D. Comparative Analysis of the Rules on the Formation of Contracts in Japanese, English, and German Law

The exposition in Sections B. and C. above has so far focused on each of the three jurisdictions individually. In this section, selected aspects of the formation of contracts will be directly compared in order to show that there are many points of congruence as well as dissimilarities. The aspects considered relate to the following topics: Firstly, to the concept and types of contract (Section I.); secondly, to the pillars of contract formation (Section II.); and thirdly, to the form requirements (Section III.). Subsequently, the adaptation of the three legal systems to electronic communication will be considered (Section IV). Finally, the points of contrast will be highlighted by taking the sale of real estate as an example (Section V.).

I. The Concept and Types of Contract

Interestingly, neither English, German, nor Japanese law contain a statutory definition for the term 'contract'; however, it is a concept that has a long history in all three legal systems, during which it has evolved from one notion to another. There are nevertheless parallels, in that contract law as known today was established in the (Early) Modern age in all three jurisdictions, an era in which states were formed and liberalism allowed individuals freedom to act and thus to contract.[2295] While the finer points in the underlying theories do deviate, there is nevertheless consensus that a contract is an obligatory relationship that arises through and due to the volition of the parties. In other words, where the intention of the parties coincide, a contract will arise consensually because the parties have the intention to bring about a specific legal consequence. While the basis of

2295 This was true for Europe at least; liberalism came to Japan a little later, in the Meiji era. On the development of society leading to the recognition of freedom of contract in Europe, compare Kötz, '*Europäisches Vertragsrecht*' (fn 17) 7–10. For an overview of the situation in Japan from the seventeenth century onwards, see Steenstrup (fn 1587) 108–150. See also Sections C.III.1. and 2. Above.

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traditional English contract law theory is an exchange of promises and the making of a bargain, both Japanese and German contract law theory are based instead on the mutual assent of the parties.[2296] Having said this, English academics have likewise emphasised the parties' agreement,[2297] so that the basis for all is, in fact, consensuality.[2298] As a corollary of the principles of consensuality and of freedom of contract, statutory rules in private law in all three jurisdictions are largely dispositive, while only particular norms have mandatory character.[2299]

The types of contract found in the three legal systems are the same. The synallagmatic or bilateral contract is recognised under all three laws. There are also one-sided contracts; however, their conceptual natures differ. A unilateral contract exists in English law only,[2300] whereas German and Japanese law have 'unilaterally obliging contracts' (*einseitig verpflichtende Verträge*; *henmu keiyaku*, 片務契約). While it is true to say that under either model, only one party undertakes to do — and consequently is obliged to do — something, the contract arises at different points in time. Under German and partly also under Japanese law, these contracts arise as soon as the first party has declared their intention, whereas, in contrast, under the English model, an act or omission by another person is expected and, in fact, the contract will only arise once this act or omission occurs.[2301] Taking the example of a gift (*Schenkung*; *zōyo*, 贈与), this can be a unilateral contract under English law if nominal consideration is provided, but

2296 On the difference between English and Japanese contract law theory, see Kitagawa, '*Contracts*' (fn 1601) § 2.01[2][a], 2-27. On the differences between German and English contract theory, compare Schmidt J (fn 25) 7, 65. Compare also Youngs (fn 34) 545, 546. For a comparative outline of the different contract theories justifying legal enforceability, see von Mehren, '*Introduction*' (fn 21) 15–23.

2297 See, in particular, the definition of a contract by Treitel, given in Section B.II.1. above, which seems to approximate the Civil law theory. cf the description by Atiyah at ibid, which is representative of the classical English contract theory.

2298 Schmidt J (fn 25) 128 states this congruence. Compare also Schlesinger (fn 25) 71.

2299 Compare Kötz, '*Europäisches Vertragsrecht*' (fn 17) 10–11. The mandatory rules usually concern form requirements, as will be seen in Section III. below.

2300 Schmidt J (fn 25) 129 calls this type a particularity of the common law.

2301 These differences between the German and English contract types are succinctly explained by ibid 125–126.

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it is seen as a unilaterally obliging contract under German and Japanese law.[2302]

It is highly interesting that contract types exist under the latter regime that resemble the English unilateral contract, at least in appearance. One example is a Japanese loan for consumption (*shōhi taishaku*, 消費貸借, art 587 *Minpō*), a real contract under which only the borrower undertakes an obligation, namely, to return an object of the same kind as the one received. In order for the contract to arise, the object to be loaned must be handed over, so that, while the lender is under no obligation to do so, their act is in fact required for the contract to come into existence.[2303] It could thus be argued that these constellations are in effect equivalent to English unilateral contracts, as the acts of both parties are factually indispensable under either regime. In contrast with Japanese law, real contracts no longer exist as such in English and German law.[2304] This will not be true for much longer, however, as real contracts have been abolished under the amendments of the *Minpō* that come into force in April 2020.[2305]

