REZENSIONEN / REVIEWS

HIROO SONO/LUKE NOTTAGE / ANDREW PARDIECK/KENJI SAIGUSA

Contract Law in Japan

Wolters Kluwer (Kluwer Law International), Alphen aan den Rijn 2019,
263 pp., EUR 85 (Softcover), ISBN: 978-94-035-0741-5

Knowing the Japanese law of contract is of utmost importance for all foreign businesses and legal practitioners engaged in business transactions with a Japanese party or otherwise related to Japan. Yet this is the first monography in English that addresses the whole field of contract law and thus finally and fortunately fills a gap that has persisted for decades.

As a matter of fact, there are numerous other books and articles on Japanese contract law, which the book also itemises in its Selected Bibliography (pp. 255–260) in a quite complete manner,[1] but none is nearly as comprehensive, and certainly not as up-to-date as this book. The book fully reflects the recent reform of contract law and general law of obligations in Japan in 2017, which has just entered into force on 1 April 2020. This makes the publication of this book even more valuable. Naturally, there is an abundance of available resources in the Japanese language. There are also books on Japanese contract law written in German, one which the reviewer has written himself more than a decade ago, but with a limited focus on consumer contracts,[2] and another one that is similarly up-to-date as this book.[3] This, however, does not at all abate the importance of this publication, for most English-speaking persons are not able to use these foreign language resources.

The authors are all renowned experts on Japanese contract law. Hiroo SONO (Hokkaidō University) and Kenji SAEGUSA (Waseda University) are

1 E.g., M. KATO, Contract Law, in: Nottage (ed.), Business Law in Japan (2008) 77–173; W. VISSER'T HOOFT, Japanese Contract and Anti-Trust Law: A Sociological and Comparative Study (2002).

2 M. DERNAUER, Verbraucherschutz und Vertragsfreiheit im japanischen Recht [Consumer Protection and Freedom of Contract in Japan] (2006).

3 S. WRBKA, Grundzüge des Vertragsrechts von Japan: Vertragsrecht und Vertragsgestaltung [Basic Features of Contract Law in Japan: Contract Law and Contract Form] (2019).

professors for contract law and other subjects at prestigious universities in Japan. Luke NOTTAGE from Sydney Law School, who specialises inter alia in contract law and consumer product safety law, is founding Co-Director of the Australian Network for Japanese Law (ANJeL) and has published extensively on contract law and various other topics of Japanese law for more than twenty years. Andrew PARDIECK is Associate Professor at the Southern Illinois University School of Law with publications in particular on contract law and financial markets' regulations in Japan.

The book was published as one volume in the International Encyclopaedia of Laws/Contracts series and therefore had to follow the structure and length of other monographs in the series. Some structural matters that will be criticised below may have resulted mainly from this publishing format that also might not be fully suitable to address Japanese contract law.

The book begins with a short General Introduction to the Japanese legal system (pp. 23–38) and to the basic features of Japanese contract law (pp. 39–50), followed by the main part, which itself is divided into a general Part I (General Principles of Contract, pp. 39–166) and a Part II on the regulation and practice in regard of various specific types of contracts and so-called "quasi-contracts" (Specific Contracts, pp. 167–253). The book is supplemented by short biographies of the authors (pp. 3–5), a Table of Contents (pp. 7–17), a List of Abbreviations (pp. 19–20) and a Preface (pp. 21–22), at the end by the mentioned Selected Bibliography on Japanese contract law (pp. 255–260) and an Index (pp. 261–263). The Table of Contents could have been a little bit more clearly arranged. The Selected Bibliography is comprehensive and thus quite useful for readers that want to further explore a specific topic, notwithstanding that the list of books and articles can also be found in a more general bibliography on Japanese business law, separately published, which has been co-edited by one of the authors of this book.[4]

In the General Introduction, the authors start with a short overview about the legal history of Japan and an evaluation in regard of the question to which legal family Japan belongs. Since two of the authors have a common law background and the other two have a scholarly interest in Anglo-American law for comparative purposes, some further issues discussed here are mainly looked upon through the lens of a common law jurisdiction, such as the question what sources of law are recognised in Japan, involving the relationship between legislation and court decisions. Since historically the Japanese legal system has been mainly influenced by continental European jurisdictions, such as Germany and France, it is apparent that Japan shares

