REZENSIONSAUFSATZ / REVIEW ESSAY

Studies in the Contract Laws of Asia, Volumes I–III

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This review surveys the first three[1] of six proposed volumes on *Studies in the Contract Laws of Asia*, part of an excellent large-scale project effectively comparing contract law in detail across multiple Asian jurisdictions. The core for comparison comprises nine jurisdictions, including Japan, Singapore and Thailand, plus four (somewhat variable) additional member states of the Association of Southeast Asian Nations (ASEAN). The lead editor, Mindy CHEN-WISHART, and other editors and several contributors share connections with Oxford University and/or the National University of Singapore (NUS).[2] The project had significant funding from the government of Singapore, which also supports a new institute including senior judges and others aimed at harmonising business laws across Asia – including ASEAN.[3]

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1 Studies in the Contract Laws of Asia, Oxford, Oxford University Press:
Mindy CHEN-WISHART / Alexander LOKE / Burton ONG (eds.), Remedies for Breach of Contract, Vol. I (2016), £97.00.
Mindy CHEN-WISHART / Alexander LOKE / Stefan VOGENAUER (eds.), Formation and Third Party Beneficiaries, Vol. II (2018), £110.00.
Mindy CHEN-WISHART / Stefan VOGENAUER (eds.), Contents of Contracts and Unfair Terms, Vol. III (2020), £125.00.

2 Introduction, in: CHEN-WISHART / LOKE / ONG (eds.), *supra* note 1, 1, 20.

3 ASIAN BUSINESS LAW INSTITUTE, Providing Practical Guidance on and Promoting the Convergence of Asian Business Laws, *https://abli.asia/Introduction*.

Several editors or authors were also involved in a project to develop *Principles of Asian Contract Law* (PACL). The concept for the latter came from the *Principles of European Contract Law* (PECL), in turn inspired by the UNIDROIT Principles of International Commercial Contracts (PICC), for which Stefan VOGENAUER (co-editor of two of these three volumes) has also edited an authoritative commentary.[4] The PACL initiative got underway from 2009, with the developments of draft contract law provisions around 2012,[5] but progress has slowed.

The present book project is therefore most reminiscent of another project that emerged in Europe after PECL, as an alternative pathway perhaps to a pan-European codification of contract law: the "Draft Common Frame of Reference" (DCFR).[6] Developed mainly by legal academics but with some support from European Union (EU) institutions, the DCFR provided more detail and background to national contract laws than the commentary to PECL, and so identified perhaps more areas of continued divergence. This could explain why the DCFR attracted some criticism and has not developed into a formal codification for Europe. Yet it still serves as an important reference point for comparative research in contract law.

Somewhat similarly, this project generating multiple books since 2016 on contract law across Asia, and bringing together a large group of Asia-based law professors, should usefully complement the PACL project. A pan-Asian Contract Law Code seems even less likely than Europe, given the greater socio-economic and political differences across the Asian region and the relative lack of supranational harmonisation mechanisms compared to the EU. Yet this book project could also helpfully add further comparative reference material for law reformers engaged in contract law reforms in individual Asian jurisdictions, whether as part of a Civil Code reform or otherwise. However, the volumes so far and in press are coming out after the deliberations have been largely concluded for new contract-related provisions in the Civil Code of Japan (2017) and the People's Republic of China (2020).[7]

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4 S. VOGENAUER, Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC) (2nd ed., 2015).

5 S. HAN, Principles of Asian Contract Law: An Endeavour of Regional Harmonisation of Contract Law in East Asia, Villanova Law Review 58 (2013) 589; N. KANAYAMA, PACL (Principles of Asian Contract Law), in: Jaluzot (ed.) Droit japonais, droit français, Quel dialogue? [Japanese Law, French Law, What Dialogue?] (2014) 185.

6 See generally N. JANSEN / R. ZIMMERMAN, "A European Civil Code in All but Name": Discussing the Nature and Purposes of the Draft Common Frame of Reference, Cambridge Law Journal 69(1) (2020) 98.

7 On Japan's protracted Civil Code amendment process, which included significant comparative law analysis including initially to PICC but with emphasis more on con-

Hugh BEALE's Foreword to the first volume also mentions that this book project adopted a "functional approach", in the sense of one that "cuts through differences in terminology and concepts in order to compare concrete outcomes, […] to compare solutions to 'real life' issues".[8] This is also reminiscent of earlier comparative law methodology derived from Europe, including the "common core" approach aimed at harmonising contract law across the EU. It likewise raises the critique of how broadly to define the "function" of contracting, especially whether to go beyond all "law in books" and consider whether and how transactions may be planned and disputes resolved based on other norms and practices (the "law in action").[9] The editors and authors of these volumes – except perhaps the third, as mentioned below – do not venture much into the realm of how contracts function in that broader sense, even though it remains a widely-discussed and important issue say in Japan.[10] Gaps between legal solutions and contract "in action" may be even more pervasive in Asian jurisdictions with less effective courts (as noted for India) or legal professions. Perhaps future volumes in this book series, including especially the fifth in planning on *Ending and Changing Contracts* mentioned in BEALE's Foreword,[11] can add more empirical or even anecdotal evidence regarding such dimensions of both practical and theoretical interest.

In the excellent concluding chapter for the first volume, CHEN-WISHART acknowledges that issues such as potential divergences between the law in books and the law in action "are beyond the scope of the present general

tinental European codifications, see generally eg S. KOZUKA / L. NOTTAGE, Policy and Politics in Contract Law Reform in Japan, in: Adams / Heirbaut (eds.), The Method and Culture of Comparative Law (2014) 235, *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2360343*; and S. KOZUKA, Between Globalisation and Localisation: Japan's Struggle to Decently Update the Civil Code, in: Graziadei / Zhang (eds.), The Making of the Civil Codes (forthcoming). For a succinct assessment of the outcomes, see M. DERNAUER, The 2017 Reform of the Law of Obligations in Japan: Impetus, Rulemaking Process, and Outcome (2018) via *https://www.anjel.com.au/research*; Some Observations on Japan's Reform of the Law of Obligations: Much Ado About Nothing?, Hōgaku Shinpō 127(5 and 6) (2021) 35–58.

8 Foreword, in: CHEN-WISHART / LOKE / ONG (eds.), *supra* note 1, vii.

9 L. NOTTAGE, Convergence, Divergence, and the Middle Way in Unifying or Harmonising Private Law, Annual of German and European Law 1 (2004) 166, manuscript at *https://ssrn.com/abstract=837104*.

10 See for example A. M. PARDIECK, Layers of the Law: A Look at the Role of Law in Japan Today, Pacific Rim Law & Policy Journal 22 (2013) 599.

