Characteristics of the Japanese Law of Contract

——Law Principles relating to the Formation of Contract——

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1. Introduction

The source of law of the Japanese Law of Contract lies not in the case law as in the countries of the Anglo-American Law system (the Common Law system), but primarily in the Civil Code (*Minpō Ten*), which was enacted at the end of the 19th Century, under the influence of the Civil Laws of the European Continental countries, such as the French Napoleon Code or the First Draft of the German Civil Code. Therefore, it has a history of almost one hundred years, and like the German Civil Code, adopts the Pandekten System in which more general provisions appear in the earlier part of the Code, whereas more specific provisions come up in the later part of the Code.

Under Japanese Law, contracts are primarily governed by Part 3 of the Civil Code regulating Obligation Law (*saiken-hō*) and Part 1 of the Civil Code providing for General Provisions of the Civil Code (*sōsoku*). Contracts concluded by merchants are, in addition to the Civil Code, governed by the General Part and the Part regulating Commercial Acts of the Commercial Code (*Shōhō Ten*). Some

specific types of contracts are governed by special laws, according to social needs such as protection of labourers, consumers and the other economically and socially weaker. In contrast to the Civil Code or Commercial Code, which fundamentally respects free intentions of the parties to the contract and provides for discretionary provisions (*nini-kitei*) which could be excluded by the agreement of the parties, these special laws mostly provide for mandatory provisions (*kyōkō-kitei*), which will make contract terms null and void to the extent that such provisions are neglected by the parties and the contract terms in violation of the provisions are agreed upon by the parties.

Furthermore, contracts are often subject to various administrative regulations. The Antimonopoly Law and Foreign Exchange Law typically set forth such regulations, and many other administrative regulations and limitations provided for by other administrative laws and ordinances may also be imposed upon private contracts, in order to ensure sanitation, security, economic and industrial policies of the society in general. However, even if a contract is concluded in violation of such administrative regulations or limitations, the contract will not necessarily be null and void just because of the violation. If the law in question provides for the nullity of the contract in case of violation of the law or the ordinance issued under it, it is clear that the contract is null and void. However, if there are no such provisions, the contract will be treated null and void only if the contract, in view of the purpose of the law, is regarded as running against the concept of "public order and good morals" (*kōjo ryōzoku*) as provided for in Article 90 of the Civil Code.

2. Contracts and Leading Principles of Contract Law
——Private Autonomy of the Parties——

The term "contract" (*keiyaku*) in Japan is a very broad legal concept and encompasses various types of contracts. For example, marriage, which is an agreement to create a husband-and-wife relationship, is a contract in the broad sense, and is called "the family status contract" (*mibun-keiyaku*). An agreement of parties to create a superficies (a type of real right to use other's land to build one's own structure thereon) or a hypothec (a type of real right security interest) establishes a real right relationship as soon as the agreement is reached between the parties and does not leave any problem relating to performance of duties arising out of the contract. This type of contract is called "the real right contract" (*bukken-keiyaku*). However, ordinarily, the term "contract" refers to an agreement of the parties which creates obligation-law rights (*saiken*) and corresponding obligation-law duties (*saimu*) according to the agreement of the parties. This type of contract gives rise to problems relating to the performance of the obligation-law duties and the fulfillment of the corresponding rights, as well as problems relating to non-performance of the obligation-law duties (*saimu-furikō*) and compulsory execution of the duties in case of non-performance (*kyōsei-rikō*). It is called "the obligation-law contract" (*saiken-keiyaku*), and it is the obligation-law type of contract that is discussed in this paper.

"The principle of autonomy of the parties" (*tōjisha-jichi no gensoku*), or in other words, "the principle of private autonomy"

(*shiteki-jichi no gensoku*) is the leading principle of the Japanese Law of Contract. This principle can be paraphrased as "the principle of freedom of contract" at the stage of formation of a contract, and can be divided into four sub-principles:

1) freedom to contract;
2) freedom to choose the partner to the contract;
3) freedom to decide the terms of the contract; and
4) freedom to decide the form of the contract.

Generally speaking, in Civil Law countries including Japan, free intention of the parties and the creation of autonomous contractual norms based upon such free intention are thought to be the core of the Law of Contract. Of course, there are limitations to the contractual norms that can be created by the free intention of the parties. Such norms may not violate public order and good morals (Article 90 of the Civil Code) or mandatory provisions (Article 91 of the Civil Code), and are also subject to various administrative limitations and regulations.

