a preferential purchase right.[2176]

2. Legal Thinking and Current Legal Practice in Japan

Having seen the legal framework for the conclusion of contracts, attention is now given to the social components, namely, Japanese legal thinking and current legal and business practice in contracting. It ought to be noted at the outset that the framework of this dissertation does not allow for an in-depth analysis of this fascinating subject. In light of this, three selected aspects will be highlighted in relation to the conclusion of contracts. These are the relationship between the Japanese and law in general (see Section a. below), their stance to contracts (Section b.), and, finally, the (popular) estimation of contract formalities (Section c.). While the first aspect will give an insight into the general appreciation of law and its bindingness in Japan, the latter two directly relate to contracts.

a. Japanese Legal Thinking Generally

It was mentioned in passing in Section III.2.b. above that the term 'right' — as in a person's subjective right that may be asserted against others — had to be created in the Japanese language during the reception of 'Western' law during the Meiji era. The reason for this necessity was the simple fact that the notion of a citizen having subjective rights against oth-

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2173 See Kitagawa, '*Contracts*' (fn 1601) § 2.01[3][j] at 2-42–2-43. For an example from Japanese customary law, see Wigmore, '*Customary Law*' (fn 1675) 30 (former province of Kaga, today's Ishikawa).

2174 Yamamoto K, '*Minpō kōgi IV-1*' (fn 1646) 220.

2175 See Yokoyama, '*Tetsuke*' (fn 2147) 43. A down payment will usually be made in an amount equivalent to one third or half of the purchase price, see ibid.

2176 See ibid 43.

er citizens was traditionally remote to the Japanese legal landscape, since the legal system had traditionally been based on public law, while private matters were customarily resolved on a non-litigatory basis, like through mediation.[2177] Instead, the cooperation between citizens was governed by their relationships and social notions like *jōri*, *giri*, and *wa*, but not by abstract legal rules.[2178] Nevertheless, this was a historical characteristic and is no longer true today.

One approach that has been adopted to analyse the attitude of the Japanese towards law in general and towards contracts in particular is to contrast this view with a 'Western' perception. The resulting differences appear greater when the perspective is that of a common law jurisdiction, like the USA.[2179] While the particulars of the US-American legal system, including perhaps the country's legal thinking, are certainly different from the English legal system, shared features exist on a general level due to both belonging to the common law legal family. At least for the purpose of the present discussion, namely, to highlight some differences between Japan and 'the West' (Europe), it suffices to treat the approaches in the US as being similar to those in the UK.

One contrasting feature between Japan and the Anglo-American approach is legal language. As the Japanese language is generally more imprecise than, say, English, phrasings in Japanese legislation leave more room

2177 See Yamamoto K, '*Rechtsverständnis*' (fn 1583) 92, who states this description as going back to the academic Takeyoshi Kawashima. On the nature of Medieval Japanese law and the settlement of disputes, see Haley, '*Medieval Japan*' (fn 879), in particular 324–325, 342–347.

2178 For further details on this, see Guntram Rahn, *Recht und Rechtsmentalität in Japan* [Law and Legal Mentality in Japan] (Gebrüder Tönnes 1981) 22–24. See also Yamamoto K, '*Rechtsverständnis*' (fn 1583) 92–93; Haley, '*Medieval Japan*' (fn 879) 347.

2179 This consideration was made by Whitmore Gray in a study conducted in Japan in the early 1980s, the results of which were published in 1984. It should therefore be borne in mind that the data has somewhat aged since then. Irrespective of this, some of the insights still seem to be valid today. For the results, see Gray (fn 1633) 97–119. For more recent observations, see John O Haley, *Rethinking Contract Practice and Law in Japan* (2008) 1 Journal of East Asia & International Law 47–69, noting, *inter alia*, how Japanese law is more favourable for contracting as contrasted with US law, since the former allows contracts to be concluded without requiring forms or consideration, while the Japanese courts seem to endeavour to find an agreement between parties in accordance with their expectations at the time of contracting.

for interpretation.[2180] The language itself thus provides greater flexibility in the law and allows the courts to adapt legal rules to the case at hand.[2181]

In terms of legal practice, there is one important observation to be made about Japan. From what has been discussed in the previous sections on Japanese law, it may have already been noted that the practices observed are not always identical to the legal framework. Thus, despite not being required under Japanese law, parties often conclude contracts in writing, or, where a transaction concerns real estate, pay *tetsuke* at the time of concluding the agreement (see Sections 1.b.ii. and 1.c.iii. above respectively). This phenomenon of formal and living law being incongruent exists in almost all areas of Japanese law and is addressed in legal reforms from time to time.[2182] The success of legal reception in Japan has been put down to the effectiveness of this living law and the fact that the received law allowed the living law to be absorbed.[2183]

b. Contracts in Japanese Legal Thinking

With regard to contracts, a number of practical deviations are discernible. First, Japanese contracts are simpler than those drafted in England or Germany. Apart from the common lack of form requirements, this is because contracts are filled-out forms rather than free-text documents.[2184] Moreover, they are also often shorter, which might be related to the use of such forms, but has furthermore been interpreted to reflect the parties'

2180 On the language differences, see the quotation in Rahn, '*Rechtsmentalität*' (fn 2178) 19–20.

2181 An interesting example of an unfair competition court case concerning perfumes is given by ibid 20–21.

2182 On this phenomenon, a range of examples, and how some aspects were addressed in legal reforms during the 1990s, see Kahei Rokumoto, *Japanese Law Symposium: Law and Culture in Transition* (2001) 49 The American Journal of Comparative Law 545–560, in particular 549–558. Some of the aims stated for the reforms of that time apply to the recent reform of the law of obligations, considered in Section V. below.

2183 Yamamoto K, '*Rechtsverständnis*' (fn 1583) 86. He is critical of the reforms mentioned in the previous footnote, since these destroyed 'the previously existing protected spaces of the "living law"' ('*die bislang geschützten Räume des „lebenden Rechts*"'; English and German original text).

2184 See Kaiser (fn 1976) para 57, noting this for contracts concerning sales of real estate. The written form was already discussed in Section 1.b.ii. above.

expectations of a fruitful development of the contractual relations,[2185] or to reflect the fact that only the transaction but not the parties' relationship is regulated in the contract.[2186] Perhaps as a consequence of this non-regulation, but also to avoid disputes over stipulations and favour settlements, contractual regulations are kept short instead of seeking to regulate all the parties' rights and obligations.[2187] While this is generally true, there are situations in which long, complex contracts are regularly concluded, such as with transactions involving real estate, corporate merger and acquisitions, or in cross-border business dealings.[2188]

Nevertheless, it has been advised that the length of a contract cannot simply be put down to cultural differences. In particular, the fact that common law practitioners tend to define terms and include a range of default rules stems from a systemic and practical need to provide for legal certainty: in making the contract self-sufficient in terms of regulation, the insecurity of varying interpretation or application of statutory rules by the courts can be avoided.[2189] Thus, while this legal practice has been established in the UK and the US, it was born from a practical necessity. This need seems not to exist in Japan.[2190] Apart from this structural reason, there is a linguistic cause: the Japanese language allows a more concise expression than English, resulting in the same text being shorter when written in Japanese script.[2191]

While this may be true, it has been said that vague formulations in Japanese texts are often chosen with the purpose of supporting settlements in case of disputes.[2192] In this sense, it has also been remarked that clauses to settle disputes out of court, in particular through conciliatory talks, are often found in contracts.[2193] While vague stipulations may be advantageous in some situations, European academics have cautioned about the uncertainty arising as the flipside of flexibility and advise bearing this in mind in contract drafting.[2194] Having said all this, contracts concluded