11 Compare eg L. NOTTAGE, Planning and Renegotiating Long-Term Contracts in New Zealand and Japan: An Interim Report on an Empirical Research Project, New Zealand Law Review 1997, 482, also at *https://ssrn.com/abstract=839064*.

overview but would be excellent subjects for future research".[12] The narrower functional approach adopted instead follows the classic approach of Zweigert and Kötz, going behind doctrinal categories to investigate how each jurisdiction addresses assumedly similar legal problems, and indeed often reaches similar results – thereby generating a "presumption of similarity". CHEN-WISHART argues that this is "broadly true of the law on remedies for breach of contract" and that such "functional comparisons and the 'presumption of similarity' are vital bases for regional harmonization projects in Asia and elsewhere".[13]

I. REMEDIES FOR BREACH OF CONTRACT: PROTECTING THE PERFORMANCE INTEREST

The rest of CHEN-WISHART's concluding chapter in this first volume comparing remedies also succinctly sets out the common law and civil law "geneologies" of the Asian jurisdictions covered, which will be particularly useful for those unfamiliar with their legal history. It then focuses on identified "conceptual differences and functional similarities" in protecting the performance interest in contract law, primarily through either orders for specific performance or through awarding damages. For example, CHEN-WISHART notes that:[14]

> "The starting point of civil law reasoning is that performance should be the primary response to non-performance since it is constituent of, inherent in, or intrinsic to the contractual right or obligation itself; its essence is not rooted in the idea of *liability* for breach. Consequently, it is foreign to regard performance as a 'remedy', connoting something external to the right. This is reinforced by the principle of *pacta sunt servanda* and the underlying moral idea that promises should be kept. In contrast, common law jurisdictions treat damages as the primary *remedy* (rather than *right*)."

She explains that the latter view is rationalised partly due to historical path-dependence (courts of common law versus equity) but also a more pragmatic approach (with one author even hinting at "the common law's aversion to moralism") alongside "arguments based on efficiency, the avoidance of constant supervision, and the personal liberty of the debtor". CHEN-WISHART

12 M. CHEN-WISHART, Comparative Asian Contract Law on the Remedies for Breach of Contract: Transplant, Convergence, and Divergence, in: Chen-Wishart / Loke / Ong (eds.), *supra* note 1, 400, 407.

13 *Ibid.*, 406, referring to K. ZWEIGERT / H. KÖTZ, An Introduction to Comparative Law (3rd ed., 1998). Compare the general critiques of such functionalist approaches to comparative law outlined in R. MICHAELS, The Functional Method of Comparative Law, in: Reimann / Zimmerman (eds.), The Oxford Handbook of Comparative Law (2nd ed., 2019).

14 *Ibid.*, 407 (original emphasis).

goes on to acknowledge that this "fundamental difference in starting points explains some differences in the *structure* of common law and civil law jurisdictions, such as the prioritization of "continuation of the contract over its break-up" (eg by requiring notice before termination in most cases, or giving cure-oriented remedies) as well as "the prima facie enforceability of agreed *penalties* (as opposed to liquidated damages) clauses in the civil law jurisdictions" covered, including Japan.[15]

However, CHEN-WISHART then argues that only Taiwan seems to significantly back up this conceptual primacy given to the remedy of specific performance. She points out that the other Asian jurisdictions (like Japan) give the creditor (innocent party) the choice instead of damages, and that even if specific performance is claimed against the debtor (breaching party) the remedy is unavailable if performance is impossible or the nature of the obligation does not permit enforcement (eg for continuing contracts, for which the common law would also not allow specific performance due to the need for constant supervision by the courts). CHEN-WISHART also argues that in "*in practice*, creditors have many practical reasons to opt for damages",[16] in the surveyed civil law jurisdictions, and that the application of a general principle of good faith reduces the gap created by common law's bar to specific performance if the court finds damages to be an adequate remedy. An example is where the cost of curing a defective performance (such as a swimming pool built a little too shallow) is disproportionate to the benefit the creditor will obtain by the cure (rebuilding it to the correct depth). She notes for example from Kunihiro NAKATA's chapter on Japan that the 2013 Interim Draft for Civil Code revisions proposed to bar specific performance when "expenses required for performance are considerably excessive in comparison to the profit earned by the creditor from the performance".[17]

However, Japan's Code amendments actually enacted in 2017 dropped this express qualification, leaving a more general limitation: "If the performance of an obligation is impossible in light of the contract or other sources of claims [*saimu*] and the common sense in the transaction [*torihiki-jō no shakai tsūnen*], the obligee [*saiken-sha* or creditor] may not request the performance of the obligation" (Art. 412-2(1) Civil Code).[18] Oth-

15 *Ibid.*, 408 (original emphasis).

16 *Idem* (original emphasis).

17 *Ibid.*, 409, referring to Performance and Monetary Remedies for Breach of Contract in Japan, in: Chen-Wishart / Loke / Ong (eds.), *supra* note 1, 107.

18 See the (de facto official) translation of Japan's revised Civil Code, Parts I–III, at *http://www.japaneselawtranslation.go.jp/law/detail/?ft=2&re=2&dn=1&yo=Civil+Code&x=0&y=0&ia=03&ja=04&ph=&ky=&page=2*.

er key provisions of the revised Code adopt a similar formulation, directing focus on both the contract terms and purpose (preferred perhaps by larger companies and their law firms) and typical transactional norms expected in society (preferred perhaps by contract parties with less bargaining power and their legal advisors). It remains to be seen how the courts will balance both considerations.[19] Nonetheless, drawing partly on the Code reform deliberations including the Interim Draft, commentators do expect that "performance where its costs are disproportionately large in relation to its benefit is likely to be considered impossible",[20] thus disallowing claims for specific performance.

CHEN-WISHART also later notes that the good faith principle is:[21]

> "pressed into service in China, Korea, Taiwan and Thailand to empower courts to reduce the agreed sums if they are too high. The Japanese [Civil Code, however,] is more rigid. Article 420 expressly empowers part to agreed on compensation for non-performance and stipulates that 'the court cannot increase or reduce the amount'. Nevertheless, there remain limited ways to reduce avoiding unfair agreed damages clauses [referring to NAKATA's discussion of public policy, consumer protection and comparative negligence], and the *Interim Draft* reform document proposes the deletion of the quoted part of article 420, presumably with the effect of empowering courts to review the fairness of such terms. This would bring the Japanese position into line with the other civilian jurisdictions and with the PICC and DCFR, which have also incorporated safeguards against unfair agreed damages clauses."

The deletion was indeed made in the 2017 Code amendments. However, commentators still do not expect the courts to have the power under this

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19 Japanese courts have long been sensitive to the weaker party in contractual relationships, including in commercial contexts, for example by deploying the good faith principle (Art. 1(2) Civil Code). One example comes from cases involving franchisees and distributors: V. L. TAYLOR, Continuing Transactions and Persistent Myths: Contracts in Contemporary Japan, Melbourne University Law Review 19 (1993) 352; H. SONO / L. NOTTAGE / A. M. PARDIECK / K. SAIGUSA, Contract Law in Japan (2019) paras. 422–425. Examples include lessees, even in commercial contexts (PARDIECK, *supra* note 10). More recently, albeit underpinned by multiple legislative interventions, this judicial concern has spilled over to consumer protection: see for example M. DERNAUER, Verbraucherschutz und Vertragsfreiheit im japanischen Recht (Studien zum Ausländischen und Internationalen Privatrecht) [Consumer Protection and Freedom of Contract in Japanese Law (Studies on Foreign and International Private Law)] (2006); L. NOTTAGE, Consumer Rights in Japan, in: Haghirian (ed.) Japanese Consumer Dynamics (2010) 31; and A. KARAISKOS, Consumer Disputes and Consumer Dispute Resolution in Japan, Journal of Law and Society (JUUM) 21 (2017) 1, at *https://www.researchgate.net/publication/326206574_Consumer_Disputes_and_Consumer_Dispute_Resolution_in_Japan.*

20 SONO et al, *supra* note 19, para. 454.

21 CHEN-WISHART, *supra* note 12, 413 (citations omitted).

particular provision to increase or decrease the agreed sum, although public policy (Art. 90 Civil Code) might still make the provision wholly or partially void.[22]