In addition, even though it can be said that the freedom of contract is the leading principle of the Law of Contract, there is, on the other hand, a growing tendency that seemingly negates this principle in Japan as well as in many other countries. This tendency is typically seen in a situation where large companies, having the need for mass, uniform and speedy transactions with the expansion of their business, prepare terms and conditions generally applicable to their transactions in advance, and ask the parties wishing to enter into an agreement with them to accept

those terms and conditions in total. The contract form containing such terms and conditions which are prepared in advance by companies having economic power and are virtually imposed upon their contract parties is called "the standard contract form" (*futsū torihıki yakkan*), and a contract concluded with the use of such standard form is often called "a contract of adhesion" (*fugōkeiyaku*), because an individual wishing to enter into an agreement with those companies has no choice but to adhere to the terms and conditions so prepared, or to give up entering into any agreement with those companies. In a situation like this, it can be said that the freedom to decide the terms of a contract is, in fact, lost. Likewise in a situation where a company providing daily necessary goods or services occupies a monopolistic position in the market, as in the case of a company supplying gas or electricity, an individual wishing to obtain his or her daily necessary goods or services will have no freedom to choose his or her partner, and will eventually be forced to contract with that company.

Given the situations like these, the theoretical grounds for the binding power of the terms and conditions contained in standard contract forms are very often disputed and discussed, and several explanations are given (social autonomous norms theory, customary law theory, presumption of intention theory). At the same time, several laws require that permission of the competent Minister be obtained for the use of some types of standard forms, or that the terms and conditions be disclosed in writing to the contract partner, to ensure the reasonableness of the contents of contracts concluded with standard contract forms.

The court may also apply general law principles such as principle of good faith and diligence to invalidate or at least reduce the effect of the unreasonable terms and conditions contained in standard contract forms. However, unlike some countries, such as Germany, Japan does not have a specific law to regulate and ensure the reasonableness of the terms and conditions in standard contract forms.

3. Formation of Contract

——Juristic Act and Contract——

As mentioned before, the Japanese Civil Code respects free intentions of individuals in the society and allows such individuals to freely create legal relationships relating to themselves. For such purposes, the Civil Code has devised a legal concept called "juristic act" (*hōritsu kōi*). A juristic act is, in brief, an act in which an essential element is the existence of at least one declaration of intention (*ishi hyōji*), the contents of which are the realization of certain legal effects. A contract can be classified as a typical type of juristic act, and if seen from this point of view, a contract can be said to be a juristic act which consists of two corresponding declarations of intentions and gives rise to obligation-law rights and duties in accordance with the contents of the declarations of intentions. The two corresponding declarations of intentions, necessary for the formation of a contract, can be divided into an "offer" (*mōshikomi*) given by one party to the contract (offeror) and an "acceptance" (*shōdaku*) given in response to the offer by the other party to the contract (offeree).

A contract is thus formed, and unless the contents of the contract are :

1) unascertainable ;
2) impossible *ab initio* to perform ; or
3) contrary to public order or good morals, or socially unconscionable,

or unless there are grounds in the process of the formation of the contract, which make the contract null and void or voidable, such as :

1) lack of intention (*ishi no kenketsu;* this includes "reservation of intention" (*shinri-ryūho*), "declaration of false intention through conspiracy" (*tsūbō kyogi hyōji*), and "mistake" (*sakugo*)) *;* or
2) defect in the declaration of intention (*ishi hyōji no kashi;* this includes "fraud" (*sagi*) and "duress" (*kyōhaku*)),

then the contract will take effect and will be binding upon the parties.

For the formation of a contract, the requirement of the existence of consideration as seen in the Anglo-American Law system does not exist in Japanese Law. Nor does a contract need be in writing as is required by the Statute of Frauds in the Anglo-American Law system for some general types of contracts to be enforceable by law. A contract may, at any time after it has taken effect, be freely modified by the agreement of the parties, and therefore the difficult problems relating to

the existence of consideration, which is required for the modification of a contract in the Anglo-American Law system, do not exist in the Japanese Law system.

An offer (*mōshikomi*), which constitutes one of the declarations of intentions necessary for the formation of a contract, becomes effective between distantly located persons at the time the offer reaches the offeree (reaching principle; *tōtatsu shugi*). Therefore, an offer may be revoked, only if notice of the withdrawal of the offer (*mōshikomi no tekkai*) reaches the offeree before the offer itself reaches the offeree. However, if no withdrawal of an offer takes place, and the offer reaches the offeree and becomes effective, it will be irrevocable and binding; if a period of time for acceptance is fixed in the offer, for that period of time, and if no period of time for acceptance is fixed, for a reasonable period of time deemed necessary for the acceptance to be made (irrevocability of an offer; Article 521, paragraph 1 and Article 524 of the Civil Code). This is a big difference from the Anglo-American Law system, which allows freedom to withdraw or revoke an offer until the acceptance is made.