2185 See Axel Schwarz, *Vom Wert des Lebens und der Normen* [On the Value of Life and of Norms], in: Menkhaus (fn 1590) 63, 69.
2186 Rahn, '*Rechtsmentalität*' (fn 2178) 23.
2187 Yamamoto K, '*Rechtsverständnis*' (fn 1583) 93.
2188 Sono and others (fn 1632) 36, 48.
2189 This caution was given by Gray (fn 1633) 102.
2190 Sono and others (fn 1632) 48.
2191 See ibid.
2192 Schwarz (fn 2185) 69.
2193 Rahn, '*Rechtsmentalität*' (fn 2178) 23.
2194 See, eg, ibid 21.

with companies and institutions such as banks do tend to be long and detailed due to the use of comprehensive standard terms.[2195] Furthermore, where contracts are concluded between Japanese and foreigners, detailed written contracts are often used.[2196]

c. Contractual Formality in Japanese Legal Thinking

In general, the Japanese tend to deem formalities in contracting more important than what is prescribed by law. This has led to a popular belief in Japan that contracts must be made in writing.[2197] It has been stated, however, that not only one but two opposing convictions exist among the Japanese: On the one hand, a contract not contained in a formal document (*shōsho*, 証書, more literally 'deed' or 'bond') being invalid; and on the other, a contractual document being a mere formality, reflecting the true agreement.[2198] In line with the first school of thought, it is said that a written document strengthens a person's intention, their earnestness.[2199] Indeed, it seems that the perfection of a sale of real estate through the drawing up of formal documents and registration of the change in property is used by the courts as an indication of the parties' earnestness.[2200]

Similarly, Japanese people often believe a written contract needs something more. Accordingly, it is believed by some that a contract is not concluded until a seal (see Section 1.b.iii. above, as well as Section D.III.2.b. below) has marked the document.[2201] In fact, something like a scale of strength for a contract's bindingness seems to exist in Japanese culture with regard to the contract's formality.[2202] According to this thinking, oral contracts are perceived as being weakest. Written contracts are deemed to be more binding, followed by contracts that bear a seal (of any kind);

2195 Compare Schwarz (fn 2185) 69.
2196 See Rahn, '*Rechtsmentalität*' (fn 2178) 25, who states that this would not be the case among Japanese.
2197 See Noriaki (fn 1641) 10.
2198 See Taniguchi and Ono (fn 1846) 392.
2199 Interview with Mrs Mika Yokoyama, Professor, Faculty of Law, University of Kyōto (Kyōto, 7 September 2016).
2200 On this, see Sono and others (fn 1632) 59–60.
2201 Interview with Dr Shōji Kawakami, Professor, Faculty of Law, University of Tōkyō (Tōkyō, 19 December 2015).
2202 On this, see Yamanushi (fn 2021) 144, 151. See also Sono and others (fn 1632) 61, 63.

however, if the seal is a *jitsu'in*, the strength of the contract's bindingness increases. Finally, the greatest force is achieved through a notarial deed (*kōsei shōsho*, 公正証書, see Section 1.b.iv. above).

Another commonly-held belief (which is reflected in business practice) about contracts for the sale of immovable property is that a formal document must be drawn up and *tetsuke* (see Section 1.c.iii. above) be handed over before the contract has been concluded effectively.[2203] This legal thinking may be a remainder from the Tokugawa era, during which bare agreements were not deemed to be binding.[2204]

d. Current Legal Practice in Japan

The exposition in the foregoing sections helps to delineate a number of legal practices observed in Japan. One concerns the form of contracts. As we have seen in Section 1.b. above, Japanese law does not require many formalities in contracting. Despite this fact, contracting parties may choose to — and in fact often do — put their agreement into writing for a number of reasons, including to avoid disputes, or to verify a party's intention.[2205] Apart from these factual needs, written agreements are held in higher esteem than their oral counterparts, as noted in Section 1.b.iii. above. This may explain why the practice is followed for a whole range of contracts.[2206] In particular, in sales of immovable property, the established business practice is to draw up a written document and hand over *tetsuke* (earnest money).[2207] Another reason may be that some transactions, such as gifts, are revocable if not made in writing.[2208] Furthermore, it is said that in transactions of high value, eg, in relation to immovable property, a written agreement prevents trouble.[2209]

2203 See Yokoyama, '*Seiritsu katei*' (fn 2038) 198.
2204 See Yoshida (fn 1651) 12. For further details, see Section II.1.c.iv. above.
2205 Compare Taniguchi and Ono (fn 1846) 393. For further details, see ibid 400–402.
2206 An illustrative list of the contract types can be found in Taniguchi and Ono (fn 1846) 400.
2207 See Yokoyama, '*Seiritsu katei*' (fn 2038) 198. On *tetsuke*, see Section 1.c.iii. above.
2208 On this, see the discussion in Section 1.b.ii. above.
2209 Noriaki (fn 1641) 13.

As noted previously, the use of standardised forms rather than freely formulated text is common for contracts, both in business contexts,[2210] and in sales of real estate.[2211] And while contracts generally tend to be short, the duties to provide information on certain matters to consumers lead to long, detailed contract documents in B2C constellations.[2212] The widespread use of standard terms (yakkan, 約款) may also contribute to this. In fact, in e-commerce, ie, online shopping, contractual terms like the price, object, the time and place of performance, etc are normally fixed in such standard terms.[2213]

While this is true for B2C or C2C contracts, the converse seems to be true in B2B situations. Thus, it has been stated that only few written contracts are concluded under Japanese commercial law.[2214] The degree may vary in specific sectors, such as in the textile industry.[2215] Where contracts are made in writing, it is standard practice to issue several copies of a contract, so that each party may obtain an original.[2216] In commercial settings, contracting parties doing business together regularly will usually conclude not just one but a series of contracts: first, a framework agreement (*kihon keiyaku*, 基本契約, literally 'basic contract'), which contains a range of stipulations to configure the contractual relationship; on this basis, 'separate (sale) contracts' ('個別(売買)契約', *kobetsu (baibai) keiyaku*) are entered into when required.[2217]

V. The Modernisation of the Saiken-hō (債権法, Japanese Law of Obligations)

A comprehensive modernisation process in relation to the Japanese law of obligations has been recently completed. This took almost nine years, over the course of which different bodies have published a plethora of ma-

2210 Kitagawa, '*Contracts*' (fn 1601) § 2.01[3][h][ii] at 2-36.
2211 See Kaiser (fn 1976) 704 para 57.
2212 Kitagawa, '*Contracts*' (fn 1601) § 2.01[3][h][ii] at 2-36.
2213 See Matsumoto, '*Keiyaku*' (fn 1830) 18.
2214 See Hideaki Seki, *Das Japanische im japanischen Handelsrecht* [The Japanese in Japanese Commercial Law], in: Menkhaus (fn 1590) 237, 240.
2215 On this, see Karl-Friedrich Lenz, *Das Japanische im japanischen Handelsrecht* [The Japanese in Japanese Commercial Law], in: Menkhaus (fn 1590) 219, 233, who notes that around 70% of contracts concluded in this commercial sphere in the 1990s were not in written form, but oral.
2216 Pardieck (fn 2079) 188.
2217 See Egashira (fn 1843) 6–8 for further details, especially as to the possible stipulations contained in the 'basic contract'.

terials. After briefly exploring the general motives for the reform project (in Section 1. below), the modernisation process will be explained in more detail (in Section 2.). This includes an overview over the different parties involved and the most important materials that have been published. Finally, attention is given to the content of the reform, whereby only those rules relevant to this dissertation will be discussed here, namely, those in relation to the formation of contracts (Section 3.).[2218]