Coming back to English law, it has been argued that the English unilateral contract and the concept of consideration are related to the Roman institute of a real contract.[2306] Indeed, the argument that consideration is like a real contract in the sense that it involves something being given — albeit not always physically — seems to have merit. If this is true, then the same argument might be advanced for the legal practices of the German *Draufgabe* and of the Japanese *tetsuke* (手付). Indeed, it has been noted that the predecessor of the *Draufgabe*, the *Arrha* or *Handgeld*, was used in Franconian times in the German territories as a fictional (part-) performance ('*Scheinleistung*') that substituted for the actual performance of contracts. In fact, the handing over of *Arrha* turned an informal contract into a real contract.[2307] At that time, *Arrha* could therefore have been said to be constitutive for the conclusion of a contract; a property that was lost for the *Draufgabe* later on, during the *alte Reich*.[2308] *Tetsuke* could be said

2302 For England, see Section B.II.1. above; for Germany, see Section B.III.1.; and for Japan, see Section C.II.
2303 See Section C.IV.1. b. above for further details on this kind of contract.
2304 See on this Schmidt J (fn 25) 110–129.
2305 Compare the outline of the changes given by Shiomi, '*Shin-saiken*' (fn 1648) 11.
2306 See Schmidt J (fn 25) 120–127.
2307 On this, see Gastreich (fn 942) 45–47.
2308 Compare Gastreich (fn 942) 51–52. See also Section B.III.2.a.iii.ee) above.

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to have fulfilled a similar function historically, since it was used to make agreements binding for both parties by constituting part performance.[2309] In a way, all three signs of earnestness therefore fulfilled a similar function in former times. Their present function will be discussed in Section II.4. below.

Another deviation in contract theory that needs to be borne in mind is the German *Abstraktionsprinzip*, according to which an act of disposition (*Verfügungsgeschäft*) and an obligatory act (*Verpflichtungsgeschäft*) are regarded as separate transactions, so that the legal effects of one does not depend on the other.[2310] This is not the case in English and Japanese law: the latter usually sees the two as one action.[2311] English law instead differentiates between executory and executed transactions, whereby the first is a promise to bring about some effect in the future, whereas the second actually brings about some effect.[2312] In this sense, it could be argued that while the terminology is different, the concepts found in German and English law are similar: obligatory acts, creating an obligation to do something in the future, may be equated with executory agreements; similarly, acts of disposition under German law, which are intended to have an immediate effect so to speak, are like English executed (ie, performed) agreements.

This seeming coherence must not lead one to think, however, that the differences found in the details of the theory, although merely alluded to above, can be ignored in practice. Rather, it will be seen in the subsequent discussion that the points of disparity as well as the varying developments in each jurisdiction have led to the creation of legal devices that, while perhaps similar in appearance and even in their function, alter the conclusion process in ways not necessarily discernible from the final contract, but which can become pitfalls in practice. This is particularly true for the form of the contract.

II. The Three Pillars of the Formation of Contracts and Indicia of Seriousness

English, German, and Japanese law have the same three pillars in the formation process of a contract, namely, offer (see Section 1. below), accep-

2309 On this, see Section C.III.1.b. above.
2310 See Section B.III.3.a above.
2311 This action is effected by one declaration of intention with a 'double effect' (*Doppelwirkung*), see Marutschke, '*Immobiliarsachenrecht*' (fn 1846) 133.
2312 See on the differentiation Section B.II.1 above.

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tance (Section 2.), and an intention to be legally bound (Section 3.). The reason is that all three legal systems have adopted the offer-and-acceptance model as the standard contracting process.[2313] Accordingly, a contract will typically be formed once acceptance of a contractual offer becomes effective.[2314] Nevertheless, the congruence in the conclusion process is not complete. In addition to the aforementioned requirements, English contract law has held onto a fourth pillar, an *indicium* of seriousness in the form of the (in-) famous doctrine of consideration. This and similar but not constitutive further requirements under German and Japanese law will be examined together with consideration in Section 4.

1. Offer

All three legal systems concur on the definition of an offer (*Antrag* or *Angebot*; *mōshikomi*, 申込み) and that it needs to be differentiated from other statements that do not have a binding effect. In this respect, offers can be roughly characterised as unequivocal declarations of intention to be bound by the terms stated therein.[2315] They can be addressed to one or more specific persons, but need not be; offers may equally be made to the general public, ie, to no one in particular.[2316] Their counterparts are non-binding statements or acts, which are, in turn, distinguished from one another. Before going into further details about the requirements for offers in Section b. below, the classifications of offers and other statements will be briefly compared in Section a. Finally, the effectiveness of offers, ie, the issue of when and for how long they are capable of being accepted, will be considered in Section c.

