

## REZENSIONEN

**BEATRICE JAZULOT, *La bonne foi dans les contrats: étude comparative de droit français, allemand et japonais.***

Verlag Dalloz (Nouvelle Bibliothèque de Thèses) (Paris 2001).  
X + 605 pp. 320 F, ISBN 3-247-04375-5

Why is a New Zealander who has migrated to Australia reviewing a book which compares good faith in contract law in France, Germany and Japan? One thread linking all these jurisdictions, with the increasingly bizarre exception of Japan, is that they have acceded to the United Nations Convention on Contracts for the International Sales of Goods (“CISG”). As the author notes at the outset (paras 8, 10-13), as one reason for embarking on her comparative analysis, article 7 (1) of CISG requires it to be interpreted in the light of good faith, but what this means is still open to debate. Commentators from the English law tradition tend to limit its scope of application, influenced by an enduring reluctance to recognise a generalised duty of good faith governing formation and performance of contracts. German commentators often advocate a broader application, unsurprisingly in view of the ways in which *Treu und Glauben* expanded rapidly to fill many perceived voids in the BGB, although the German skill – sometimes, mania – for systemization goes some way towards breaking down this general clause into more manageable and predictable principles. The Code Civil of 1805 made little mention of a broad principle of good faith, and French contract law has maintained a comparatively restrictive attitude.

In the first part of the book, after a historical perspective on the doctrine of good faith dating back to Roman law, the author shows this to be so even regarding performance of contracts (paras 695-785). The restrictive approach of French law is particularly notable in the reluctance to develop good faith as a contract interpretation rule independent of the parties’ intentions (paras 468-474, 587-594). A sharp contrast is drawn with German law, seen to have “generalised” the principle of good faith to general new rules for a myriad of situations. Japanese law has been more restrained, with judges perceived as having focused closely on facts rather than evolving new legal rules when applying good faith. They have generated acceptable results in particular cases, but not permitted elaboration of the content of the good faith principle (para 885). This spectrum also characterises the case law analysed exhaustively in the latter half of the book, bringing in a related debate about “contractual justice”. Interest in a general duty of good faith or similar notions under French law has only made headway since the 1980s

(para 906). Wanton application of *Treu und Glauben* is seen to have led to “contemporary German law being the European system most distant from positivist legal certainty, in the sometimes desperate search for substantive justice” (para 913, quoting *Broggini*, reviewer’s translation from author’s French translation). Since the 1960s, Japanese courts have proceeded “in a relatively measured fashion: judgments are many but limited in absolute numbers, and the invocation of good faith follows certain broad directions which remain identifiable. Good faith is the solution of last resort, that to which one has recourse when all other is impossible, when the situation must be resolved urgently. In this way, it is a veritable guide to the legislator, which is warned by case law based on good faith about the matters into which it must intervene. It is therefore an essential element of contractual justice” (para 910, reviewer’s translation). Thus, in terms of legislation and legal theory, as well as case law, Professor *Frédérique Ferrand* is correct in describing Japanese law as “occupying an intermediate position” (Preface p. X). The divergences therefore remain prominent, despite the author arguing at times that all three legal systems do share common concerns and have points of overlap along both dimensions.

Generally, this work rises successfully to the challenge of comparing more than two jurisdictions, a task central to begin accurately determining where differences and similarities lie among the objects of comparison. In this respect, it is even more impressive than *Guntram Rahn’s “Rechtsdenken und Rechtsauffassung in Japan”*.<sup>1</sup> That also closely examined Japanese civil law (especially its overall methodology), but concluded with some comparisons only with German law, which may have (mis-)led one reviewer to conclude that “Japans Juristen denken anders”.<sup>2</sup> Adding multiple points of reference compounds the effort involved, but the payoffs are usually significant. This reviewer hopes Jazulot will now broaden her comparative compass to bring in more systematically the English and American law approaches to good faith: two very different beasts.<sup>3</sup>

Unlike Rahn’s work, however, this book remains strictly limited to comparing legislation, contract theory, and case law. That strategy is better than “legal orientalism”, a term coined by Veronica Taylor.<sup>4</sup> It has been indulged in by too many continental European commentators (but thankfully less so over the 1990s), and not a few Japanese law professors writing for French audiences. Focusing on “black letter law” is also acceptable if a broader approach to comparing legal systems in socio-economic context is attempted elsewhere, since both are ultimately necessary to any meaningful compara-

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1 Munich 1990.

2 Frankfurter Allgemeine Zeitung, 11 Juni 1990, at 18.

3 L. NOTTAGE, Form and Substance in US, English, New Zealand and Japanese Law: A Framework for Better Comparisons of Developments in the Law of Unfair Contracts, in: 26 Victoria University of Wellington L.Rev. 247 (1996).

4 In her chapter with the same title in her edited collection, *Asian Laws Through Australian Eyes* (Sydney 1997) 47.

tive law methodology.<sup>5</sup> So this reviewer also hopes that Jazulot will now relate her present work to some of the empirical and theoretical work undertaken in related fields in recent years.<sup>6</sup>

If these paths are followed, the notion of a simple convergence of views on good faith in an international instrument like CISG will probably become even more problematic. So too, a ready elaboration of “Common Principles of European Private Law”, a research initiative financed by the European Union (part of the “Training and Mobility of Researchers”) which supported publication of this thesis in book form. None of this is to say such instruments or initiatives are not worthwhile. On the contrary. The point is only that black letter law comparisons should be a necessary first step, but not the end of the story. Hopefully, the emerging globalisation of academic worlds and growing engagement of law with other disciplines will make this more and more feasible over the next few decades.<sup>7</sup>

In the meantime, this book should be bought for any collection of Japanese law materials deserving of that description. It is particularly recommended for those collections whose users are likely to enjoy French academic writing, for its elegance as well as functionality – particularly the fact that most Europeans nowadays, even specialists in Japanese law, are still likely to read French faster than they do Japanese. This book contains a wealth of material that will make it an essential starting point for many areas of research into Japanese contract law, as well as broader comparative research into the good faith principle. Those unfamiliar with French theses, however, should note an idiosyncrasy: the detailed Table of Contents is found only at the very end of the book (pp. 599-605).

*Luke Nottage*

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5 L NOTTAGE, *Convergence, Divergence and the Middle Way in Unifying or Harmonising Private Law*, EUI Working Papers in Law, LAW No 2001/1 (Florence 2001).

6 E.g., S. KITAYAMA, *Keizoku-teki torihiki ni kansuru kokunai ankêto chôsa no kekka* [National Survey Concerning Continuous Transactions] (1997) 627 NBL 11; L. NOTTAGE, *Planning and Renegotiating Long-Term Contracts in New Zealand and Japan: An Interim Report on an Empirical Research Project*, in: *New Zealand L.Rev.* 482 (1997).

7 See generally H. SONO/L. NOTTAGE/T. GINSBURG (eds.), *The Multiple Worlds of Japanese Law: Disjunctions and Conjunctions* (Victoria BC 2001).