CHEN-WISHART's comparative conclusion further suggests that there is less divergence in fact with Asian common law jurisdictions regarding the civil law's requirement of fault in order to claim damages and termination for breach (but not specific performance). She points out that the typically strict liability approach to all breaches (say for imperfect delivery under a sales contract) under the common law, along with the United Nations Convention for Contracts for the International Sale of Goods (CISG) and PICC, is tempered by the "frustration doctrine (akin to a *force majeure* doctrine) [which] discharges the contract on the occurrence of an unforeseen event that renders the performance of a contract impossible or radically different; consequently, no remedies for breach are available".[23] She goes on to argue that:[24]

> "While the notion of 'fault' seems to impose a significant threshold to accessing damages and termination in civil law jurisdictions, the final result is not too different from the common law, for the threshold of 'fault' is actually set very low. The Japanese [Civil Code, Article 415] refers to 'fault' in terms of non-performance due to 'reasons attributable to the debtor'. Non-attributability (ie absence of 'fault') designates non-performance due to the actions of the creditor or third parties, or to *force majeure* (including government intervention); this seems to cover broadly the same ground as the frustration doctrine and the causation requirement at common law. Attributability (or 'fault') designates non-performance due to the debtor's intentional or negligent default. But this is not the tortious notion of 'fault'; rather, it refers to the assumption of risk of the supervening event happening in the light of the purport of the contract. Framed in these terms, the approach is entirely consistent with the common law approach based on contractual interpretation or implied terms."

CHEN-WISHART analysis refers to NAKATA's chapter on Japan, and those for Taiwan and Korea, but notes that the latter chapter (by attorney Tae-Yong AHN) "stresses that the convergence is not exact, for there may be circumstances where a debtor would be exempt under fault liability but not under frustration or *force majeure*".[25] That qualification also seems true for Japan, for example, as it could allow an excuse for pure commercial impracticability (such as a dramatic increase in production costs for the seller, not linked say to any government intervention) whereas this has almost never been permitted by (at least English sub-tradition) common law courts.[26] However,

22 SONO et al., *supra* note 19, para. 505.
23 CHEN-WISHART, *supra* note 12, 411.
24 *Idem* (citations omitted).
25 *Ibid.*, 412.
26 L. NOTTAGE, Changing Contract Lenses: Unexpected Supervening Events in English, New Zealand, U.S., Japanese, and International Sales Law and Practice, Indi-

there may be more convergence in another respect. When asserting a frustration defence in a common law court, the debtor bears the burden of proof in a common law court. In Japan, for a tort claim based on fault (under Art. 709 Civil Code), the injured party would normally bear the burden of proof. However, NAKATA points out that for contractual "non-performance, due to the fact that the debtor bears the original obligation to perform, the debtor is required to prove that there are no reasons attributable to it" (such as a natural disaster or other force majeure event) to avoid liability.[27] This does still leave the question of what the standard of proof is for civil claims and defences. Civil law jurisdictions like Japan generally maintain a higher standard (closer to beyond reasonable doubt) compared to common law jurisdictions (the balance of probabilities).[28]

NAKATA indeed elaborates that:

> "Japanese judicial practice does not actually follow the principle of fault liability. If Japanese judges draft their decisions according to the theoretical framework of the traditional commonly accepted requirement of fault, this should mean that the debtor does not bear liability for non-performance if he is not at fault. However, Japanese courts have held that if the date agreed under the contract has elapsed without performance by the seller, the seller must compensate the buyer even if the delay results without any fault on the seller's part. There are cases where the seller is exempted from liability to pay damages. But the decisions in those cases are not based on the issue of fault, but on whether the seller-debtor has assumed the risk of circumstances happening that prevented performance; the issue what judgment would be appropriate in light of the contract's purport. This means that those decisions do not constitute judgments on fault."

Nakata adds the Interim Draft aimed to reflect this judicial practice, by similarly exempting liability only if "in light of the purport of the contract, it is not suitable to demand the debtor to perform its obligations".[29]

Again, however, the 2017 revisions backtracked from this position, perhaps thereby further opening the scope for the debtor to establish an exemption from damages. Compensation is not payable if the misperformance

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ana Journal of Global Legal Studies 14 (2008) 385, also at *https://ssrn.com/abstract=1105240*.

27 Comparative Asian Contract Law on the Remedies for Breach of Contract: Transplant, Convergence, and Divergence, referring to NAKATA's Performance and Monetary Remedies for Breach of Contract in Japan.

28 See generally K. M. CLERMONT, Standards of Proof in Japan and the United States, Cornell International Law Journal 37 (2004) 263. CHEN-WISHART, *supra* note 12, 428, remarks that procedural law concerning enforcement of performance orders (such as imprisonment) potentially impacting on the scope of the performance remedy would be a useful future research agenda. In addition, the outworkings of differences in the standard of proof expected in contract law cases would also be fruitful.

29 *Supra* note 27, 115.

is due to grounds not attributable to the obligor (a) "in light of the contract or other sources of obligation" but also (b) "the common sense in the transaction". Commentators note conflicting views on how these two factors should be weighed by future courts:[30]

"One view considers that (b) the 'general sense of trade' is a subfactor in determining the aim of the contract (because contractual obligation is determined not only in accordance with the subjective intent of the parties but also to the nature, purpose and history of the contract), and thus 'contract' is the controlling element. Another view considers that the two are independent factors, one that focuses on the aim of the contract, while the other focuses on extra-contractual reasonableness."

The former view is more in the (especially English variant) common law tradition, oriented towards formal reasoning. The latter view would be more consistent with an approach traditionally taken by Japanese law that is more flexible and oriented instead towards substantive reasoning (somewhat like the US variant of the common law, and perhaps influencing other Asian civil law jurisdictions like Korea).[31]

Tomohiro YOSHIMASA observes that the revised Article 416 Civil Code represented an "unsophisticated compromise" in light of strong differences in views expressed during the Code reform deliberations, with the Ministry of Justice (coordinating the reform) stating there was no intention to change the status quo. He points out that the provision could become very relevant in our current pandemic, echoing somewhat the approach adopted in the chapter by NAKATA:[32]

"After the outbreak of COVID-19, it has been debated whether the instances of non-performance caused by the pandemic are excused under Art. 415 of the Japanese Civil Code. The answer to the question depends upon the content of the contract and the direct

30 SONO et al., *supra* note 19, para. 487.

31 On the formal versus substantive reasoning contrast, see generally NOTTAGE, *supra* note 26; 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, Victoria University of Wellington Law Review 26 (1996) 247 also at *https://ssrn.com/abstract=842684*; and L. NOTTAGE, Form, Substance, and Neo-Proceduralism in Comparative Contract Law: Law in Books and Law in Action in New Zealand, England, the United States of America, and Japan (PhD in Law thesis, Victoria University of Wellington, 2001) at *https://researcharchive.vuw.ac.nz/handle/10063/778*.