2313 For English law, see Section B.II.3.a.i.; for German law, see Section B.III.3.a.; for Japanese law, see Section C.IV.1.a. above.

2314 This is currently not explicit in neither of the three contract laws but nevertheless forms part of their contract theories. See ibid. From 1 April 2020, Japanese law will have an explicit provision on this matter, see the discussion of art 522 para 1 *Minpō* in Section C.V.3.b. above.

2315 For further details on English law, see Section B.II.3.a.ii. above; for German law, see Section B.III.3.a.ii. above; and see Section C.IV.1.a.ii. above for Japanese law.

2316 See Section B.II.3.a.ii.aa) above for English law, Section B.III.3.a.ii.aa) for German law, and Section C.IV.a.ii.aa) for Japanese law.

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a. Differentiation Between Offers and other Statements or Acts

Acts or statements other than offers are divided into two: those that can lead to the contract process being initiated are referred to as 'invitations to treat', '*invitationes ad offerendum*' or '*Aufforderung zur Abgabe eines Angebots*', and '*mōshikomi no yūin*' (申込みの誘引) in English, German, and Japanese respectively.[2317] These denominations already suggest that such statements will be made with the aim of having the other party make an offer, or to begin negotiations. In contrast, still other statements or even acts do not count as invitations of this kind and have no consequence whatsoever. These include, in particular, sales talk ('mere puffs'), and acts of kindness (*Gefälligkeiten*; *kōi*, 好意 [2318]).[2319]

The kinds of circumstances in which invitations to make an offer occur can be grouped together. The interesting point is that while the definitions of the categories coincide in the three legal systems, the classifications of particular groups of cases do not. Furthermore, it ought to be noted that the types of cases discussed in academic literature from the three countries are often not the same; thus, a particular situation that might be the topic of ample discussion in one country might be given little if any attention in another.

i. Statements and Acts Deemed as Offers

One circumstance in which an act will be deemed to be an offer is the display of goods, whereby the nature of the goods will not allow the parties to change their mind subsequently. This is true for petrol stations, in which case the customer fills fuel into the tank of their vehicle prior to making the payment. Due to the nature of the goods (fuel), a subsequent change of mind would lead to disproportionate effort or expenses. Accordingly, self-service petrol pumps constitute offers made at the displayed price in

2317 See Sections B.II.3.a.ii.bb), B.III.3.a.ii., and C.IV.1.a.ii. above respectively.
2318 Götze, '*Rechtswörterbuch*' (fn 10) 308.
2319 These instances will not be discussed here, but together with the intention to create legal relations in Section 3. below.

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England and Germany[2320], rather than being mere invitations to treat.[2321] While not discussed in Japan, it seems logical to deem self-service petrol stations as offers rather than *mōshikomi no yūin*. The reason is that — as will be discussed in further detail below — one rationale for differentiating between *mōshikomi* and *mōshikomi no yūin* in Japanese law is whether a party reserves themselves the right to decide whether to contract with the other party.[2322] As it is not practical for the attendant at the self-service petrol station to refrain from contracting with the customer, seeing as the fuel is already inside the customer's tank when the customer comes to pay, the price displayed at the pump ought to be considered to be an offer.

Another instance of a deemed offer in Japan and England is a taxi waiting at a taxi rank: due to the fact that the taxi drivers only have very limited reasons for refusing a potential customer who wishes to use their service, the taxi constitutes an offer, rather than an invitation to begin negotiations.[2323] It must be noted that a vacant taxi circulating in traffic in Japan is only deemed to be an invitation to treat, as the driver is *a priori* under no obligation to contract with the person signalling the taxi. In fact, if the circulating taxi were an offer, this might lead to several theoretical problems. Where a pedestrian signals to a circulating taxi that they wish to board and in so doing were accepting the 'offer' embodied by the taxi, the driver would fail to perform their contractual obligation if they did not stop, although this might in practice not be possible, as the driver might otherwise cause a traffic accident, for example. This might arguably also be true for England; however, it is not a question that has been discussed in legal academic literature. Similar consideration might be applicable in Germany as well, where this constellation is also not discussed in academic literature.

Other cases of deemed offers are not shared by the three countries. A perfect illustration is advertisements in unilateral contracts, a constellation

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2320 To be precise, petrol pumps are deemed as offers *ad incertas personas*, see Wolf and Neuner (fn 48) 419–420 para 11.

2321 cf petrol stations at which attendants fill the car with fuel. In this case, English law deems the prices displayed for the fuel as an invitation to treat, see Treitel/Peel (fn 65) para 2-009.