4 H. BAUM / L. NOTTAGE / J. RHEUBEN / M. THIER, Japanese Business Law in Western Languages. An Annotated Selective Bibliography (2nd ed. 2013).

the civil law tradition's emphasis on the primacy of legislation over case law applications by the judiciary, and that it does not recognise a doctrine of *stare decisis*, as the authors correctly observe (p. 26). On the other hand, the brief overview on the formal structure of the judiciary in Japan (pp. 27–28) offers no conclusion as to whether Japan in this regard follows more a common law or civil law tradition.

The authors then emphasise that public law has an impact on private law relations such as contracts only in exceptional cases. This is a quite important aspect and sometimes overlooked in English language literature on Japanese law. Some common questions in this regard are, whether constitutional rights and a violation of administrative law provisions can have an effect on the validity of contracts (Art. 90 Civil Code), as discussed on pp. 28–29 and later on in the main part of the book on pp. 81–82. A similar aspect, as to whether the violation of administrative law provisions could give rise to claims based on tort (e.g. Art. 709 Civil Code), could have given slightly more attention, since there are many such provisions regulating contract formation for the purpose of protecting one of the contracting parties. Possible consequences for the validity of the contract in cases of a collision with human rights guaranteed under the Japanese Constitution, are briefly mentioned (p. 29).

Not fully clear is what the authors mean when they vaguely state that "Japan follows the German rather than the French tradition in not distinguishing between contracts concluded by the government or public authorities compared to those involving private parties." (p. 28) They also do not clarify this issue later in the book in their analysis of government contracts as a specific type of contract (pp. 241–242). German law recognises agreements between public authorities etc. and private parties either as administrative contracts or private law contracts, depending on its purpose. Similarly indistinct appears the reference to "the emergence of hybrid private and public contracting patterns in Japan" (p. 29). If there are specific hybrid private-public law contracts in Japan, it might have been useful to explain these in more detail. In addition to the distinction between public law and private law, the authors also point to the distinction between contract law and property law (p. 45), civil law and commercial law (pp. 30–31), and between civil law and consumer contract law (pp. 32–33). Very informative is the short section at the end of the General Introduction dealing with the function and perception of the use of contracts in Japan (pp. 34–37), in particular for readers not particularly familiar with this topic.

On the whole, the General Introduction provides the reader with a generally well-written summary of the basic features of the Japanese private law system and the law of contracts.

Part I of the main part of the book (General Principles of the Law of Contract) deals with what would be in Japan called "General Contract Law"[5]. Here the authors describe in detail all main aspects of general contract law: the formation of contracts (pp. 51–70), the conditions for its substantive validity, distinguishing between the capacity of the parties to act (pp. 71–72), defects of consent (pp. 73–81) – including instruments to warrant procedural fairness –, issues of illegal and unfair contents (pp. 81–84), as well as the different legal consequences in the various cases (pp. 84–86). Furthermore, Part I also analyses other issues as regards the contents of a contract, such as the interpretation of contracts (pp. 93–94), the regulation of standard terms of business (pp. 89), specific contract clauses that cause particular problems, such as penalty clauses and arbitration clauses (pp. 87–92), and contracts concluded under certain conditions and time limits (pp. 94–96). In addition, the authors here discuss the various interactions between contracting parties and third parties despite the privity of contract principle (pp. 98–128), the various ways to terminate a contract, including a termination of some types of continuous contracts that often cause particular problems (pp. 129–141), and remedies for a breach of a contract (non-performance) (pp. 142–166).

The section on the formation of contracts refers to all related aspects, in particular the basic principles of contract law such as freedom of contract, offer and acceptance as corresponding declarations of intent to enter into a contract (pp. 51–55), situations in which it appears to be difficult to identify such declarations of intent (e.g. realising intentions, invitations to make offers, pp. 55–58), formal requirements for a valid contract (including notarisation requirements), and issues of pre-contractual liability (*culpa in contrahendo*) (pp. 58–70). Particularly informative and well-written is the part on the traditional use of seals in Japan as confirmation of an intent to enter into a contract (pp. 60–62). The only question that is not addressed here is, whether a contract is considered to be concluded if the official and registered seal mark is added to a contract, but by a different person than the seal owner, and under what further conditions. For readers with a common law background, the authors point out that a consideration is generally not required for the conclusion of a contract (p. 56), but that there are some exceptional cases where Japanese law also requires the parties to demonstrate their seriousness in entering into agreements, for instance real contracts such as gift contracts and loan for use contracts which can be rescinded if not in writing until the concerned object has been handed over to the other party (pp. 57, 62–63).