32 T. YOSHIMASA, The Effects of the Corona Crisis on Contractual Obligations under Japanese Law, in: Effinowicz / Baum (eds.), Reaktionen auf Corona im japanischen und deutschen Recht – Beiträge zur virtuellen Tagung am 19. und 20. August 2020 in Hamburg [Responses to the Coronavirus in Japanese and German Law. Papers of the Virtual Conference on 19 and 20 August 2020 in Hamburg], Max Planck Private Law Research Paper 2020, 20/20, *https://ssrn.com/abstract=3745631*.

cause of the non-performance. For instance, in the case of a sales contract, even when the cost necessary for the material procurement has substantially increased because of the pandemic, in most cases the manufacturer (seller) is a superior risk-bearer compared to the demander (buyer), and the former is likely to have assumed the risk of the change in the market price of the material. On the other hand, when it has become impossible to perform a contractual obligation due to special measures taken by local governors based on the Special Measures Act, e.g. a request or instruction by a governor not to use public facilities (see Art. 45 of the Special Measures Act) or an expropriation of the necessary goods (see Art. 55 of the Special Measures Act), it is hard to imagine that either party had assumed the risk of such an impediment before the outbreak. In such a case, therefore, the non-performance may be regarded as having been caused by 'grounds not attributable to the debtor', and the liability of the debtor to pay damages hence may be exempted."

Such outcomes may not diverge much from the common law position, but only time will tell how the Japanese courts will interpret the newly reworded Code provisions.

As another interesting example proposed under the heading of "conceptual differences and functional similarities", CHEN-WISHART points to reasonable convergence around the extent of recoverable damages, focusing on foreseeability of loss as epitomised by *Hadley v Baxendale*[33] "despite the preoccupation of civil law jurisdictions (Japan, Korea, Taiwan and Thailand) with the German concept of 'adequate causation of loss'".[34] Yet they acknowledge again a significant difference: the time for assessing foreseeablility. Later, under the heading of "Overt Differences" among the covered Asian jurisdictions, she elaborates:[35]

"Japan, Korea, and Thailand measure the foreseeability of loss by reference to what the debtor could reasonably foresee at the time of *non-performance*, rather than at the time the *contract was made* (as is the case in all other common and civil law jurisdictions in this volume, and according to the DCFR, CISG, and PICC). This deferral of the reference point for assessing foreseeable, and so recoverable, loss undoubtedly accords better protection for the creditor's performance interest. However, it also eliminates the creditor's incentive to disclose unusual risks at the time of formation, and consequently will prejudice the debtor's ability to plan for loss that is unforeseeable when entering the contract. Professor NAKATA takes the view that 'there will usually be no large difference' in the scope of damages between foreseeability judged at the two different points in time. This assessment may also apply to Korea, given Korea's extra techniques for restricting damages. Nonetheless, the proposed Japanese *Interim Draft* ameliorates the Japanese position by proposing that the debtor should not be liable for loss that is foreseeable only after contract formation if the debtor has 'taken appropriate measures, in the light of the purport of the contract, to avoid such damage'."

33 *Hadley v Baxendale* (1854) 9 Ex 341. This early English judgment was already influenced by French law: See Z. KITAGAWA, Damages in Contracts for the Sale of Goods, Law in Japan 3 (1969) 43.

34 CHEN-WISHART, *supra* note 12, 412 (citations omitted).

35 *Ibid.*, 422 (original emphasis, citations omitted).

Again, however, Japan ended up reverting to the stronger protection of the performance interest than in common law jurisdictions. As commentators have recently explained:[36]

"Courts have consistently interpreted that the relevant time is the 'time of non-performance', and not the time of contract formation. On the other, there is considerable support among scholars for using the time of contract formation as the relevant time. That is a rule that favours predictability of the contract, and one which is adopted in the common law and the CISG. Nonetheless, the 2017 reform maintained the formulation of Article 416, which means that the existing court practice will continue. The rationale for using the 'time of non-performance' is that since the obligor has undertaken to provide the obligee with a certain interest by way of performance, the obligor should not simply sit back and leave the obligee to incur loss that was foreseeable by the obligor at the time of non-performance. This is perhaps a unique characteristic of Japanese law."

Other "overt differences" noted by CHEN-WISHART include India and Malaysia on compensatory and even exemplary damages for breach of a contract to marry: "Local cultural conditions may mean that a particular remedy is available in circumstances where it would be denied in other jurisdictions".[37] However, CHEN-WISHART mostly focuses on situations where Asian jurisdictions seem to have diverged, including from the source legal tradition, without clear intention or rationale to do so. She groups and elaborates under the heading of "the life of the law after reception" those situations where the transplanted laws may develop in unanticipated and sometimes unintended ways, in a framework that should be helpful for comparative law scholarship more generally, as follows:[38]

"[1] Sometimes the foreign law is consciously adjusted before reception, but that adjustment is neutralized by the gravitational pull of the source law or its jurisprudence. [2] On the other hand, an intention to follow the source law may be deflected by different, and at times highly questionable, interpretations of the source law. [3] Sometimes problems arise from the reception process itself, because the recipient jurisdiction thought it was getting one thing when it actually got something different, or because the reception was only partial. [4] Sometimes the divergence from the source jurisdiction arises from a failure to keep pace with the developments in the source jurisdiction."

Examples given for the first category include Japan's adoption of the German requirement for 'fault' in claims for damages and termination, as well as its 'adequate causation' theory complicated the extent of recoverable damages, and German law's traditional tripartite classification of breach (for delayed, impossible and defective non-performance – albeit reduced under the 2017 reform, influenced by Germany's own Code reforms in

36 SONO et al., *supra* note 19, para. 494 (citations omitted).
37 CHEN-WISHART, *supra* note 12, 425.
38 *Ibid.*, 414.

2002). As examples of her third category (problems originating from the transplant process), she refers to Thailand's experience copying largely from English translations of both German and Japanese Codes to enact and then apply Thailand's Contract and Commercial Code in 1925, leaving unclear there too whether and how "fault" impacts on contractual liability.[39]

Overall, therefore, CHEN-WISHART's masterful comparative analysis first seems somewhat to over-emphasise functional convergence, even when focusing just on judicial practice. This is especially when the analysis is updated (as above) for the actual 2017 outcomes of the Japan's Civil Code reforms, although only time will tell how Japanese courts apply some new statutory formulations. Secondly, even when the results are more closely aligned across all or most jurisdictions for now, the different conceptual rationales and indeed perhaps approaching to legal reasoning (formal versus substantive) – along with legal institutions supporting such reasoning styles – may remain quite distinct, and this could impact on future judicial or legislative developments. The principle of good faith, for example, varies significantly between France and Germany, with Japan closer to Germany,[40] but Thailand perhaps applying it in the narrower French fashion. Thirdly, even when some results and rationales align, there may still be differences in practice. An example could be the propensity to seek and achieve renegotiations for unexpected supervening events.[41]

This somewhat less optimistic perspective also casts some doubt on CHEN-WISHART's concluding observation that the

> "reception and subsequent development of contract law in the Asian jurisdictions in this volume support [Alan] Watson's 'insulation thesis' in explaining the apparent ease of legal reception; namely that the legal system is shaped by the elite priesthood of legal professionals […] largely 'insulated' from external factors such as culture, economics and politics".[42]

Yet she herself acknowledges the chapters "demonstrate that 'external' factors cannot be shut out altogether", mentioning Hong Kong as concerned "not to appear to deviate from the law of a high-status source jurisdiction" (England), and referring back again for example to the illustrations given under the heading of the life of the law after reception.[43]

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39 *Ibid.*, 418.

40 B. JAZULOT, La bonne foi dans les contrats – Étude comparative de droit français, allemand et japonais [Good Faith in Contracts – Comparative Study of French, German and Japanese Law] (2001).

41 NOTTAGE, *supra* notes 26 and 31.

42 CHEN-WISHART, *supra* note 12, 425.

43 *Ibid.*, 414.