2322 On the different differentiating factors, see Section C.IV.1.a.ii.bb) above.

2323 See Sections C.IV.1.a.ii.bb) and B.II.3.a.ii.bb) above for Japanese and English law respectively.

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that is unique to English law.[2324] Further examples will be considered in the next section.

ii. Statements and Acts Deemed as Invitations to Make an Offer

A wide range of cases exists in which acts or statements are deemed to be mere invitations to treat. The consequence, as already explained, is that the contracting process does not begin with the act or statement in question, which instead constitutes a pre-step. Advertisements, both online or in print form are a prominent example of *invitationes ad offerendum* found in England, Germany, and Japan. These will include things like 'help wanted' signs, catalogues, and price lists.[2325] A comparable item to price lists are cost estimates, which are also not binding under Japanese, German, or English law.[2326] Although not expressly discussed in England, these might fall within the category of 'transmission of information', the example given being that of the statement of a price at which a person might be willing to sell that is made in response to an information request.[2327] While this is a circumstance that is treated the same in all three countries, we see a divergence in the estimations of English, German and Japanese law in other instances.

Displays of goods are one such situation. English and German law concur that both a display of goods in a shop window (with or without prices being shown), as well as the display on shelves inside a shop are only invitations to treat.[2328] In contrast, Japanese law differentiates between goods that are displayed in shop windows and those on shelves inside shops. In the former case, the window display is treated as an invitation

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2324 See Section B.II.3.a.ii.bb) above. On unilateral contracts existing in English law only, see Section I. above.

2325 See Sections B.II.3.a.ii.bb), B.III.3.a.ii.bb), and C.IV.1.a.ii.bb) above for English, German, and Japanese law respectively.

2326 For Japan, see Section C.IV.1.a.ii.bb) above. For Germany, see, eg, Industrie- und Handelskammer Bonn/Rhein-Sieg, *Kostenvoranschlag* [Cost Estimate] (leaflet, May 2018) 1, available online at www.ihk-bonn.de/fileadmin/dokumente/Downloads/Recht_und_Steuern/Vertragsrecht/Kostenvoranschlag.pdf. For England, see, eg, the information provided on the difference between price estimates and quotations by Invest Northern Ireland at www.nibusinessinfo.co.uk/content/difference-between-quotation-and-estimate.

2327 See Treitel/Peel (fn 65) para 2-006 and Section B.II.3.a.ii.bb) above, where the leading case of *Harvey v Facey* (fn 456) is discussed.

2328 See Sections B.II.3.a.ii.bb) and B.III.3.a.ii.bb) above respectively.

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to treat, whereas goods on shelves are deemed as offers.[2329] It ought to be noted, however, that this is true where no price is indicated for the goods displayed in shop windows. As has already been argued above,[2330] it would nevertheless seem most practical to deem such goods as only constituting invitations to make an offer, like in English and German law.

Another instance concerns public transport, like bus or train services. Under Japanese law, the display of timetables for these services is deemed to be an invitation to treat, whereas English case law treats it as an offer.[2331] Similarly, the factual provision of the service in Germany is an offer *ad incertas personas*.[2332] These circumstances ought to be distinguished from the case where a ticket is purchased prior to boarding the vehicle. In this case, the usual process of offer and acceptance ought to be applied, whereby the offer should be deemed as having been made by the customer.[2333]

b. Requirements for Offers: Certainty and Communication

Bearing in mind the definition of offers given in Section a. above, this section will set out the requirements for offers found in the three jurisdictions considered in this dissertation. In principle, these come down to certainty of the intention and of the content of the statement. With regard to intention, this means that the offeror as the statement maker has the aim of entering into a contract with the other party.[2334] In relation to the content of the statement, the contract's essential terms must be either stated explicitly or at least be determinable through some mechanism contained in the offer.[2335]

2329 See Section C.IV.1.a.ii.bb) above.
2330 See ibid.
2331 See Sections C.IV.1.a.ii.bb) and B.II.3.a.ii.bb) above respectively, where it has been argued for the latter that these should be treated as invitations to treat as well.
2332 See Section B.III.3.a.ii.bb) above.
2333 For the arguments, see Sections B.II.3.a.ii.bb), B.III.3.a.ii.bb), and C.IV.1.a.ii.bb) above for English, German, and Japanese law respectively.
2334 See Section B.II.3.a.ii.cc) above for England, Section B.III.3.a.ii.cc) for Germany, and Section C.IV.1.a.ii.aa) for Japan.
2335 For German law, see Section B.III.3.a.ii.cc) above. For English and Japanese law, see Sections B.II.3.a.ii.cc) and C.IV.1.a.ii.aa) above respectively.