An acceptance (*shōdaku*) of the offer, on the other hand, becomes effective at the time the acceptance is sent (Article 526, paragraph 1 of the Civil Code). Therefore, a contract between distantly located persons will be formed at the time the acceptance is sent by the offeree to the offeror (sending principle; *hasshin shugi*). This differs from the German Civil Code which adheres to the reaching principle also with respect to acceptance, and is rather similar to the principle in the Anglo-American Law system.

However, according to Article 521, paragraph 2 of the Civil Code, if a period of time for acceptance is fixed in the offer, the acceptance must reach the offeror within the period fixed in the offer, otherwise the contract will not be formed. The interpretation by the majority of the scholars with respect to these provisions is that a contract once formed at the sending of the acceptance will be deemed as not having been formed retroactively, if the acceptance does not reach the offeror within the period of time fixed for the acceptance.

Moreover, attention must be paid also to some special laws, which provide for a cooling-off system, in which the offer once made or a contract once formed may be revoked or cancelled by a certain person under certain conditions within a certain period of time without any responsibility to be taken by him or her for the cooling-off (See, for example, Article 6 of Door to Door Sales Act, Article 4-3 of Installment Sales Act or Article 37-2 of Housing Land and House Transaction Business Act).

4. The Obligation-Law Relationship and Contract

Under the Japanese Law of Contract, it is not only the obligation-law rights and duties *stricto sensu* that arise to the parties to a contract. Each party, far more than other people in general, will have a close relationship with the interests of the other party, as soon as both parties come to have social contact with each other for the negotiation of a contract, and this relationship will last, throughout the formation of a contract resulting from the negotiation, until when the contract is totally performed and both parties are satisfied with the fulfillment of the contract

purpose. It may, under some circumstances, continue to exist even after the expiration of the contract. This relationship, when legally evaluated, is called as "an obligation-law relationship" (*saiken-kankei*) under Japanese Law, and the parties involved in an obligation-law relationship will be obligated to act in consideration of each other's interests in accordance with the principle of good faith and diligence (Article 1, paragraph 2 of the Civil Code).

Therefore, if a sales contract, in which the subject-matter has already perished, is concluded, the contract will be null and void *ab initio* because of impossibility to perform such contract. However, if the seller was negligent in not having conducted a survey as to the existence of the subject-matter of the contract, then the buyer will be entitled to make a claim for damages of his or her reliance interests which he or she has had as to the validity of the contract, and will be able to recover from the negligent seller such wasteful expenses as he or she has spent in the process of the formation of the contract. Even in a case of an effectively formed contract, if one of the parties fails to disclose or explain to the other party, facts which are important to the decision of that other party, and that other party suffers damage thereby, then the negligent party will be obligated to pay damages to the injured party. This treatment of law derives from what we call the "theory of *culpa in contrahendo*—theory of negligence in contract formation" (*keiyaku teiketsujō no kashitsu no riron*).

5. The Significance of The Contract Document and the Sealing Practice

5-1. The Contract Document

Under the Japanese Law of Contract, a contract in general need not be in writing for it to be effective and enforceable by law. This is true even in cases of gratuitous contracts in which only one party to the contract bears obligation-law duties and renders interests to the other party: e.g. a donation (*zōyo*) or gratuitous mandate contract (*mushō inin keiyaku*); or gratuitous real contracts such as a gratuitous loan for consumption (*mushō shōhi taishaku keiyaku*), loan for use (*shiyō taishaku keiyaku*) and gratuitous deposit (*mūshō kitaku keiyaku*), for which the delivery of the subject-matter is required for their formation, but which nevertheless need not be in writing to be effective and enforceable. This is remarkably different from the Anglo-American Law system in which a gratuitous promise needs to be in a deed for such a promise to be enforceable by law. Indeed some special laws in Japan require that a contract be in writing (Articles 25 and 32 of Agricultural Land Act or Article 19 of Construction Undertaking Business Act), or that contract terms and conditions be disclosed in writing to a consumer who wishes to enter into an agreement with certain types of contracting parties (Article 4 of Installment Sales Act, Article 4 of Door to Door Sales Act, or Aticle 37 of Housing Land and House Transaction Business Act). Theoretically, however, a contract can be concluded orally, and even when a document evidencing the agreement of the parties is not made, the contract is effectively formed and concluded under Japanese Law. In fact, in the mind of the Japanese people, even an oral agreement is thought as an effective contract. But, in practice, it is true that there are also cases where parties to the contracts intend

that the contracts are formally perfected only when the contract documents are made: e.g. in the case of real estate transaction. In addition, when an important agreement is reached, the parties will usually draft contract documents evidencing the agreement and exchange them: that is, they will make two copies of the contract, sign them, and each party will keep a copy.