Under "Defects of Consent" (Part I. Chapter 2, § 2, pp. 73–81), the authors comprehensively analyse not only the traditional instruments in the

5 契約総論 *keiyaku sōron* or 契約法総論 *keiyaku-hō sōron*.

Civil Code such as mistake, fraud (fraudulent misrepresentation) and duress, but also special instruments in the Consumer Contract Act for the protection of consumers (at pp. 79–81: special concepts of fraudulent misrepresentation and duress for consumer contracts). Similarly, in the following section on material conditions for the validity of contracts, in addition to illegality of contracts, contracts contravening public policy and contracts revealing a gross disparity (mostly in reference to the general provision Art. 90 Civil Code), the authors also include the special instruments of the Consumer Contract Act that allow a control of unfair terms in consumer contracts (pp. 83–84). A little bit later, in a different section on further issues regarding the contents of a contract, the authors also address the new regulations for standard terms of business (at p. 89) (Art. 548-2–548-4 Civil Code) introduced to the Civil Code through the recent reform of the law of obligations. The reviewer would have appreciated if the relation between those two instruments had been more emphasised, since both refer to a legal control of unfair clauses in a contract and to the question whether individual clauses of a contract can be rendered (partly) invalid.

The section on "implied terms" of a contract (p. 88) again is particularly written for readers with a common law background. Legal doctrine in Japan would rather address the discussed matters from the viewpoint of the functions of mandatory and non-mandatory rules in the Civil Code (or other laws) or as issues of contract interpretation. Contract interpretation is dealt with separately in this book (at pp. 93–94). From the viewpoint of Japanese law, one also would have expected to find the discussion on the handling of "entire agreement clauses" in the section about contract interpretation. Instead, the authors chose to discuss this issue separately (at p. 63) under the heading "Parol Evidence Rule", probably again with a reader with a common law background in mind. Apart from this, the reviewer was delighted to find some references to Japanese court decisions on entire agreement clauses cited by the authors, of which he was not aware of.

Very concisely written is Chapter 4 on the rule of privity of contract, also understood as the relativeness of contractual relations, not extending to third parties (pp. 98–128). Here the general rule and its exceptions are accurately described, including the recently introduced provisions on the general conditions for a change of a party to a contract (transfer of contract, Art. 539-2 Civil Code, at p. 113), the special provisions with regard to the change of a party to a real property lease contract (Art. 605-2–3 Civil Code, at p. 113, and further on p. 207), and – at least mentioned – the provision that gives a real property tenant a direct claim against third parties who impede and disturb the tenant in using the leased property, derived from the lease contract (Art. 605-4 Civil Code, at pp. 103, 105). These new provisions, however,

mainly represent the hitherto case practice of the courts in Japan, and thus do not significantly change the legal situation as such.

In Chapter 5 (Termination of the Contract), the authors provide a very good summary of the problems involved in the termination of continuous contracts (at pp. 136–138). For foreign companies engaged in franchise or distribution contracts with Japanese companies it is very important to know the particular Japanese view on this matter, which often confuses foreign parties.