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English contract law alone foresees the additional requirement that an offer be communicated in some way in order to be effective, which means that it must be known to the other party.[2336] It might be surprising at first that no similar requirement is discussed in German or Japanese academic literature; however, this lack can be explained very easily on the basis of the underlying contract theory. While English law traditionally considers contracts to be based on promises, German and Japanese law are based on the theory that transactions arise from declarations of intention (*Willenserklärungen*; *ishi hyōji*, 意思表示).[2337] Inherent in this latter notion is the requirement that the intent is announced; otherwise, the declaration is not effective. This is particularly true for offers, which are seen as *empfangsbedürftige Willenserklärungen* (declarations of intention that need to be received).[2338] In effect, all three legal systems therefore require that offers be known by the other party in order to be effective; however, in Japan and Germany, this is not a requirement discussed specifically with offers, but rather on a general level with declarations of intention.

c. The Effectiveness of Offers

The question of when an offer comes into effect and whether and until when it may be revoked also reveals differences in the contract laws of England, Germany, and Japan. This is more so with the issue of (ir)revocability than with the time of coming into effect. All three countries concur that offers — made to a person at a distance, eg, by letter or e-mail — become effective upon their receipt by the offeree.[2339] This generally occurs at the time when the offeree can access and therefore is able to have knowledge of the offer; actual knowledge of its content is not required.[2340]

The situation is very different in relation to the revocability of offers. English law is the most liberal in that it generally allows offers to be revoked if the revocation reaches the offeree before acceptance is made

2336 On this, see the discussion in Section B.II.3.a.ii.dd) above.

2337 See Sections B.II.1., B.III.3.a.i. and C.IV.1.a.i. above respectively for further details.

2338 On this, see Section B.III.3.a.ii.aa) above.

2339 This is laid down in German law in § 130 para 1 BGB, and in Japanese law in art 97 para 1 *Minpō*. For English law, see Treitel/Peel (fn 65) para 2-015 and *Henthorn v Fraser* (fn 494) 37 (Kay LJ, *obiter dictum*).

2340 See Section B.II.3.a.ii.ee) above for English law, Secion B.III.3.ii.dd) for German law, and Section C.IV.1.a.ii.cc) for Japanese law.

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(sent).[2341] The middle position is taken by Japanese law. It differs between offers made to persons present or at distance, and whether a period of acceptance has been specified in the offer when determining whether an offer is revocable. Generally, an offer without a period for acceptance is revocable until it is accepted; however, when it is made to a person at distance, the offeror must wait for a reasonable period before a revocation can be made (see art 524 *Minpō*). Where an offer made in the physical presence of a person specifies a period of acceptance, it becomes irrevocable (art 521 para 1 *Minpō*), unless the offeror reserves themselves the right to revoke.[2342] German law is at the other end of the spectrum in that it generally deems offers to be irrevocable (§ 145 BGB), unless one of the following three circumstances applies: the revocation reaches the offeree before the offer; the offer indicates clearly the offeror's intention not to be bound (§ 145 BGB); or the offeror reserves themselves the right to revoke (*Widerrufsvorbehalt*). In order to be effective, the revocation must reach the offeree but need not have been read.[2343]

Even without revocation, offers can expire and thereby lose their effectiveness. In this respect, the three countries' laws are again very alike. They concur in that offers will expire automatically after the stipulated period for acceptance ends, or, otherwise, when a reasonable period has elapsed.[2344] German and Japanese (commercial) law have a special rule where the parties are in each other's presence: here, the offer will expire if it is not accepted immediately (Germany) or before the parties separate (Japan).[2345] While no such rule seems to exist in English law, it may be that a similar result would be reached implicitly. This is due to the fact that the method of making an offer, or rather the speed of transmission, affects the length of time of the offer's validity where persons are at a distance from each other: the speedier the transmission, the shorter the time before the offer expires.[2346] If the underlying principle were to be applied to offers made between persons in each other's presence, the fact that the offeree

2341 See Section B.II.3.a.ii.ff) for further details.
2342 For further details, see Section C.IV.1.a.ii.dd) above.
2343 See Section B.III.3.a.ii.ee) above for further details on revocations under German law.
2344 For English law, see Section B.II.3.a.ii.ff) above; for German law, see §§ 146, 147 para 2, 148 BGB and Section B.III.3.a.ii.ee) above; for Japanese law, see art 521 para 2 *Minpō* and Section C.IV.1.a.ii.dd) above.
2345 See Sections B.III.3.a.ii.ee) and C.IV.1.a.iii.cc) above for Germany and Japan respectively.
2346 On this, see Section B.II.3.a.ii.ff) above.

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knows of the offer immediately ought to lead to the conclusion that the offer will only be valid for a short period, or, as in Japanese law, until the parties separate.