Nonetheless, CHEN-WISHART maintains that: "Consistent with a dominant thesis of comparative law scholarship […] we have seen many functional convergences in spite of conceptual divergences", resulting perhaps from:[44]

"– the rhetoric and jurisprudence not matching the actual law as interpreted and applied (eg on the primacy of performance over damages);
– the effect of the general duty of 'good faith' (eg in barring performance or cost of cure claims);
– the fact that the same outcome may be supported by quite different conceptual reasoning (eg on the free availability of actions for the contract price); and
– different techniques and terminologies being deployed to deal with similar substantive problems (eg 'fault' and 'frustration' in one case, and 'causation', 'foreseeability', 'mitigation', and 'contributory negligence' in another)."

II. FORMATION AND THIRD PARTY BENEFICIARIES

Further divergence seems to emerge from Volume II. As co-editor Alexander LOKE observes in his concluding comparative analysis, the philosophical foundations of contract differ among civil and common law jurisdictions. Although both traditions focus on agreement of the parties, common law adds the requirement of "consideration" or bargained-for exchange. By contrast, the "emphasis on honouring promises in the civilian law tradition, which can be traced to religious origins, [explains] why an offeror is bound to honour his promise to hold his offer [open] for a stated period of time",[45] as indeed highlighted for Japan's Code by Yoshikazu YAMASHITA's chapter on formation in the second volume[46] (as well as for historically linked Codes in Korea, Taiwan and Thailand). LOKE adds that the more utilitarian philosophical approach of the common law further helps explain why "civil law jurisdictions have little issue with enforcing the subsequent promise to pay more for what the promise has already promised to do under the original contract, in the Delayed Building Work hypothetical" presented to chapter authors.[47] However, he notes that an English Court of Appeal judgment[48] (inspiring that hypothetical) allowed enforcement of the subsequent promise if the promisee could be seen as providing consideration by providing some "practical benefit" to the promisor, thus undercutting this principle and the distinction. This development has been embraced in Singapore,

44 *Ibid.*, 426.

45 A. LOKE, Insights from Comparing the Contract Laws of Asia on Formation and Third Party Beneficiaries, in: Chen-Wishart / Loke / Vogenauer (eds.), *supra* note 1, 516, 524.

46 Y. YAMASHITA, Formation of Contract in Japan, in: *ibid.*, 244, 247 (Civil Code Art. 523, largely corresponding to Art. 521 before the 2017 reform).

47 LOKE, *supra* note 45, 524.

48 *Williams v Roffey* [1991] 1 QB 1.

Hong Kong and Malaysia, thus drawing them closer to civil law jurisdictions like Japan, but not yet in India.

LOKE also identifies partial convergence, despite different philosophical starting points, regarding general theories of interpreting contractual intentions. The civil law jurisdictions start with a subjective theory, but this dominant approach is tempered with elements of objective interpretation; common law approaches start with an objective theory, but recognise some situations where (eg shared) subjective intentions prevail.

Largely convergent yet somewhat different approaches could impact on issues discussed then by LOKE under the heading of the line drawn between liability and no liability for contract, including how courts resolve the "battle of forms". Even though the surveyed jurisdictions adopt the "last-shot rule", so that the last set of standard terms to be proposed dealing with material or essential terms constitutes an offer open for acceptance (including by conduct),[49] a more objective approach to interpretation for example could mean that a reasonable person in the shoes of the offeror would not understand the conduct (say of shipping the goods ordered) to constitute acceptance.

LOKE later remarks that a "different cultural context may also mean that a problem which exists in one jurisdiction is a non-issue in another jurisdiction. A good example of this is the battle of forms. According to YAMASHITA, forms are not exchanged till the conclusion of negotiations. In YAMASHITA's succinct words, 'no form, no battle'. This goes some way towards why the battle of forms has not been litigated in Japan".[50] YAMASHITA's chapter elaborates that in common business practice, parties do exchange memoranda recording agreement on various terms, but the final contract document only incorporates the most important or standard terms. Although the courts can look to such memoranda as evidence of what the parties intended, he further contrasts a 2007 Supreme Court judgment where memoranda but not final contract documents were agreed: the defendant slot machine manufacturer could not establish that a contract was formed.[51]

However, YAMASHITA notes that the Supreme Court did award some damages for the plaintiff creating an expectation that a contract would be concluded. This connects to another important issue highlighted in LOKE's comparative conclusion: pre-contractual liability. The distinction here lies in the civilian doctrine of *culpa in contrahendo* or fault in contracting, rooted in the general principle of good faith. A partial functional analogue

49 LOKE, *supra* note 45, 534.

50 *Ibid.*, 541.

51 Judgment of 27 February 2007, discussed by YAMASHITA, *supra* note 46, 251. See also at Part III. below regarding the lack of a general parol evidence rule when it comes to interpreting the contents of contract.

in the common law can be promissory estoppel, but it is still only permitted as a defence in Hong Kong and (usually now more adventurous) Singapore, whereas in India (like Australia) promissory estoppel can be invoked as a cause of action. Nonetheless, LOKE suggests that "many of the scenarios covered by *culpa in contrahendo* are addressed by existing common law doctrines. This is not to say that the outcomes will be identical, for the conceptions of permissible hard bargaining and the limits of self-interested behaviour which underpin pre-contractual liability can be expected to be different".[52] Overall, the jurisdictions in the (especially English variant) common law tradition do seem to allow harder bargaining and maintain a somewhat stricter distinction between mere negotiations and entering the realm of contractual liability.

As another issue under the heading of the line drawn between liability and no liability, LOKE also notes that:[53]

> "Even if all the terms have been agreed upon, 'subject to contract' indicates parties' presumptive intention that contractual responsibility is contingent on the parties executing the formal contract. It is, therefore, not surprising that strong evidence is needed to prove that 'subject to contract' no longer applies."

A close inspection of Japanese contract law judgments, however, reveals that in deciding whether such phrases create a reasonable expectation that no liability is intended until formal contract execution, Japanese courts tend to weigh up quite flexibly all the circumstances in each case. By contrast, English and New Zealand courts tend towards *presuming* no liability if such wording is used in particular types of cases.[54] It would be interesting to explore if that more formal reasoning style is still retained in those jurisdictions, and also more characteristic of common law rather than civil law jurisdictions across Asia.