1. Reasons Underlying the Reform Project of the Law of Obligations

Seeing as the *Minpō* has been in force for over 120 years with little to no amendments during this time (see Section III.3. above), and with the social, economic, and technological changes occurring, it is not surprising that the Japanese legislator initiated a project to reform Japanese private law. Indeed, the motives for the reform admit that the 'changes in the state of affairs in relation to the socio-economic situation need to be heeded' ('社会経済情勢の変化に鑑み', *shakai keizai jōsei no henka ni kangami*).[2219] Furthermore, it was stated explicitly that certain provisions, such as in relation to extinctive limitation periods (*sōmetsu jikō no kikan*, 消滅時効の期間), or the protection of guarantors (*hoshō-nin no hogo*, 保証人の保護) were in need of reform.[2220] Of course, amendments in private law were made subsequent to the *Minpō* coming into force; however, as this was done in special laws,[2221] the regulation of some matters had become scattered and confusing. One pertinent example is the coming into effect of declarations of intention (see Sections IV.1.a.ii. and iii. above). There was thus a need to bring the regulation together, including legal developments made in court decisions or by legal academics.[2222]

2218 Interested readers on other aspects of the proposed reform are referred to Yoshio Shiomi, *Minpō (saiken kankei) kaisei hō'an no gaiyō* [Overview of the Legislative Bill to Reform the Minpō (Law of Obligations)] (Kin'yū Zaisei Jijō Kenkyū-kai 2015).

2219 Hōsei Shingi-kai Minpō (Saiken Kankei) Bukai, *Riyū* [Motives], document no 001142183. This document (hereinafter '*Riyū*') and other documents related to the reform are available online from the *Hōmu-sho*'s website at www.moj.go.jp/MINJI/minji07_00175.html.

2220 See *Riyū* (fn 2219).

2221 See on this Yamamoto K, '*Minpō kōgi I*' (fn 1632) 26.

2222 Compare ibid 29–30.

2. The Reform Process: Initiation, Intermediate Results, Coming into Effect of the Amendments

The Japanese Civil Code (Law of Obligations) Reform Commission (法制審議会民法（債権関係）部会, *Hōsei Shingi-kai Minpō (Saiken Kankei) Bukai*; hereinafter simply '*Kaisei-kai*') was inaugurated in November 2009 by the *Hōmu-sho*.[2223] Beside employees of the *Hōmu-sho*, the Commission's members comprise leading legal academics in the field of the law of obligations from several universities, as well as representatives of legal practitioners (including lawyers (affiliated with local bar associations), judges, consumer protection consultants) and the commercial sector (companies, banks).[2224]

After holding a series of meetings, the *Kaisei-kai* adopted an 'Interim Tentative Plan for the Reform of the Civil Code (Law of Obligations)' (hereinafter '*Chūkan shi'an*'[2225]) on 26 February 2013.[2226] Based on this, the public were invited to comment on the proposed changes during a period of two months.[2227] These comments were taken into account during subsequent debates of the *Kaisei-kai*, and the proposal underwent another series of changes before a final proposal, which was then translated into a

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2223 See, eg, Chūkan shi'an Explanations (fn 1876) 1 (foreword).

2224 A list of the Commission's members names (*meibo*, 名簿) can be downloaded from the reform project website at www.moj.go.jp/shingi1/shingikai_saiken.html. The list dated 23 July 2014 is used here, www.moj.go.jp/content/001127663.pdf.

2225 Hōsei Shingi-kai Minpō (Saiken Kankei) Bukai, *Minpō (saiken kankei) no kaisei ni kansuru chūkan shi'an* [Interim Tentative Plan for the Reform of the Civil Code (Law of Obligations)] (March 2013, corrected July 2013). The document, which is often abbreviated to '中間試案' (*chūkan shi'an*) in Japanese, is available online at www.moj.go.jp/content/000112242.pdf.

2226 It was first published on 11 March 2013, but subsequently underwent a series of corrections, so that the final version dates from 4 July 2013 (document no 000112242). See www.moj.go.jp/shingi1/shingi04900184.html, from which all the documents relating to the *Chūkan shi'an* can be downloaded. In the following discussion, references to the *Chūkan shi'an* are to this last version. Having said this, the corrections that were made did not affect the provisions discussed in this dissertation, see Hōmu-shō, *Minpō (saiken kankei) no kaisei ni kansuru chūkan shi'an seigō-hyō* [Correction of the Interim Tentative Plan for the Reform of the Civil Code (Law of Obligations)] dated 4 July 2013, document no 000112240, available online at www.moj.go.jp/content/000112240.pdf.

2227 See the postscript dated 27 March 2013 at www.moj.go.jp/shingi1/shingi04900184.html.

legal bill to be submitted to the Japanese Parliament, was adopted on 10 February 2015.[2228]

The legislative bill (*Kaisei hō'an*, 改正法案) was presented to Parliament on 31 March 2015.[2229] The *Shū'in* (Japanese lower house in the Diet, 衆院) deliberated and approved the legislative bill on 14 April 2017.[2230] The Lower House proposed no amendments concerning the content of the reform; it merely recommended changing the designation of what would become the reform law to reflect the new timeline, so that the law was now designated as '平成二十九年法律第[blank space]号' (*Heisei 29-nen hōritsu dai*-[blank space]-*gō*, Law No [blank space] of 2017) instead of bearing the year 2015 (*Heisei* 27-*nen*, 平成二十七年).[2231] As had been anticipated, the *San'in* (Japanese upper house in the Diet, 参院) passed the bill without further amendments on 26 May 2017.[2232] The Law (No 44/2017)[2233] was officially proclaimed on 2 June 2017 and published in

2228 This final proposal was termed '*yōkō-an*' (要綱案, draft of general plan) and published on 23 February 2015, see www.moj.go.jp/shingi1/shingi04900244.html. In terms of the proposed changes, the content of this final proposal is identical with the *Kaisei hō'an* (reform bill, see subsequent fn).

2229 See Hōsei Shingi-kai Minpō (Saiken Kankei) Bukai, *Minpō ichibu wo kaisei suru hōritsu* [Law to Amend one Part of the Civil Code] (submitted for consideration by the Japanese Parliament on 31 March 2015). This document (hereinafter '*Kaisei hō'an*') is available online at www.moj.go.jp/content/001142186.pdf.

2230 See Unnamed author, *Minpō kaisei-an ga Shū'in tsūka keiyaku rūru bappon minaoshi* [Civil Code Refom Bill Passed by Lower House Drastic Review of Contract Rules], Nippon Keizai Shinbun (14 April 2017), www.nikkei.com/article/DGXLASFS13H70_U7A410C1MM0000/.

2231 See Hōsei Shingi-kai Minpō (Saiken Kankei) Bukai, *Minpō ichibu wo kaisei suru hōritsu-an ni taisuru shūsei-an shinkyū taishō jōbun* [Amendment Proposal to the Law to Amend one Part of the Civil Code, Old and New Text Contrasted], document no 001226884, available online at www.moj.go.jp/content/001226884.pdf. The same changes were proposed for the outline and the draft of the bill, see ibid, *Minpō ichibu wo kaisei suru hōritsu-an ni taisuru shūsei-an yōkō* [Amendment Proposal to the Outline of the Law to Amend one Part of the Civil Code], document no 001226882, available online at www.moj.go.jp/content/001226882.pdf, and ibid, *Minpō ichibu wo kaisei suru hōritsu-an ni taisuru shūsei-an-an* [Amendment Proposal to the Draft Law to Amend one Part of the Civil Code], document no 001226883, available online at www.moj.go.jp/content/001226883.pdf respectively.