2. Acceptance

Similarities and differences are also discernible between Japanese, German, and English law in relation to the second pillar of a contract, acceptance. The correlation begins with the definition of acceptance (*Annahme*; *shōdaku*, 承諾) as an unconditional declaration of intention expressing assent to the terms of a specific offer,[2347] and extends to the differentiation with other acts or statements and the methods of acceptance (on which, see Section a. below), although first small disparities appear here. While the requirements for acceptance are similar in all three legal systems (Section b.), the contrasts deepen in relation to the effectiveness of declarations of acceptance (Section c.).

a. Acceptance and other Acts or Statements; Method of Acceptance

Japanese, German, and English law concur in that acceptance has to be differentiated from other acts or statements, namely, mere confirmations.[2348] This means that a simple acknowledgement of having received an offer will not be sufficient, unless a contrary intention is perceptible. Having said this, German law allows a confirmation to be combined with a declaration of acceptance. In practice, this often occurs with confirmations of goods or services being ordered, in which case acceptance consists of an unconditional notice that the order will be fulfilled.[2349]

All three contract law systems also recognise both express and certain kinds of implied forms of acceptance, but do not generally deem mere silence as a declaration of intention.[2350] Implied acceptance will be allowed where the offeror has waived the need for a notice of acceptance in the

2347 For English law, see Section B.II.3.a.iii.aa) above; for German law, see Section B.III.3.a.iii.aa); for Japanese law, see Section C.IV.1.iii.aa).

2348 See ibid.

2349 On this, see BGH decision of 16 October 2012 (fn 1110) para 19 and Section B.III.3.a.iii.aa) above.

2350 For details, see Sections B.II.3.a.iii.bb), B.III.3.a.iii.aa), and C.IV.1.iii.aa) above for English, German, and Japanese law respectively.

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offer, or where custom does not require it.[2351] Interestingly, it seems that implied acceptance is unusual in Germany,[2352] whereas it is common in England. This is due to the existence of unilateral contracts in English law, under which acceptance normally consists of an act requested by the offeror and of which the offeror will only have notice when that act has been completed.[2353] A similar provision exists in both Japanese and German law for advertisements offering prizes (*kenshō kōkoku*, 懸賞広告, art 529 *Minpō*; *Auslobung*, § 657 BGB), according to which acceptance is implied where a person acts in accordance with the request of the offeror: performance of the act puts the offeror under the obligation to give the offered reward. Furthermore, implied acceptance under German law may consist of the performance of some act that is objectively seen as congruent with acceptance, such as payment of the purchase price or (taking) delivery of an object.[2354] The situation is therefore comparable in all three countries' laws on this point.

b. Requirements for Acceptance: Unconditionality, Congruence, and Communication

As has already been noted when acceptance was defined in Section 2. above, the statement must be an unconditional declaration of intention to contract. It has also been noted previously that it must relate to the offer and be congruent with the terms of the same, as the statement will otherwise — unless the modification concerns an insignificant change — be deemed as a rejection of the offer and constitute a new offer (with different terms) instead.[2355] Unless exceptions (ie, implied acceptance) apply, declarations of acceptance must also be communicated to the offeror in order to be effective.[2356] This leads to the next aspect, namely, from and until when a declaration of acceptance is effective.

2351 This is laid down in German law in § 151 BGB, and in Japanese law in art 526 para 2 *Minpō*. For English law, see Section B.II.3.a.iii.bb) above.

2352 See Section B.III.3.a.iii.aa) above.

2353 On this, see Section B.II.3.a.iii.bb) above.

2354 See Section B.III.3.a.iii.aa) above.

2355 See § 150 para 2 BGB, art 528 *Minpō*, and, eg, McKendrick (fn 48) 81 for German, Japanese, and English law respectively. For further details, see Sections B.III.3.a.iii.aa), C.IV.1.a.iii.aa), and B.II.3.a.iii.aa) above respectively.

2356 See Section B.II.3.a.iii.bb) above for England, Section B.III.3.a.iii.aa) for Germany, and Section C.IV.1.a.iii. for Japan. Note that this requirement is again

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c. The Effectiveness of Acceptance

Apart from the requirements just discussed, there is also the question of when acceptance becomes effective (see Section i. below) and how it might become ineffective (Section ii.). The regulation found in English, German, and Japanese law is complex and diverges most in this respect. Moreover, the situation will change again in April 2020, when the *Minpō* reform takes effect in Japan. This change in the Japanese rules with regard to the coming into effect of declarations of intention is interesting from a comparative law perspective, because it will alter the law's alignment: under the current rule, acceptance follows the same rule as English law; in future, it will follow the model found in German law.[2357]

i. Coming into Effect of Acceptance

The rules for the coming into effect of acceptance is most straightforward in German law: *Annahme* made at a distance becomes effective upon its receipt (see § 130 para 1 BGB, embodying the 'receipt theory', *Empfangstheorie*), a rule which is said also to apply to declarations made in the physical presence of a person.[2358]