Turning to broader "Convergences and Divergences", LOKE focuses on the "broader forces that serve to bring about functional convergence", including the key undercurrent of "the imperative to honour contracting parties' intentions".[55] Yet here again, the starting point seems distinctly stronger for civil law jurisdictions like Japan, which allow third party beneficiaries to enforce promises agreed between contracting parties. Common law jurisdictions, which traditionally disallow this by extending the doctrine of consideration or on other rationales, are only partially and belatedly moving towards allowing this recognition of party agreement. Even in the mostly

52 LOKE, *supra* note 45, 533.
53 *Ibid.*, 528.
54 NOTTAGE, PhD in Law thesis (2001), *supra* note 31.
55 LOKE, *supra* note 45, 534.

civil law jurisdictions, a provision for third party beneficiaries was also curiously omitted from the Chinese Contract Law 1999.[56]

LOKE's concluding chapter also includes a sub-heading cataloguing "Divergences" under five categories. Under "Intentional Mix and Match", for example, is given the "requirement for [the] third party to accept benefit before rights accrue in Japan: adaptation to suit cultural sensitivities". Despite inspiration from the French then German Codes, the Civil Code 1898 did not provide that the third party beneficiary's right should accrue immediately (when agreed by the contracting parties), because "such a legal position did not comport with the 'Japanese way of thinking'. It was considered to be against the 'samurai spirit' to confer a benefit without the recipient acknowledging his consent to receive the benefit".[57] Another example given under this category was the "mailbox rule in Japan and Korea", noting that "the time of dispatch as the determinant for the time of acceptance" was set in Article 526(1) Civil Code. By way of update, after the 2017 reforms to the Japanese Civil Code, this (common law inspired) provision was deleted so that the general "receipt principle" (under Article 97 Civil Code) will generally apply to notices of acceptances as well.[58] This followed longstanding criticism by academic commentators, some involved in Japanese government aid projects to help the enactment of Cambodia's civil code in 2007, with LOKE noting that the mailbox rule was omitted also "when the Japanese Civil Code was transplanted into Cambodia".[59]

Under the second category of "institutional and contextual differences", LOKE describes the adjustments made compared to German Code provisions due to the lack of a (costly) public notary system in Thailand and (until recently) Taiwan. (By contrast, Japan introduced this institution alongside their original Code, and notaries play an important role including under the 2017 Code amendments, such as Article 465-6 Civil Code.) Another example provided is Japan's distinctive approach in practice to contract negotiations and drafting, elaborated by YAMASHITA as mentioned above.[60]

LOKE also delineates categories where there exist complications,[61] but concludes Volume II by suggesting that: "A useful operating precept is to be conscious of the forces of convergence while being alert to the values and

56 *Ibid.*, 536. However, it can now be added that Article 522 the 2020 Civil Code expressly sets out third party beneficiary rights.

57 LOKE, *supra* note 45, 540, referring to M. OKINO, Contracts for the Benefit of Third Parties, in: Chen-Wishart / Loke / Vogenauer (eds.), *supra* note 1, 256, 260–261.

58 SONO et al., *supra* note 19, para. 85.

59 LOKE, *supra* note 45, 539.

60 *Ibid.*, 541.

61 S. VOGENAUER, Interpretation of Contracts and Control of Unfair Terms in Asia: A Comparison, in: Chen-Wishart / Vogenauer (eds.), *supra* note 1, 541–543.

policy considerations which finally determine the legal outcomes".[62] Yet key values identified include both giving effect to the parties' intentions and broader fairness in dealings, and despite examples of some convergence in legal principles or applications in particular cases, to my mind the volume illustrates considerable differences still especially between the common law and civil law origin jurisdictions in Asia. Indeed, those differences arguably stand out more than for the area of remedies, analysed in the Volume I.

III. Contents of Contract and Unfair Terms

The differences seem even greater in Volume III. Co-editor Stefan Vogenauer presents a magisterial concluding comparative analysis. The second half focuses on "whether the different Asian laws interfere with contractual terms that can be broadly described as 'unfair', and what the range of legal responses to the perceived unfairness is".[63] He notes this topic clearly highlights the tension between honouring contracts and party autonomy versus notions of fairness, implicating a strongly political dimension (the relationship between the State including courts and the individual), which varies across space and time. Vogenauer remarks generally:[64]

> "Hong Kong and Korea represent opposite ends of the spectrum. The bare bones protection against unfair terms in Hong Kong may be regarded as perfectly in tune with the liberal and laissez-faire economic environment characterized by low regulation that prevails in this jurisdiction. In Korea, there is an abundance of protective mechanisms and the issue of unfair terms is connected to broader policy objectives, such as consumer protection and the promotion of fair trading and competition. This seems to be very much in line with the country's social welfarist outlook, as exemplified by the political vision of an 'economic democracy' and community-based thinking in private law.
>
> Most Asian legal systems aim to strike some kind of balance between these opposites. They offer some protection, but they do not allow for open-ended judicial interference with any term that might be perceived as unfair. Instead they restrict control to one or more of three scenarios where there seems to be a particularly strong reason to protect a party against an unfair term: first, if he or she had little economic or de facto power to influence its content; secondly, if to discuss its substance would have been inefficient for the parties; and, thirdly, if it is of a kind that is particularly prone to abuse."

Respectively, this translates into three justifications for judicial intervention: (i) protecting consumers against businesses or traders (such as Japan's Consumer Contracts Act 2000, and epitomised by French law), (ii) protecting consumers and businesses against professional users of standard terms (in the German tradition, partly reflected in the complex compromise re-

62 *Ibid.*, 544.
63 *Ibid.*, 518.
64 *Ibid.*, 519 (citations omitted).

gime added to the 2017 reforms to Japan's Civil Code[65]); and (iii) protections against frequently used and per se onerous contract terms (such as limitation clauses, characteristic of English law and evident in Singapore and Hong Kong). VOGENAUER observes that: "In today's Asian legal systems, these different justifications are frequently intermixed, as they are in Europe, where the EU Unfair Terms in Consumer Contracts Directive 1993 […] integrated and combined all three rationales".[66]

He then analyses control under the general law of contract. For example, VOGENAUER notes Japanese courts' reluctance to invoke the broadly-worded public policy exception under the Civil Code (Article 90) except to a degree regarding exception clauses or those trying to exclude the right of a delayed party to receive a *Nachfrist*-style reasonable extension of time before the innocent party can terminate the contract for breach. VOGENAUER also finds that the general contract law of Asian civil law jurisdictions has generally been cautious to invoking the good faith principle to police unfair terms, with Japanese courts only starting to do from the 1950s and largely limiting themselves to what they were prepared to do under Article 90 of the Civil Code.[67]

VOGENAUER also compares control under legislation aimed specifically at unfair terms, in some detail. For example, regarding those in consumer contracts, he notes how the rules can interact with product liability legislation or competition law – fields of law that, to my mind, add further complex sets of values and policy considerations especially as they intersect with public law.[68] He also notes how legislation targeting unfair consumer contracts tends to adopt a two-pronged approach. As well as targeting specific types of terms, a broad rule voids terms for unfairness. For the latter, referring to Japan's Consumer Contract Act of 2000 (Article 10), he suggests that Asia's:[69]

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65 SONO et al., *supra* note 19, paras. 210–212; A. KARAISKOS, Civil Code Reform in Japan: Is the New Regulation of Standard Contract Terms a Desirable One?, in: Heidemann / Lee (eds.), The Future of Commercial Contract in Scholarship and Law Reform: European and Comparative Perspectives (2018).

66 VOGENAUER, *supra* note 61, 521.

67 *Ibid.*, 551–553, referring to H. KIHARA, The Regulation of Unfair Terms and Consumer Protection in Japan, in: Chen-Wishart / Vogenauer (eds.), *supra* note 1, 186. See also NOTTAGE, *supra* note 31 (1996). Compare however the Japanese courts' growing application of good faith from the 1960s to limit termination rights generally in franchise and other business contexts, outlined in TAYLOR, *supra* note 19.

68 VOGENAUER, *supra* note 61, 540. Compare generally L. NOTTAGE, Product Safety and Liability Law in Japan: From Minamata to Mad Cows (2004); and L. NOTTAGE et al., ASEAN Consumer Law Harmonisation and Cooperation: Achievements and Challenges (2019), chapter 3 version at *https://ssrn.com/abstract=3551793*.