2232 See fn 2230 and www.moj.go.jp/MINJI/minji07_00175.html, showing the bill's progress.

2233 *Minpō ichibu wo kaisei suru hōritsu*, 民法の一部を改正する法律, Law to Amend one Part of the Civil Code.

the Japanese official gazette (*Kanpō*, 官報) no 116 on the same day.[2234] Initially, no definite date was set for its coming into force; however, on 15 December 2017, the cabinet issued an order that the revised *Minpō* was to come into force generally on 1 April 2020 (Heisei 32).[2235]

On the day that the legislative bill to reform the *Minpō* was submitted for consideration to the Japanese Diet, another legislative bill of relevance was presented: the Law to Maintain Laws Affected by the Enforcement of the Law to Amend one Part of the Civil Code (hereinafter '*Kaisei kankei-hō*').[2236] It was passed as Law No 45/2017 and proclaimed on the same day as the *Minpō* reform law. It also generally came into force on 1 April 2020.[2237] As its title suggests, it amends a series of laws that will be affected by the reform of the *Minpō* for, eg, stipulations that may become obsolete or contradict the new regulations. Any pertinent changes under these two laws are discussed below.

3. Content of the Reform Project[2238]

As the title of the reform project suggests, it encompasses amendments regarding several aspects of the Japanese law of obligations. In relation to the formation of a contract, the reform proposal contains several novel stipulations. The novelty stems not so much from the content itself, but often from the simple fact that the rules were codified in the *Minpō* for the

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2234 See fn 2232. The amended bill that became law (document no 001226886) is available online at www.moj.go.jp/content/001226886.pdf. The proclaimed text is contained in pages 11–31 of the official gazette and can be viewed in the online edition at https://kanpou.npb.go.jp/old/20170602/20170602g00116/20170602g001160011f.html.

2235 See Unnamed author, *Kaisei minpō sekō-bi kakugi kettei heisei 32-nen 4-gatsu tsuitachi mi-harai-kin no shōmetsu jikkō tō'itsu nado 200 kōmoku* [Civil Code Reform Coming into Force on 1 April 2020: 200 Provisions on the Consolidation of the Limitation Period of Debts etc], Sankei News (15 December 2017), www.sankei.com/politics/news/171215/plt1712150011-n1.html. For further details on the coming into force of the amended law, see www.moj.go.jp/MINJI/minji06_001070000.html.

2236 民法の一部を改正する法律の施行に伴う関係法律の整備等に関する法律, *Minpō ichibu wo kaisei suru hōritsu no shikō ni tomonau kankei hōritsu no seibi-tō ni kansuru hōritsu*, available online at www.moj.go.jp/content/001226891.pdf.

2237 See www.moj.go.jp/MINJI/minji07_00176.html.

2238 As noted in Section IV. above, the following discussion is based on the law as of December 2019, ie, before the amendments came into force.

first time.[2239] One excellent example is the new art 521, the first stipulation in the subsection on the formation of contracts:

> (Conclusion of a Contract and Freedom of Content)
> Article 521 Anyone can choose freely whether to enter into a contract or not, unless the law prescribes otherwise.
> 2 The parties to a contract may freely stipulate the content of a contract within the limits prescribed by law. [2240]

As was stated above, the principle of freedom of contract is not new to Japanese contract law; but it has existed as an unwritten rule thus far. For this simple reason, and because it is deemed desirable to make it an explicit principle, this stipulation is included in the reform.[2241]

Apart from making some principles explicit, the reform amends the stipulations concerning the declaration of one's intention (see Section a. below), and thus the time of formation of a contract (Section b.), the

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2239 The following discussion is based on the *Kaisei hō'an* as published in March 2015 on the website indicated in fn 2229.

2240 The new provision states: (契約の締結及び内容の自由) 第五百二十一条 何人も、法令に特別の定めがある場合を除き、契約をするかどうかを自由に決定することができる 。
2 契約の当事者は、法令の制限内において、契約の内容を自由に決定することができる。
(Keiyaku no teiketsu oyobi naiyō no jiyū) Dai-521-jō Nanbito mo, hōrei ni tokubetsu no sadame ga aru ba'ai wo nozoki, keiyaku wo suru ka dō ka wo jiyū ni ketteisuru koto ga dekiru.2 Keiyaku no tōji-sha ha, hōrei no seiken-nai ni oite, keiyaku no naiyō wo jiyū ni ketteisuru koto ga dekiru.) In what follows, unless stated otherwise, kanji for cited provisions will have been taken from Hōsei Shingi-kai Minpō (Saiken Kankei) Bukai, *Minpō ichibu wo kaisei suru hōritsu-an shinkyū taishō jōbun* [Comparison of New and Old Provisions of the Draft Law to Amend one Part of the Civil Code] (document no 001142671; hereinafter '*Minpō* Provision Comparison') 99, available online at www.moj.go.jp/content/001142671.pdf. Similarly, transcriptions and English translations are by this author, unless stated otherwise, as no English translation of the amended provisions was available at the time of submitting the dissertation. Subsequently, a semi-official translation of the amended *Minpō* has been made available online at www.japaneselawtranslation.go.jp/law/detail/?id=3494&vm=04&re=2&new=1. A German translation of the *Minpō*'s affected provisions can be found in Hiroyuki Kansaku and others, *Übersetzung des novellierten Zivilgesetzes 2020* [Translation of the Amended Civil Code 2020] (2018) 45 ZJapanR / JJapanL 183–305.

2241 Chūkan shi'an Explanations (fn 1876) 322, 324. cf Sono and others (fn 1632) 46, 58, who state that the freedom of form is now recognised explicitly be Japanese law.

validity and revocability of declarations of intention (Section c.), as well as the formalities of contracts (Section d.).

a. Concerning the Coming into Effect of Declarations of Intention

While Japanese law traditionally differentiates between declarations of intention made between persons present and those at distance, the reform will radically change (simplify) this by making three alterations.

i. Article 97 *Minpō*

The first change under the reform concerns the general rule contained in art 97 *Minpō*. This rule is amended as follows (changes to the formulation are marked in the following manner — new text is underlined; old text is ~~struck out~~):

> (Time of Coming into Effect of a Declaration of Intention ~~to Person at a Distance~~, etc)
> Article 97 A declaration of intention ~~to a person at distance~~ shall become effective at the time of arrival of the notice to the other party.
> 2Where the other party hinders the arrival of a notice of a declaration of intention without just reason, the declaration of intention will be seen as having arrived at the time that it would have arrived under normal circumstances.
> 3The validity of a declaration of intention ~~to a person at a distance~~ shall not be impaired even if the person who made the declaration dies, loses their capacity to make declarations of intention, or becomes limited in their capacity to act after the dispatch of the notice. [2242]

2242 The amended provision reads: (~~隔地者に対する~~意思表示の効力発生時期等）第九十七条 ~~隔地者に対する~~意思表示は、その通知が相手方に到達した時からその効力を生ずる。
2 相手方が正当な理由なく意思表示の通知が到達することを妨げたときは、その通知は、通常到達すべきであった時に到達したものとみなす。
3 ~~隔地者に対する~~意思表示は、表意者が通知を発した後に死亡し、意思能力を喪失し、又は行為能力を喪失したときであっても、の制限を受けたときであっても、そのためにその効力を妨げられない。
(*(Kakuchi-sha ni taisuru ishi hyōji no kōryoku hassei jiki-tō) Dai-97-jō Kakuchi-sha ni taisuru ishi hyōji ha, sono tsūchi ga aite-kata ni tōtatsushita toki kara sono kōryoku wo shōzuru.*

While the content of paras 1 and 3 is basically identical to before, the difference lies in the elimination of the words 'between persons at distance' ('隔地者間', *kakuchi-sha-kan*). The effect of this amendment is that the arrival rule will no longer be applicable solely to declarations made to persons at distance, but will become a true general rule with regards to the coming into effect of declarations of intention.[2243] This is underlined by a change relating to what is now art 526 para 1 *Minpō* (time of formation of contract between persons at distance; see subsequent section).