In English law, the situation is more complicated, as differentiations are made between unilateral and bilateral contracts on the one hand, and between declarations made by communication that is direct or at a distance on the other. Leaving unilateral contracts aside,[2359] in bilateral contracts, acceptance made by direct or instantaneous communication (eg, face-to-face and telephone conversations, fax, e-mail) will come into effect once received by the offeree under the mailbox rule, while other communication at distance (eg, letters) come into effect once sent under the postal rule.[2360] In this sense, receipt means that the declaration has

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inherent in the notion of acceptance constituting a declaration of intention that needs to be received, on which see BGH decision of 28 March 1990 (fn 1100) para 15.

2357 For a discussion of this alignment, see Shinomiya and Nōmi (fn 1944) 292–293.

2358 See Sections B.III.3.a.iii.dd) and B.III.3.a.ii.dd) above.

2359 Here, acceptance is by conduct and becomes effective only once the required act has been completed, see Section B.II.3.a.iii.cc) above.

2360 For details on the differentiation, see Section B.II.3.a.iii.cc) above, where it is also noted that this classification has been criticised but remains valid law.

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reached the offeree, whereby actual knowledge of its arrival or content is not necessary.[2361] Sending means posting, ie, putting the letter into the post box, or handing the letter to a clerk at the post office.[2362]

Japanese law follows the English model in that *shōdaku* generally become effective upon dispatch (art 526 para 1 *Minpō*, containing the dispatch rule, *hasshin shugi*, 発信主義; cf art 508 para 1 *Shōhō*). This simply means that the declaration has been sent out.[2363] In contrast, where a period of acceptance is determined in the offer, art 521 para 2 *Minpō* implies that acceptance will come into effect once received.[2364] Similarly, declarations of intention sent in an electronic form such as an e-mail are not governed by art 526 para 1 but by art 97 para 1 *Minpō* (codifying the arrival rule, *tōtatsu shugi*, 到達主義; see art 4 *Denshi keiyaku-hō*), so that *shōdaku* made in this way will also only become effective once received.[2365] In either case, receipt occurs when the addressee is objectively able to have knowledge of the declaration, namely, when it has entered the recipient's sphere of influence, such as a letter that is handed over to a member of the offeree's family or an e-mail that is accessible to the offeree.[2366]

We see, therefore, that different rules have been adopted for different situations. While German law has decided on one uniform rule for all declarations of intention, in fact, under English and Japanese law, the question of whether acceptance becomes effective upon being sent or upon being received depends not only on whether acceptance is made *inter presentes* or *inter absentes*, but also —and perhaps even more so — what communication method is used (England), or whether the offer stipulates a period of acceptance or is made in electronic form (Japan). Having said this, the rules in Japan will change in the near future, to the effect that all declarations of intention — irrespective of whether they are declarations of offer or acceptance and what form they take, or whether they are made between persons physically present or between absent persons — will come into effect upon being received.[2367] This will approximate the situation in Japanese law to that in German law, namely, that all declarations of intention are governed by the arrival rule.[2368]

2361 See on this further Section B.II.3.a.iii.cc) above.
2362 For further details, see Section B.II.3.a.iii.cc) above.
2363 See Section C.IV.1.a.ii.cc) above.
2364 See ibid.
2365 See ibid.
2366 See on this further ibid.
2367 On this, see in detail Section C.V.3.a. above.
2368 Compare Shinomiya and Nōmi (fn 1944) 292–293.

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One further aspect that needs to be considered with respect to the effectiveness of acceptance is that it will usually have to be made in the time period that is set in the offer, or, otherwise, within a reasonable period under English, German, and Japanese law. What is reasonable will depend on the circumstances of the case.[2369] A connected issue is the effect of late declarations of acceptance. This matter is regulated in German and Japanese law, but not in English law, which may be due to the fact that the postal rule is often applicable to English contracts and thus makes delays in transmission irrelevant. It has been suggested for other cases that the late declaration of acceptance might be deemed as a counter-offer if the declaration fulfils the requirements of an offer.[2370] This solution is also possible by virtue of art 523 *Minpō* and § 150 para 1 BGB in Japanese and German law. Nevertheless, both of these legal systems contain a provision modifying this situation: Under § 149 BGB and art 522 *Minpō*, the offeror must give notice of the delay to the offeree if they are aware that the declaration ought normally to have arrived on time; otherwise, the declaration of acceptance will not be deemed to be late and thus display its effect.[2371]

ii. Loss of Effect of Acceptance

The rules regarding the withdrawal or revocation of acceptance also differ from each other. German law again has the most straightforward principle: *Annahme*, like an offer, can be withdrawn (*widerrufen*) through a declaration to that effect if it reaches the offeror before or together with the declaration of acceptance (§ 130 para 1 BGB), but not thereafter, unless the offeror has excluded being bound by the offer (§ 145 ibid).[2372] The situation is more complicated in both English and current Japanese law. Seeing as the postal or dispatch rule often applies, a declaration of acceptance cannot normally be withdrawn once it has been sent in either of these two countries, as it will already have come into effect. Having said this, in cases where the mailbox or arrival rule applies, the declaration will only come