69 VOGENAUER, *supra* note 61, 542.

"civilian legal systems, clearly influenced by German law, tends to link the notion of unfairness not only to the disadvantage incurred, but also the principle of good faith and the extent to which a particular term deviates from the otherwise applicable default rules, assuming that the latter strike a fair and reasonable balance between the competing interests of the parties".

Similar arguments have been made for interpreting the 1993 EC Directive. VOGENAUER perceptively adds, however, that unlike that regime, "Asian contract laws do not exempt 'core terms', ie terms defining the main subject matter of the contact or relating to the adequacy of the price and remuneration, from judicial scrutiny".[70]

Adopting first a narrower functional approach, VOGENAUER also tries to compare how the substantive laws would be applied by to five hypothetical clauses included in sales contract, finding "a wide variety of solutions across Asia".[71] Further adding to divergences and complexity, perhaps the most important contribution in this analysis is that (compared to the earlier two volumes) there is more acknowledgement and significant discussion of the "law in action", in the sense of diverse enforcement mechanisms and practices across the region especially for consumers faced with unfair terms. Referring to the chapters on Indonesia and by Professor Sakda Thanitcul on Thailand, arguably rather optimistically regarding the former given much less functional courts, VOGENAUER observes:[72]

"Those jurisdictions that have embraced a variety of these enforcement mechanisms have vastly increased the effectiveness of the protection against unfair terms. […] Hong Kong and Myanmar, the two jurisdictions with the least protective unfair contract terms regimes in substantive contract law, are the only ones that have not established any public agency with enforcement powers on behalf of consumers or against unfair standard terms."

As for interpretation and implication of contractual terms more generally, in the first half of his concluding chapter VOGENAUER notes differences not only regarding the scope of "interpretation" but also the subjective approach (prioritising party autonomy and freedom of contract, the starting point for civil law jurisdictions including in Asia) and the objective approach (promoting legal certainty and third-party reliance). However, he notes that:[73]

"Japanese and Korean lawyers closely adhere to the German model, despite the absence of pertinent provisions in their Civil Codes. […] In Japan, the long prevailing objective approach has recently been questioned, and there is at present a trend to re-emphasize that in the interpretation of contracts the ultimate search if for the common intentions of the par-

70 *Ibid.*, 543.
71 *Ibid.*, 549.
72 *Ibid.*, 545 (citations omitted). See also NOTTAGE et al, *supra* note 68.
73 VOGENAUER, *supra* note 61, 490.

ties. However, the predominant view is still that if it is not possible to establish such an intention the court should determine the 'reasonable intention of the parties', which is based on the objective meaning that is reasonable with regard to the circumstances. […]

While there is a broad de facto convergence around a 'hybrid' or 'mixed' approach with regard to interpretation […] the divide between 'subjective' and 'objective' approaches is far from meaningless. It mostly matters in the law of mistake."

VOGENAUER also dissects the approaches taken in the covered jurisdictions regarding priority rules for determining relevant circumstances or the like (beyond the contract wording), which are starting to be given more weight in common law jurisdictions including in Asia. Yet for ambiguous clauses: "Asian civil law systems appear to give more weight to the evidence derived from preliminary negotiations than to a trade usage when determining the meaning of a clause. These negotiations would not even be admitted for the purposes of interpretation in most of the common law jurisdictions" (ie as one manifestation of the parol evidence rule).[74] The common law also applies a *contra proferentum* rule of priority, interpreting an ambiguous clause against the drafter. Yet, according to the chapter by Masami Okino, it is not established in Japanese case law, nor incorporated clearly into the 2018 revisions to the Consumer Contracts Act 2000 – let alone the 2017 reforms to the Civil Code.[75]

As for unambiguous or clearly worded contract terms, VOGENAUER observes that Asian common law jurisdictions now reject the "plain meaning rule", yet make contract wording the "pre-eminent consideration", while:[76]

"Most of the Asian civil law systems do not even pay lip service to literalism and the plain meaning rule. They expressly reject it, often by stressing that where 'there is conflict between the mutual intention of the parties and the wording used in the contract' the former shall prevail [in China …]. Japanese case law presents a similar picture. According to a 1964 decision of the Supreme Court, the ordinary meaning of the words will normally prevail, 'unless special circumstances dictate otherwise'. Here, the contract had stated that a designated stretch of mountain forest was to be sold. However, 'considering all the circumstances existing at the time of the conclusion of the contract', the court found that the intention of the parties was to sell only a part of the designated area. The Japanese courts have reached similar results by relying on the subsequent conduct of the parties or other surrounding circumstances."

74 *Ibid.*, 496.

75 *Ibid.*, 498, referring to M. OKINO, The Interpretation of Contracts under Japanese Law, in: Chen-Wishart / Vogenauer (eds.), *supra* note 1, 161. Compare the more specific controls in the Act outlined in SONO et al. *supra* note 19, paras. 184–189 (and, at paras. 172–173, the expanded situations where consumers can rescind contracts in situations of high pressure not necessarily amounting to duress).

76 VOGENAUER, *supra* note 61, 503–504 (citations omitted).

This is consistent with a detailed analysis of recent Japanese case law across several fields, even when the practice involves drafting increasingly detailed contract terms, with the courts also arguably bringing in notions of fairness or reflecting an expectation that parties will resolve their dispute without strict adherence to the written terms.[77] The approach is also consistent with the lack of a parol evidence rule in such civil law jurisdictions, excluding admissibility of extraneous evidence contradicting a clearly worded term if the contract was expressly or impliedly intended to embody the parties' entire agreement. Also, by reference to the chapter by Okino, VOGENAUER notes that in Japan "the evidential principle of the free assessment of proof is seen as militating against restrictions on the admissibility of evidence, and the idea that extraneous evidence should be excluded is barely even discussed […] To this extent, the position in these legal systems is very similar to the compromise between legal certainty and the desire to reach a fair and 'correct' outcome struck by German law".[78]

In his conclusions, VOGENAUER restates the "structural and terminological differences" partly summarised above, and argues that they:[79]

> "matter greatly because they often reflect underlying concerns of legal policy and tend to influence the mental 'map of the law' which lawyers rely on to structure their thinking and reasoning. Such differences may also determine the outcome of individual cases. […] In many cases, however, legal systems reach similar or broadly outcomes despite fundamental structural or terminological differences. […]

He also identifies two mega-trends at the structural level across all or almost all surveyed jurisdictions:[80]

> "They are, first, the move from a more literal to a more contextual approach in contractual interpretation and, secondly, the evolution from procedural towards substantive fairness in the law of unfair terms, brought about by specialist legislation superseding general contract law doctrines. On both issues, Asian laws have undergone a fundamental shift from more formal to more substantive reasoning. In addition, there are many similarities with regard to individual rules and doctrines: contract clauses must be interpreted in light of the contract as a whole; customs and usages inform the interpretation

77 PARDIECK, *supra* note 10.

78 VOGENAUER, *supra* note 61, 505. However, there is limited Japanese case law giving effect to the parties' inclusion of an "entire agreement" clause: SONO et al., *supra* note 19, para. 113.

79 VOGENAUER, *supra* note 61, 550.

80 *Ibid.*, 551 (citations omitted). The posited distinction between formal and substantive reasoning more broadly is backed up by reference to P. S. ATIYAH / R. SUMMERS, Form and Substance in Anglo-American Law (1987), which was extended to compare Japan and New Zealand by NOTTAGE (*supra* notes 11, 26 and 31). See also recently S. KOZUKA, The Style and Role of Judgments by Japanese Courts: How They are Written and Read, ZJapanR / J.Japan.L. 49 (2020) 47.

of contracts; some kind of *contra proferentem* rule applies; standard terms are only incorporated if their user has taken reasonable steps to draw them to the attention of the other party; clauses are almost universally invalid if they purport to exempt liability for death or personal injury, restrain freedom of trade, or impede access to the courts."