While the words 'to a person at distance' were at first replaced by the words 'to the other party ('相手方のある', *aite-kata no aru*),[2244] the words were later deleted completely in the *Kaisei hō'an*.[2245] The reason for the initial change in the wording was to make it clear that the rule was now applicable to 'persons other than those at distance' ('隔地者以外の者に対する', *kakuchi-sha igai no mono ni taisuru*),[2246] which was deemed appropriate in light of the commonly-held view that the arrival rule was equally applicable in cases where the parties where 'in conversation' ('対話者', *taiwa-sha*).[2247] This proposed revision thus makes an explicit statement of an existing assumption. Furthermore, while the dispatch rule served commercial purposes in facilitating swift and smooth contract formation, modern means of communication have drastically reduced the need for

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2 Aite-kata ga seitō na riyū naku ishi hyōji no tsūchi ga tōtatsusuru koto wo samatageta toki ha, sono tsūchi ha, tsūjō tōtatsusubeki de atta toki ni tōtatsushita mono to minasu.

3 Kakuchi-sha ni taisuru ishi hyōji ha, hyō'i-sha ga tsūchi wo hasshita ato ni shibōshi, ishi nōryoku wo sōshitsushi, mata ha kōi nōryoku wo sōshitsushita toki de attemo, no seigen wo uketa toki de attemo, sono tame ni sono kōryoku wo samatakerarenai.)

2243 Interestingly, the special provision contained in current art 521 para 2, according to which acceptance of an offer containing a period for acceptance is governed by the arrival rule, will apparently be maintained although it will become superfluous. Compare Minpō Provision Comparison (fn 2240) 99–100: The document indicates that the provision will remain unchanged.

2244 See, eg, *Chūkan shi'an* (fn 2225) 3.

2245 See *Kaisei hō'an* (fn 2229) 7–8. For a direct comparison of the old and new wordings, see *Minpō* Provision Comparison (fn 2240) 8.

2246 Hōsei Shingi-kai Minpō (Saiken Kankei) Bukai, *Minpō (saiken kankei) no kaisei ni kansuru yōkō-an no tatakidai (1)* [Draft Proposal for the Motion Outline in Relation to the Reform of the Civil Code (Law of Obligations) (1)] (September 2013) 7. This document (hereinafter 'Draft Proposal Outline (1)') is available online at www.moj.go.jp/content/000118124.pdf.

2247 See Chūkan shi'an Explanations (fn 1876) 29, 30.

this exceptional rule.[2248] The suggested elimination therefore also reflects social change.

The newly-inserted para 2 of art 97 *Minpō* contains a stipulation to regulate a deemed arrival, namely, where the recipient hindered (delayed) the arrival of the notice without just cause. Under such circumstances, the notice is deemed to have arrived at the time that it normally ought to have arrived. Interestingly, the *Chūkan shi'an* originally included another paragraph that also concerned cases of deemed arrival ('*dai-3 ishi hyōji 4 ishi hyōji no kōryoku hassei jiki nado (minpō dai-97-jō kankei)*'):

> (2) Arrival in the sense of paragraph (1) above, other than when the other party has knowledge of the declaration of intention, is defined as follows:
> a) A document containing the declaration of intention being delivered to the domicile, habitual residence, place of business, or office of the other party or of a person who is authorised to receive a declaration of intention on behalf of the other party (subsequently referred to as the 'other party etc'), or to a place that the other party etc has designated as a place at which knowledge of declarations of intention can be had.
> i) Otherwise, where the other party etc is placed in a position that lets them have knowledge of the declaration of intention.[2249]

2248 Ibid 354, 355. This is underlined by the fact that contracts concluded electronically are not within the scope of art 525 para 1 (art 4 *Denshi keiyaku-hō*), ibid 355. See further Tōda (fn 1850) on *dai-526-jō* [Article 526] at 493.

2249 The proposal stated: (2) 上記(1)の到達とは、相手方が意思表示を了知したことのほか、次に掲げることをいうものとする。
ア 相手方又は相手方のために意思表示を受ける権限を有する者（以下この項目において「相手方等」という。）の住所、常居所、営業所、事務所又は相手方等が意思表示の通知を受けるべき場所として指定した場所において、意思表示を記載した書面が配達されたこと。
イ その他、相手方等が意思表示を了知することができる状態に置かれたこと。
(*(2) Jōki (1) no tōtatsu to ha, aite-kata ga ishi hyōji wo ryōchishita koto no hoka, tsugi ni kakakeru koto wo iu mono to suru.*
a) Aite-kata mata ha aite-kata no tame ni ishi hyōji wo ukeru kenken wo yūsurumono (ika kono kōmoku ni oite 'aitekata nado' to iu.) no jūsho, jōkyo-sho, eigyō-sho, jimu-sho mata ha aite-kata nado ga ishi hyōji no tsūchi wo ukerubeki basho to shite shiteishita basho ni oite, ishi hyōji wo kisaishita shomen ga haitatsusareta koto.
i) sono hoka, aite-kata nado ga ishi hyōji wo ryōchisuru koto ga dekiru jōtai ni okakareta koto.) See Tentative Reform Plan (fn 2244) 3. Translation Note: The Japanese syllabary goes a, i, u, e, o, ka, ki, ku, etc and this sequence is followed in enumerations. Therefore, 'i)' would be written as 'b)' under the 'Western' enumeration system.

In essence, this proposal contained criteria to determine the point in time at which a declaration of intention is deemed to have arrived where the recipient has no actual knowledge. Here, actual knowledge is understood to mean that the person has knowledge either of the existence or of the content of the declaration of intention.[2250] Two instances had been foreseen: First, where the declaration is delivered to an address that is connected with the intended recipient (para a)). Secondly, where the recipient is otherwise in a position to know about the declaration (para i)). In all three instances under para a, the basis of the assumption lay in the fact that the declaration was deemed to have entered the recipient's area of control (*shihai ryō'iki*, 支配領域).[2251] Similarly, for the case foreseen in paragraph i), this was based on the concept of the recipient's sphere of influence (*seiryoku han'i*, 勢力範囲) or sphere of control (*shihai kennai*, 支配圏内).[2252] Which circumstances were to fall under these cases was to be judged on the facts of each case; however, the provision strove to shed some light on the meaning of the state of 'arrival'.[2253]

This attempt to define the circumstances of when a declaration of intention is deemed to have arrived was abandoned, as no consensus could be reached on the question whether including such an abstract definition would make the concept of arrival clearer to laypersons.[2254] Furthermore, a detailed regulation had been questioned in the public comment procedure, since it could be expected that methods of communication might change again in future,[2255] which might then render any explicit regulation out of date shortly after the enactment of the law. As a consequence, the meaning of arrival has been left to interpretation.[2256] Having said this,