Chapter 6 discusses the remedies for the creditor in case of non-performance of contractual obligations[6] (breach of contract) (pp. 142–166). At a different location in Chapter 5, the authors already define this term as representing a unitary concept including in particular delay, impossibility and incomplete performance (at p. 136), later adding non-conformity (non-conforming performance[7] (p. 142 etc.), which however is only a special form of incomplete performance, used in regard to certain types of contracts, such as for instance sales contracts, contracts for work and generally contracts for value (Art. 559 Civil Code). Despite the unity of this concept, which allows the application of certain provisions (e.g. Art. 415 Civil Code on damage claims) in regard to all forms of breach of contract through the use of the broad term "non-performance" (債務(の)不履行 *saimu (no) fu-rikō*), a little doubtful is the author's further statement that the "distinction…" between the different forms of non-performance, "…which existed…prior to the 2017 revision is abandoned." There are still different conditions for confirming a specific form of non-performance, and the available remedies in each case can also differ. As specific types of remedies, the authors distinguish correctly between self-help remedies, meaning remedies the creditor can fully exercise on his own, and all other remedies. As self-help remedies the book mentions the defence of simultaneous performance, the right of retention in regard of a specific thing, and set-off (at pp. 142–146). Set-off could have been also discussed under the topic discharge of obligations in Chapter 5, but is indeed better suited to be discussed here in the chapter on remedies for non-performance. In the context of non-performance, however, the other remedies are in the primary focus. The authors discuss as such the claim for specific performance and substitute claims, the cancellation of the contract, the claim for damages (in cases of a debtor's fault), the cure of non-conformity (e.g. by repair of the delivered item), and price reduction in all relevant aspects.

The authors also analyse the role of third-party assistants on side of the debtor (person assisting performance) with regard to performance and lia-

6 A part of the discussed legal provisions in this regard however do of also apply to non-performance of other obligations not deriving from a contract.

7 内容に適合しない *naiyō ni tekigō shinai* (不適合 *fu-tekigō*).

bility for non-performance (at pp. 113–114, 154), mentioning also the German origin of the concept in Japanese law (履行補助者 *rikō hojo-sha*; in German "*Erfüllungsgehilfe*"). In this context, the authors claim that the conditions for a liability of the debtor for an act of the assistant causing the non-performance (by negligence/fault) had changed through the 2017 reform of the law of obligations, by amendment of Art. 415 Civil Code. This is at least doubtful. Art. 415 Civil Code only regulates the general conditions for a claim of the creditor for damages in case of non-performance of the debtor. It does not refer to the assistant at all. The authors also do not cite any authority for their opinion. They only refer to academic legal doctrine before the reform. Already before the reform, however, the courts concordantly accepted a very broad responsibility of the debtor for acts of their assistant, and left the debtor hardly any chance to escape from liability. In view of the prevailing view among courts and legal doctrine on a likewise broad liability in tort for acts of an assistant under Art. 715 Civil Code, recognising a broad responsibility of the debtor for acts of their assistant is only consequent.

Some aspects discussed in Part I seem to transcend the limits of contract law. For instance, the authors discuss in detail the rules for the assignment of receivables (claims) (pp. 106–113). The assignment of receivables certainly requires an agreement (*in personam*) between assignor and assignee (a contract), but this is only one precondition for the disposition (transaction *in rem*) (物件行為 *bukken kōi*, 処分行為 *shobun kōi*) of a receivable. The rules on assignment of receivables in the Civil Code (Art. 466 to 472-4 Civil Code) focus mainly on the conditions for the material transfer of rights *in rem*, but not on the contractual transaction that creates the obligation to transfer (assign) the receivable (the cause, or "*causa*" in Latin) and which is the actual subject matter of contract law. Moreover, the rules on assignment do also apply to non-contractual receivables. If one considers the law of assignment as part of contract law, then the law of property and the transfer of all types of rights would likewise constitute parts of contract law. Similarly, the authors also discuss the creditor's subrogation right (債権者代位権 *saiken-sha dai'i-ken*, Art. 423 et seq. Civil Code) and the creditor's right to rescind fraudulent acts of the debtor (詐害行為取消権 *sagai kōi torikeshi-ken*, Art. 424 et seq. Civil Code) (pp. 115–126) to secure performance of an obligation by the debtor. These instruments, however, serve to secure all kinds of obligations, not only contractual obligations. In Part II (on) Specific Contracts, there are some further sections dealing with aspects that are no core components of contract law, for instance Chapter 9 on Pledge (pp. 233–235). As the authors correctly state, pledge is a possessory security right, a right to secure performance of an obligation (e.g. of a pecuniary obligation). The obligation to be secured does not need to be based on a contract, though this is often the case. Moreover, the pledge – like the assignment of a receivable – is mainly a