Anywhere, whether a contract is made orally or in writing, the Japanese people do not seem to think that the terms and conditions of the contract which they have concluded are the only grounds for regulating their contractual relationship. It seems that sometimes the human relationship between the parties is emphasized more than the terms and conditions of the contract themsevles. In such cases, a contract, in the mind of the Japanese people, is thought as something which creates a special framework for their relationship, the actual contents of which will be decided according to the social and human relationship of the parties, the circumstances surrounding the parties, as well as the terms and conditions of the contract; thus as something very variable, which is unconsciously thought to be flexibly changed from time to time. This socio-legal concept of contract of the Japanese people differs remarkably from the concept of contract which the people in the Anglo-American Law system have; especially the British and the American, who unexceptionally insert a "final agreement clause" or an "entire agreement clause" in their contract, and, in light of the legal principle called the "parol evidence rule", consider that the terms and conditions contained in their contract document are the only support for regulating their contractual relationship. In Japan, even when a

contract document is made, a final or entire agreement clause is almost never inserted in domestic contracts, and there is no legal principle such as the "parol evidence rule" as seen in the Anglo-American Law system. However, this, together with the Japanese people's concept of contract and their morality relating to *On* and *Giri*, seems to make the handling of contracts in business practices very flexible, except for in cases of litigation in court, where strict legal reasoning and application of law is required for the settlment of disputes.

5-2. Signing and Sealing

Although theoretically a contract can be formed orally, it is quite common in actual practice for contract documents to be made, when contracts relating to important business transactions are concluded. In making contract documents and other various kinds of documents, the Japanese people, in their minds, place greater importance on sealing the documents than signing them. The most usual type of seal (*in*), in which the family name or surname of a person is engraved, is called the "junk seal" (ready-made cheap seal ; *sanmon ban*), and can easily be obtained at stationary stores. However, pressing on a contract document a seal in which one's own name is engraved seems to be regarded, according to the social consciousness of the Japanese people, as manifesting a decisive intention to enter into a contractual relationship or to confirm the contents of the document containing the terms and conditions of a contract. In fact, signing and sealing a document, or pressing a name stamp (*kimei-in*) on a document and sealing it, is very often conducted in Japan, in cases where only a signature will do in other countries.

Moreover, when important contracts are to be concluded, a seal called an "authenticated seal" (*jitsu in*) is often used in sealing such contracts. An authenticated seal is one which is registered at a local city office and the certificate thereof is issued by the office. The certificates of the seals of both parties will be shown to each other when a contract is to be concluded, in order to evidence the identification of the parties However, there is no difference in legal effects whether a contract document is only signed or, in addition, sealed; or when sealed, whether an authenticated seal or any other kind of seal is used. In fact, according to Article 325 of the Code of Civil Procedure, when a private document such as a contract document is submitted as evidence in court, the authenticity of the document must be proved, but if the document has *the signature and/or the seal of the principal or his or her representative,* the document will be presumed to be authentic (Article 326 of the Code of Civil Procedure). This means that legally a document having only the signature of the principal or his or her representative will, even without being sealed, be treated equally as those documents that are sealed by such person. However, the wording of the provisions of Article 326 of the Code of Civil Procedure also seems to suggest that a seal is as important as a signature in Japan, as far as proof relating to the authenticity of a private document is concerned. It can be easily perceived from the provisions of this Article that if a document is not signed and only a name stamp is pressed upon it, there needs to be a seal of the principal or his or her representative on the document, in order for it to be presumed to be authentic under the Article.

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＊本稿は，国際協力事業団及び財団法人比較法研究センターの主催による発展途上国の法律専門家を対象とした国際技術貿易セミナーにおける一連のレクチャーの中で，私が，日本の契約法の特徴 ―特に契約締結に関わる側面― について担当し，プレゼンテーションのために自ら英文で用意したペーパーに，若干の訂正と補正を加えたものである。最終の校正にあたっては，オーストラリアのグリフィス大学及びクィーンズランド工科大学ロー・スクール生で本学に留学しているヘーザ・ラータ女史に若干の表現上の示唆をいただいた。感謝の意を表する次第である。本稿は，プレゼンテーションのために用意したものである性質上，またほぼ原文に近い形で紹介するという著者の意図から，依然言い回しその他の上で不適切な点が多々存在し得ることを覚悟の上，国際理解その他何かの参考のためにとここに掲載する次第である。