2250 Chūkan shi'an Explanations (fn 1876) 31.
2251 Ibid 32, 31.
2252 This criteria is derived from two court decisions (on which, see the discussion in Section IV.1.a.iv.aa) above) on the meaning of the state of being able to have knowledge: ibid 31.
2253 See ibid.
2254 Specifically, the *Kaisei-kai* could not reach a consensus on the issue of arrival with electronic means of communication, see Draft Proposal Outline (1) (fn 2246) 7–8. Note that one of the objectives of the reform proposal is to make the law more accessible (easily comprehensible) to laypersons, see the restatement of the result of enquiry no 88 from 2009 in Hōsei Shingi-kai Minpō (Saiken Kankei) Bukai, *Minpō saiken kankei no minaoshi ni tsuite* [Concerning the Revision of the Civil Code's Law of Obligations] (date unknown), available online at www.moj.go.jp/content/000103338.pdf.
2255 See Draft Proposal Outline (1) (fn 2246) 7.
2256 On this, see Chūkan shi'an Explanations (fn 1876) 347.

it is generally understood to mean reaching the recipient, ie, having been transmitted successfully, but does not require actual knowledge.[2257] In this way, the interests of both parties are balanced concerning the point in time of the declaration of intention coming into effect.[2258]

It was pointed out in the discussion surrounding the proposed elimination of art 526 para 1 *Minpō* (containing the dispatch rule, *hassin shugi*) that art 97 para 1 was a dispositive rule (*nin'i kitei*, 任意規定), so that even after the explicit removal of the dispatch rule, the parties were still free to make a stipulation to that effect if they wished.[2259] Nevertheless, as mentioned in the public comment procedure, there were concerns that this dispositive nature was not evident; however, even if the dispositive nature were made apparent for offers, that this problem would remain and might even cause misunderstanding in relation to the (non-) dispositive nature of other provisions.[2260]

ii. Article 526 *Minpō*; Article 508 *Shōhō*

Under the reform, the dispatch rule contained in art 526 para 1 *Minpō* will be deleted, so that, taken together with the above change to the wording of art 97, the arrival rule will become applicable to declarations of acceptance directed at a person at distance.[2261] This means that the dispatch rule, and thus the English influence stemming from the 'postal rule', has been effectively removed from Japanese private law. Having said this, the contracting parties are free to stipulate the dispatch rather than the arrival rule as applying to their declarations of intention,[2262] so that the rule may still live on in legal practice. It will certainly still be used

2257 See Draft Proposal Outline (1) (fn 2246) 6–7.

2258 See ibid 7.

2259 On this, see Hōsei Shingi-kai Minpō (Saiken Kankei) Bukai, *Minpō (saiken kankei) no kaisei ni kansuru yōkō-an no tatakidai (2)* [Draft Proposal for the Motion Outline in Relation to the Reform of the Civil Code (Law of Obligations) (2)] (September 2013) 52. This document (hereinafter 'Draft Proposal Outline (2)') is available online at www.moj.go.jp/content/000118482.pdf.

2260 Draft Proposal Outline (2) (fn 2259) 52.

2261 Sono and others (fn 1632) 54–55 note that the general rule in art 97 para 1 *Minpō* has been reinstated. Compare also the discussion in Section IV.1.a.ii. and iii. above. The rule contained in art 526 para 2 (formation of contract through other facts implying acceptance) is maintained, but re-numbered as art 527, see Minpō Provision Comparison (fn 2240) 101–102.

2262 See Chūkan shi'an Explanations (fn 1876) 354.

with regards to commercial transactions that are governed by art 508 para 1 *Shōhō*, as this provision — like the former art 526 para 1 *Minpō* — foresees that acceptance for an offer which does not stipulate a period for acceptance is governed by the dispatch rule.[2263] Under the *Kaisei kankei-hō*, the commercial (dispatch) rule found in art 508 para 1 *Shōhō* will be maintained.

iii. Article 4 *Denshi keiyaku-hō*

As a side-effect of the deletion of art 526 para 1 *Minpō*, the provision found in art 4 *Denshi keiyaku-hō*, providing for an application of art 97 *Minpō* instead of art 526 para 1 *Minpō* to acceptances made per electronic means, becomes superfluous.[2264] In accordance with art 297 para 1 *Kaisei kankei-hō*, art 4 *Denshi keiyaku-hō* will be deleted. Accordingly, the arrival rule contained in art 97 para 1 *Minpō* will apply to electronic communication methods such as fax and e-mail in future.[2265]

b. Concerning the Time of the Formation of a Contract

For the same reasons as stated for freedom of contract,[2266] the offer-and-acceptance model will be codified for the first time in a newly-inserted art 522 para 1, which reads:

> (The Formation of Contracts and Form)
> Article 522 A contract is formed when a declaration of intention, which indicates the content of the contract and proposes its conclusion (hereinafter referred to as 'offer'), is accepted by the other party. [2267]

2263 This was already discussed in Section IV.1.iv.bb) above.
2264 See on this Nakata, '*Willenserklärungsrecht*' (fn 1954) 264. See also Sono and others (fn 1632) 55.
2265 The exceptional rule has already been discussed in Section IV.1.a.iv.bb) above.
2266 See fn 2241.
2267 The new provision reads: (契約の成立と方式) 第五百二十二条 契約は、契約の内容を示してその締結を申し入れる意思表示(以下「申込み」という。)に対して相手方が承諾をしたときに成立する。(*(keiyaku no seiritsu to hōshiki) Dai-522-jō keiyaku ha, keiyaku no naiyō wo shimeshite sono teiketsu wo mōshi'ireru ishi hyōji (ika 「mōshikomi」 to iu.) ni taishite aite-kata ga shōdaku wo*

This rule makes the point at which a contract is formed explicit, namely, when an offer is accepted by the other party. In other words, the stipulation constitutes a codification of the basic principle of Japanese contract law.[2268]

A very similar provision had already been foreseen in the *Chūkan shi'an*. It was more explicit than the final version, as it split two objectives into two paragraphs, namely, the codification of the principle of how a contract is concluded by way of offer and acceptance (para 1) and the definition of an offer (para 2):

> Number 28 The Formation of Contracts
> 1 Offer and Acceptance
> (1) A contract is considered to have formed when acceptance is made on an offer.
> (2) An offer under the foregoing [paragraph] (1) is required to indicate the content of a contract to such an extent that the contract is concluded when acceptance is made.[2269]

While both this proposal and the final draft opted to make the model for the conclusion of a contract explicit, it was admitted during the discussion that not all contracts fit this offer-and-acceptance model in terms of its conclusion process. Consequently, the stipulation was meant to be a general requirement, which allows the possibility of (ie, does not rule out) other formation processes through the method of interpretation.[2270] While both objectives of the former proposal are still achieved, it could be argued

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shita toki ni seiritsu suru.). The provision's second paragraph will be discussed in Section d. below and is therefore set out there.

2268 See Chūkan shi'an Explanations (fn 1876) 346. See further Shiomi, '*Hō'an no gaiyō*' (fn 2218) 194–195.

2269 The proposal stated: 第２８　契約の成立　１　申込みと承諾
(1) 契約の申込みに対して、相手方がこれを承諾したときは、契約が成立するものとする。
(2) 上記(1)の申込みは、それに対する承諾があった場合に契約を成立させるのに足りる程度に、契約の内容を示したものであることを要するものとする。
(*Dai-28 keiyaku no seiritsu 1 mōshikomi to shōdaku*
(1) Keiyaku no mōshikomi ni taishite, aite-kata ga kore wo shōdakushita toki ha, keiyaku no seiritsusuru mono to suru.
(2) Jōki (1) no mōshikomi ha, sore ni taisuru shōdaku ga atta ba'ai ni keiyaku wo seiritsu saseru no ni tariru teido ni, keiyaku no naiyō wo shimeshita mono no de aru koto wo yōsuru mono to suru.)