disposition, a transaction *in rem* of a right. That is why it is regulated not in Part III (Book III) of the Civil Code ("Obligations"), but in Part II (Book II) entitled "Real Rights" (in Art. 342–368 Civil Code). Admittedly, the disposition itself is also kind of an agreement, but not an agreement *in personam*, but *in rem*.[8] As always in cases of providing a collateral to secure an obligation, there is also an agreement *in personam* on the creation of a pledge as the cause for the disposition *in rem*, but this agreement *in personam* is not expressly regulated in the Civil Code as a specific contract under the law of obligations in Part III (Book III) on obligations. Finally, in Part II (Chapter 13) the book also deals with obligations arising from *negotiorum gestio* (management of another's business) and unjust enrichment (pp. 250–253) as their cause of origin. The designation of these two causes as "*quasi-contracts*" cannot conceal that they do exactly not involve any contract. And the general law of unjust enrichment at present also does not govern the restitution in case of a void contract anymore. As the authors have correctly observed, the recent reform of obligations has introduced a special provision for this purpose in Art. 121-2 Civil Code, which was already mentioned on p. 85 (Part I) and did not necessarily need to be repeated on p. 252. The mentioned parts nonetheless are certainly very informative and accurately written, but one would have rather expected to find them only in a more general book on Japanese civil law, not particularly in a book on contract law, or at least not in such detail.

Some other aspects discussed in Part I and II of the book, such as the various grounds for discharge of obligations, e.g. performance, release and set-off (pp. 129–136, 142–145) – which also apply to other than contractual obligations –, the rules on agency (pp. 167–175), and product liability issues (pp. 126–128), are also technically not parts of contract law, but of the broader field of the law of obligations. Nonetheless, they are indeed very closely related to the contractual issues discussed and the information given thus quite useful also in the broader context of contract law.

In Part II, the book describes in detail a great number of contract types expressly regulated by the Civil Code (pp. 167–249) and government contracts (Chapter 11). The explanations are generally very precise and well-written, and the authors have probably addressed all important issues currently discussed. Where special laws are applicable in addition or instead of the provisions of the Civil Code, the authors have referred to and analysed them too, while the extent of this analysis differs a little bit depending on how important the authors found the matter.

A little bit odd though appears the classification of "agency" (Chapter 1) as one type of specific contract. The concept of agency in Japanese civil law

8 This applies also for the mentioned assignment, the act *in rem* to transfer a receivable.

is not represented by one single contract. Traditionally, it involves the legal relationships between the agent and principal and the relationship between the principal and a third party towards whom the agent may use the power of agency. Between the agent and the third party there is usually no specific relationship. The legal relationship between principal and third party can be any type of contract. The legal relationship between the principal and the agent usually consists of a mandate to negotiate and enter into an agreement with the third party.[9] The mandate can be also part of a broader non-gratuitous contract to manage the business of another or a similar type of contract. The conferment of authority to act as agent is either regarded as a separate unilateral act of the principal (maybe the prevailing view) or a separate contract on the conferment of the authority between principal and agent. Certainly, the power of agency is usually conferred within the framework of the mandate, but the conferment is not identical with the mandate agreement. On the other hand, mandates should have better treated in a separate chapter, not as a section of Chapter 1, as mandates can be also used as a commission to carry out factual acts, as the authors have correctly stated (p. 176), and then no power of agency is required or present. Mandate is also a specific type of contract expressly regulated in a separate chapter in Part III (Book III) of the Civil Code (Art. 643–656), like others such as the sales contract.

One would have certainly wished the authors had even extended their analysis in detail to some further types of contracts that are very important in legal practice (e.g. license agreements, franchise agreements), but this was probably not possible under the publishing format of the book.

Despite some critical remarks, on the whole, the book provides a wonderful overview on contract law: reliable, well written and entirely up-to-date. It can without any reservation be highly recommended to practitioners in law offices and enterprises and academics seeking reliable information about details of Japanese contract law and related matters.

Marc DERNAUER*

9 Or to carry out a juristic act other than a contract for the principal.

* Prof. Dr. iur., LL.M. (Tōhoku University, Japan), Chūō University, Faculty of Law.