Further, VOGENAUER notes that similar fact scenarios do often generate similar responses across the jurisdictions' authors, although "some of the hypotheticals indicate that the Asian contract laws are far from uniform" and that:[81]

"Overall, six key differences remain. First, some legal systems admit recourse to the preliminary negotiations and subsequent conduct of the parties as an aid to interpretation, while others exclude it. Secondly, although all jurisdictions allow the courts to deviate from the apparently 'clear and unambiguous' words of a contract if there are compelling reasons to do so, some contract laws are more willing than others to assume that such reasons exist in a given case. Thirdly, some jurisdictions have more stringent tests than others for the filling of gaps by reading a term into the contract that was not expressly spelt out by the parties. Fourthly, some legal systems are more reluctant than others to strike down unfair terms on the ground of 'public policy'; while some rely on 'good faith' for this purpose, others entirely reject this notion. More generally, fifthly, the level of protection afforded by legislation against unfair terms in commercial contracts differs from one legal system to another. Sixthly, the mechanisms for enforcing legislation directed against unfair terms, while broadly moving in the same direction, still differ across the continent."

VOGENAUER ends by drawing important further pointers for comparative law researchers more generally. He proposes and illustrates eight types of legal transfer or transplant.[82]

VOGENAUER also highlights promising further areas for future research, including the idea emerging that private laws are being somewhat guided and informed by constitutional law, and the potential for harmonisation including revisiting the PACL project in light of this book series' findings. He also suggests "an increasing sensitivity of comparative lawyers to the broader cultural context of legal transfers", noting however that:[83]

"We found that there are indeed strong differences in legal values and policies, both on contractual interpretation and unfair terms, most importantly the struggle between legal certainty and fairness of individual outcomes and the underlying liberal and welfarist philosophies; we also found some huge gaps between the 'law in the books' and the 'law in action' when assessing the enforcement of consumer legislation. However, these do not exceed the spectrum that is familiar from the source jurisdictions.

There were only very few instances throughout this volume where particular political attitudes or cultural issues surfaced. [For example, our authors] related the fact that there

81 VOGENAUER, *supra* note 61, 551–552 (citation omitted).

82 *Ibid.*, 555. Compare also some types of legal transplants suggested by CHEN-WISHART in the concluding chapter to Volume I, *supra* note 12, 414–419.

83 VOGENAUER, *supra* note 61, 557–558 (citations omitted).

was for a long time no legislation providing for judicial control of unfair terms in Japan and Vietnam to the notorious aversion of potential litigants in these countries to resolve their disputes through formal court procedures. For Japan, it was added that, once Japanese citizens actually do embark on litigation, their trust in the judiciary is such that they are content to endow their judges with a wide discretion to find fair and reasonable solutions on the basis of vague standards such as 'good faith' and 'public policy or good morals'.

The limited number of references to specific cultural features is not sufficient to establish the existence of distinctive Asian values in the areas of contract law covered in this volume. While it is convincing to connect the 'wholistic' [sic] approach to contract interpretation in China to Confucianism, European contract laws have adopted a similar stance since at least the second century AD. The Japanese trust in judges doing the right thing when relying on open-ended standards does not seem to exceed the attitude of Germans vis-à-vis their judiciary. As to the supposed Japanese hostility to litigation, it has long been doubted whether it is as strong and exceptional as was previously believed. Overall, there is no specifically 'Asian flair' to the Asian rules on contractual interpretation and unfair terms.

Of course this conclusion may be distorted because our contributors focused almost exclusively on the state law of their jurisdictions and did not pay much attention to other spheres of normativity, both non-legal and legal."

Even focusing on narrower legal norms, including for example the outcomes of the 2017 amendments to Japan's Civil Code, Souichirou KOZUKA highlights some interesting and quite persistent features of its legal system. The scale of the reform became more modest as controversy emerged, and the codification remained in line with the Japanese concept of a "lawyer's law".[84] Such key features for Japan would be interesting to compare with recent law reform processes, outcomes, or proposals in the other Asian jurisdictions covered by these *Studies in the Contract Laws of Asia*, such as China's Civil Code enactment achieved in 2020. Based on various distinctive aspects identified even in these volumes, as well as comparisons with contract law reform initiatives in other jurisdictions, the central aspects of the approach towards contract law in Japan identified above by KOZUKA seem likely to expose important conceptual and practical differences when comparing law reform initiatives.

IV. CONCLUSIONS: PERSISTENT DIVERGENCE AMIDST CONVERGENCE

Overall, the three rich volumes so far in this series succeed admirably in three core goals, alluded to in the introduction to the first volume and restated by VOGENAUER in his conclusion to the third volume.[85] These are to gather reliable information on the contract laws of multiple Asian jurisdic-

84 KOZUKA forthcoming, *supra* note 7. See also DERNAUER (2021), *supra* note 7. As such, Japanese contract law seems closer to the German than the French legal tradition.

tions, provide a tentative comparison, and explore the relationship between these Asian laws and their respective European source jurisdictions.

As mentioned above, BEALE's Foreword as well as the introduction to the first volume mention that more are in planning. The fourth on *Invalidity of Contract* is being co-edited by CHEN-WISHART and VOGENAUER with Professor Hiroo SONO (Hokkaido University), and can be expected out around late 2021. The sixth planned volume is on *Public Policy and Illegality.* Both these topics, and Volume III especially regarding Unfair Terms, probably fit together well, and should collectively reveal much about background socio-economic, political or even cultural circumstances in each Asian jurisdiction compared. Two others likely to fit together well should be Volume VI on *Ending and Changing Contracts* (edited by CHEN-WISHART and VOGENAUER with NUS Professor Dora NEO) and the first Volume already published on *Remedies.*

It will be interesting to see what other Asian jurisdictions may be compared, beyond the core so far comprising Japan and eight others, and whether the volumes keep growing in detail and length. Already, more divergences in approaches and applications seem to be accumulating than suggested in the first volume. Yet this is perhaps unavoidable as the scope of covered topics and jurisdictions both expand. Anyway, the editors of all three books do persuasively uncover many areas of significant and perhaps growing convergence, especially as (and if) the Asian common law jurisdictions keep moving away from the traditional more formal reasoning based English variant of the common law of contract. From the perspective of those keen to promote harmonisation of contract law across Asia, including those involved in the PACL project or presumably the Asian Business Law Institute, the glass could be seen to be half full or half empty. The former view probably remains that of the collective co-editors of the *Studies in the Contract Law of Asia* so far, but the latter view may well prevail as the scope of the project keeps expanding.

In sum, the three volumes already published provide a rich and reliable resource for a variety of readers. Particularly useful will be the introductory chapters containing detailed chapter summaries, and the concluding chapters with more integrated comparative analysis, as well as the chapters for nine core jurisdictions across all three topic areas covered so far. The next three volumes should provide further authoritative analysis and perceptive insights, especially given the relative paucity of English-language material on the Asian jurisdictions outside the English common law tradition. Hopefully at least some parts of these *Studies in the Contract Laws of Asia* can be translated too into other Asian languages, including perhaps Japanese.

85 VOGENAUER, *supra* note 61, 477–480.