2270 On this, see Chūkan shi'an Explanations (fn 1876) 346, 347.

that the former proposal is more reader-friendly and that by inserting the explicit definition of an offer, it is more accessible to laypersons than the indirect definition found in the final version. Moreover, the definition highlighted the difference to an invitation to make an offer (*mōshikomi no yū'in*), even though this was not explained explicitly in paragraph 1 of the proposal. Interestingly, the explanation given for defining an offer as a 'declaration suggesting the conclusion of a contract' rather than a 'declaration indicating the content of the contract' is to make the difference between an offer and an invitation to treat clearer.[2271]

c. Concerning the Effectiveness of Declarations of Intention: Validity and Revocability

The reform project also affects the rules on the duration of the effectiveness of offer and acceptance found both in the *Minpō* and the *Shōhō*, as five pertinent provisions are amended.

i. Former Article 521, new Article 523 *Minpō*

What was art 521 *Minpō* (Offers that Specify Period for Acceptance, 承諾の期間の定めのある申込み, *Shōdaku no kikan no sadame no aru mōshikomi*) has been re-numbered as art 523, maintaining both paras 1 and 2. The change that has been made is the insertion of the following sentence: 'ただし、申込者が撤回をする権利を留保したときは、この限りでない' (*tadashi, mōshikomi-sha ga tekkai wo suru kenri wo ryūhoshita toki ha, kono kagiri de nai*; However, this shall not apply when the applicant reserves themselves the right to withdraw).[2272] The effect is the creation of an exception to the rule of irrevocability of offers specifying a period for acceptance. Accordingly, even an offer that specifies a time frame for acceptance can be revoked where the offeror reserves themselves the right to do so.[2273] It is interesting that this exception is a principle that had been long recognised by Japanese legal academics.

2271 On this, see ibid 43–44.
2272 See Minpō Provision Comparison (fn 2240) 99–100.
2273 On the current situation, see the discussion in Section IV.1.a.ii.dd) above.

ii. Former Articles 522–523, new Article 524 *Minpō*; Article 508 *Shōhō*

Similar to art 521, the provision contained in art 523 *Minpō* (late acceptance can be deemed to be new offer by offeror) remains; however, the norm is re-numbered as art 524.[2274] Due to this change, art 508 para 2 *Shōhō* is amended to reflect this and refer to the new provision number.[2275] As a consequence of this, the rule on late acceptance will still be applicable to C2C transactions in future. While this is so, the special rule contained in art 522 *Minpō*, under which a declaration of acceptance that arrived late could still be effective where the delay was not due to the offeree's fault and the offeror failed to send a notice of delay, will be deleted.[2276] In future, the only way to keep the contracting process moving is therefore through the offeror's discretion to deem the late declaration as a new offer.

iii. Former Article 524, new Article 525 *Minpō*; Article 507 *Shōhō*

Due to the moving of the provisions discussed above, what is now art 524 *Minpō* (Offers that do not Specify Period for Acceptance, 承諾の期間の定めのない申込み, *Shōdaku no kikan no sadame no nai mōshikomi*) is re-numbered as art 525, but the rule itself remains the same.[2277] Having said this, the same exception that has been introduced into art 521 (new 523) para 1 *Minpō* has also been inserted into para 1 of art 524/525,[2278] so that it is now explicitly possible for the offeror to reserve themselves the right to withdraw the offer. Moreover, the words '隔地者に対して' (*kakuchi-sha ni taishite*; to an absent person) are deleted,[2279] so that it is now clear that the rule applies to contracting parties *inter presentes* and *inter absentes*.[2280]

2274 See Minpō Provision Comparison (fn 2240) 100. See further Shiomi, '*Hō'an no gaiyō*' (fn 2218) 195.
2275 See art 3 para 1 *Kaisei kankei-hō*.
2276 See Minpō Provision Comparison (fn 2240) 100.
2277 For further details on this, see Shiomi, '*Hō'an no gaiyō*' (fn 2218) 196.
2278 See Minpō Provision Comparison (fn 2240) 100.
2279 See ibid.
2280 See Shiomi, '*Hō'an no gaiyō*' (fn 2218) 196, who states that this rule is now 'generally applicable' ('一般的に適用される', *ippanteki ni tekiyō sareru*).

Beside this, two new paragraphs have been added to the provision:

> 2 Irrespective of the provision in the previous paragraph, an offer made to a present person in accordance with that provision can be withdrawn by the offeror at any time during the conversation.
> 3 Where the offeror does not receive acceptance of an offer made under paragraph 1 during the conversation, the offer shall become ineffective. However, this will not apply where the offeror has indicated that the offer shall not lose its effect even after the end of the conversation.[2281]

Due to the insertion of para 3, art 507 *Shōhō* will be deleted ('削除', *sakujo*) in accordance with art 3 para 1 *Kaisei kankei-hō*.[2282] This means that the special commercial rule leaving offers to a present person open only for as long as the parties are together, will not be maintained. It seems that this provision has become superfluous, which suggests in turn that the *Minpō*-rule will become applicable generally, ie, to B2B, B2C, and C2C situations, in future.

d. Concerning Formalities of Contracts

There are a couple of changes in relation to the formalities of a contract under the *Minpō*-reform. These concern the form of a contract on the one hand (see Sections i.–ii.) and the legal practice of paying *tetsuke* upon the conclusion of a contract on the other (see Section iii.). Furthermore, loans for use and deposits, which used to be real contracts under Japanese law,

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2281 The new provision says: 2 対話者に対してした前項の申込みは、同項の規定にかかわらず、その対話が継続している間は、いつでも撤回することができる。
3 対話者に対してした第一項の申込みに対して対話が継続している間に申込者が承諾の通知を受けなかったときは、その申込みは、その効力を失う。ただし、申込者が対話の終了後もその申込みが効力を失わない旨を表示したときは、この限りでない。
(*2 Taiwa-sha ni taishite shita zenkō no mōshikomi ha, dōkō no kitei ni kakawarazu, sono taiwa ga keizokushiteiru aida ha, itsu demo tekkaisuru koto ga dekiru.*
3 Taiwa-sha ni taishite shita dai-ichi-kō no mōshikomi ni taishite taiwa ga keizokushiteiru aida ni mōshikomi-sha ga shōdaku no tsūchi wo ukenakatta toki ha, sono mōshikomi ha, sono kōryoku wo ushinau. Tadashi, mōshikomi-sha ga taiwa no shūryō-go mo sono mōshikomi ga kōryoku wo ushinawanai mune wo hyōjishita toki ha, kono kagiridenai.)

2282 Compare Shiomi, '*Hō'an no gaiyō*' (fn 2218) 197.

have now been turned into consensual contracts.[2283] While these modifications are not major, they are nevertheless important in modernising the *Minpō*. This is because the changes discussed below basically constitute codifications of pre-existing legal rules or practices.

i. New Article 522 *Minpō*

A completely new stipulation is found in para 2 of the new art 522 *Minpō*. It concerns formalities and reads as follows:

> 2 Except where legislation provides otherwise, the drawing up of a document or the adoption of other formalities is not required for the formation of a contract.[2284]

By adopting this provision, the general principle of freedom of form is made explicit. It is therefore not a novel creation, but a codification of an existing principle of contract law.

ii. New Article 587-2 *Minpō*

In art 587-2 *Minpō*, another new stipulation has been created that qualifies the rule in art 587, according to which a loan for consumption can only be created by the exchange of the delivery of the money or the object and a counter-promise to return money or an object of equal value. The new provision reads:

> (Loans for Consumption in Writing etc)
> Article 587-2 Notwithstanding the provision of the preceding article, a loan for consumption in writing shall become effective when one of the parties promises to deliver money or other things and the counterparty promises to return a thing of the same kind, quality, and quantity.

2283 See on this Sono and others (fn 1632) 41–42, who go on to note that loans for consumption keep their nature as real contracts. For further details, see ibid 181, 239, 236.

2284 The new provision states: 2 契約の成立には、法令に特別の定めがある場合を除き、書面の作成その他の方式を具備することを要しない。(*2 keiyaku no seiritsu ha, hōrei ni tokubetsu no sadame ga aru ba'ai wo nozoki, shomen no sakusei sono hoka no hōshiki wo gubisuru koto wo yōshinai.*)

> (2) A borrower under a loan for consumption in writing may cancel the contract until they receive money or other things from the lender. In this case, the lender may demand damages from the borrower, if they suffered a loss from the cancellation of the contract. […]
> (4) When a loan for consumption is made by an electromagnetic record that records the contents thereof, the loan for consumption shall be deemed to be in writing and the provisions of the preceding three paragraphs shall apply.[2285]

Paragraph 1 of the provision clearly allows an alternative mechanism for concluding a loan for consumption, namely, in writing.[2286] By virtue of para 4, the form can also be by electronic means. This provision seems to suggest that 'writing' does not automatically encompass an electronic form. The purpose of this new requirement is the protection of borrowers by stopping them from the 'careless conclusion of consumption loans'.[2287]

2285 The new provision reads: (書面でする消費貸借等) 第五百八十七条の二 前条の規定にかかわらず、書面でする消費貸借は、当事者の一方が金銭その他の物を引き渡すことを約し、相手方がその受け取った物と種類、品質及び数量の同じ物をもって返還をすることを約することによって、その効力を生ずる。
2 書面でする消費貸借の借主は、貸主から金銭その他の物を受け取るまで、契約の解除をすることができる。この場合において、貸主は、その契約の解除によって損害を受けたときは、借主に対し、その賠償を請求することができる。[…]
4 消費貸借がその内容を記録した電磁的記録によってされたときは、その消費貸借は、書面によってされたものとみなして、前三項の規定を適用する。
(*(Shomen de suru shōhi taishaku-tō) Dai-587 no 2 Zenjō no kitei ni kakawarazu, shomen de suru shōhi taishaku ha, tōji-sha no ippō ga kinsen sono hoka no mono wo hikiwatasu koto wo yakushi, aite-kata ga sono uketotta mono to shurui, hinshitsu oyobi sūryō no onaji mono wo motte henkan wo suru koto wo yakusuru koto ni yotte, sono kōryoku wo shōzuru.*
2 Shomen de suru shōhi taishaku no karinushi ha, kashinushi kara kinsen sono hoka no mono wo uketoru made, keiyaku no kaijo wo suru koto ga dekiru. Kono ba'ai ni oite, kashinushi ha, sono keiyaku no kaijo ni yotte songai wo uketa toki ha, karinushi ni taishi, sono baishō wo seikyūsuru koto ga dekiru. […]
4 Shōhi taishaku ga sono naiyō wo kirokushita denjiteki kiroku ni yotte sareta toki ha, sono shōhi taishaku ha, shomen ni yotte sareta mono to minashite, mae san-kō no kitei wo tekiyō suru.)

2286 For a discussion of the requirements of this provision, see Shiomi, '*Hō'an no gaiyō*' (fn 2218) 251.

2287 Sono and others (fn 1632) 236.

iii. Article 557 *Minpō*; Article 39 Paragraph 2 *Takuchi-gyō-hō*

The provisions on *tetsuke* contained in the *Minpō* and the *Takuchi-gyō-hō* will be amended under the reform. The new wording of art 557 para 1 *Minpō* is as follows (changes underlined):

> When the buyer delivers earnest money to the seller, cancellation of the contract may be effected <u>by the buyer by forfeiting the earnest money, and by the seller by actually tendering twice its amount. However, this does not apply where the other party has commenced performance of the contract.</u>[2288]

While these changes in the wording are made, the effect of the provision will remain the same. This is because the amendments relate to two aspects that have already been settled in case law: The first concerns the handing over of *tetsuke*; the second relates to the question who may cancel the contract after performance has been commenced. Regarding the former, the new words '現実に提供して' (*genjitsu ni teikyōshite*, actually tendering) concern a requirement for the seller to actually repay *tetsuke* that had already been laid down in a case in 1976.[2289]

The other change concerns the last sentence and the right to cancel before the commencement of performance. As the matter has already been considered in Section IV.1.c.iii. above, it will only be stated here that the added sentence is meant to clarify that the right to cancel a contract is no longer exercisable after performance is commenced, unless it is the party that has initiated fulfilment that cancels the contract.[2290] In effect, exactly the same changes are made to art 39 para 2 *Takuchi-gyō-hō*. Therefore, these will not be discussed here.[2291]

2288 The amended provision reads: 第五百五十七条 買主が売主に手付を交付したときは、<u>買主はその手付を放棄し、売主はその倍額を現実に提供して、契約の解除をすることができる。ただし、その相手方が契約の履行に着手した後は、この限りでない。</u>(*Dai-577-jō Kainushi ga urinushi ni tetsuke wo kōfushita toki ha, kainushi ha sono tetsuke wo hōkishi, urinushi ha sono baigaku wo genjitsu ni teikyōshite, keiyaku no kaijo wo suru koto ga dekiru. Tadashi, sono aite-kata ga keiyaku no rikō ni chakushu shita nochi ha, kono kagiridenai.*)

2289 *Saikō Saiban-sho* decision of 20 December 1976 (Shōwa 51), Hanji No 843 46. On this, see Shiomi, '*Hō'an no gaiyō*' (fn 2218) 228.

2290 For further discussion, see Shiomi, '*Hō'an no gaiyō*' (fn 2218) 228.

2291 On the change, see art 316 para 1 *Kaisei kankei-hō*. See also Shiomi, '*Hō'an no gaiyō*' (fn 2218) 228–229.

VI. Summary of Results

The discussion in this section has shown that contracts under Japanese law are normally consensual and are therefore formed through acceptance of an offer. This theoretical basis was only introduced in the Meiji era, a period in which the modern Japanese legal system was established. Inspiration for the regulation of private law was drawn from several European laws, in particular German and French law, but in parts also from English law. One pertinent example is the adoption of the English 'postal rule' as the *hasshin shugi* (dispatch rule) for declarations of intention. In other areas, US-law was influential. While this is true, Japanese contract law is not simply a blend of European laws; rather, it incorporates Western ideas with Japanese traditional elements. Accordingly, land and buildings can constitute separate immovable property, which is not true under English or German law. Here, buildings form part of the land and are deemed as movable property where this is exceptionally not the case.[2292]

In terms of Japanese legal practice, the payment of *tetsuke* is of particular interest, which is a legal custom already existing in the Tokugawa period that is still practiced in selected transactions today. Weak similarities to the English doctrine of consideration and also to the German notion of *Draufgabe* can be found, although the latter is no longer used today.[2293] The use of seals that still predominates in Japanese legal practice is also interesting from a comparative perspective, although handwritten signatures are recognised in Japan as forms of authenticating documents as well.

The blending of legal concepts from different legal orders has led to complex regulation. This is particularly true for the effectiveness of declarations of intention, as two doctrines traditionally compete: the *hasshin shugi* and the *tōtatsu shugi* (arrival rule). This situation is alleviated greatly by the comprehensive reform of the Japanese law of obligations: The former rule has been abolished, so that only the latter doctrine will be applicable from April 2020, like in Germany.[2294]

2292 See Sections B.II.3.b.i. and B.III.3.b.i. above respectively.

2293 See Sections B.II.3.a.v. and B.III.3.c.ii. above. For a further comparison, see Section D.II.4. below.

2294 See Section B.III.3.a.ii.dd) above.