2369 See Sections B.II.3.a.iii.cc), B.III.3.a.iii.dd), and C.IV.1.a.iii.cc) above respectively for details.

2370 On this, see Schmidt J (fn 25) 586.

2371 For a detailed discussion, see Section B.III.3.a.iii.dd) above for the German provisions and Section C.IV.1.a.iii.aa) above for the Japanese provisions. It ought to be noted that art 522 *Minpō* will cease to exist after the amended *Minpō* has entered into force, see Section C.V.3.c.ii. above.

2372 See on this further Sections B.III.3.a iii.dd) and B.III.3.a.ii.ee) above.

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into effect once it reaches the offeror, so that a declaration of withdrawal that arrives before or at least at the same time as the declaration of acceptance will revoke it.[2373]

One further point needs to be noted with regard to the effectiveness of acceptance *inter absentes*. It concerns the potential risk of declarations getting lost or distorted while being transmitted and which party must bear this risk. In Japan and England, the risk is divided between the parties, but not equally: Under the *tōtatsu shugi* or mailbox rule, the offeror bears the risk during the time the declaration is transmitted and until it is deemed to have been received. Consequently, if a fax message or an e-mail is sent by the offeror and it is recorded on the offeree's fax machine or e-mail provider's server, its loss or any distortion before this moment will be to the disadvantage of the sender, but any subsequent events are to the disadvantage of the recipient, since actual knowledge of the content is irrelevant for the effectiveness of acceptance. In contrast, under the *hasshin shugi* or postal rule, the sender has to bear the risk only until the declaration of acceptance has been sent, eg, until a letter has been handed over to the post office clerk, so that any subsequent loss or distortion is at the risk of the recipient. This means that the risk will in effect be on the offeree longer in both situations, since the interval between sending of a fax or e-mail message and its receipt is short; as is the time until a letter is in the post office's control.[2374]

As the German rules adopt the arrival rule only, a larger portion of the risk is always on the sender, namely, from the time of sending, during the transmission, and until receipt.[2375] Nevertheless, seeing as declarations of offer and acceptance are treated the same way under German law, both parties will have to bear the same amount of risk: the offeror will bear more when making the offer; the offeree will bear more when making acceptance. It could thus be argued that the risk allocation is most balanced in German law as compared with English or Japanese law; nevertheless, this aspect ought not to be assessed in isolation. Rather, the possibility to revoke ought to be taken into account as well.

The current Japanese rule of irrevocability of the offer in combination with the general application of the dispatch rule for acceptance has been

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2373 For further discussion on English law, see Section B.II.3.a.ii.ff) above; for Japanese law, see Section C.IV.1.a.iii.dd) above.

2374 The rules are discussed in detail in Sections C.IV.1.a.iii.bb) and B.II.3.a.ii.cc) above for Japan and England respectively.

2375 See Section B.III.3.a.ii.dd) above.

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criticised for favouring the offeree (sender of the acceptance) too much.[2376] That said, an argument used in the past against the arrival rule (currently applied to acceptance in Germany and also to be applied in Japan in future) was that it slowed down transactions due to the lag time between the sending and receiving of the declaration of acceptance and the consequent delay in the conclusion of the contract; however, as has been rightly pointed out, this lag time has basically been eliminated due to the rise of e-commerce.[2377]

It could be argued that the German position of applying the arrival rule to acceptance while not generally allowing offers to be revoked strikes a good balance: the arrival rule favours the offeror for acceptance, since the risk of the declaration reaching the other party is largely on the offeree; however, the offeree is protected as well, since the offeror cannot withdraw their offer once it has reached the offeree. The German model is therefore said to emphasise certainty.[2378]

In contrast, the English position of applying the postal rule to acceptance while allowing offers to be revoked is said to allow the parties to compete freely on an equal footing.[2379] Indeed, while the fact that acceptance already comes into effect upon being sent burdens the recipient (offeror) with a larger portion of risk; however, the fact that the offeror is free to withdraw their offer at any time until acceptance has been made may well offset this risk in practice. This is not true where the mailbox rule applies to acceptance in England, since the risk is largely on the sender (offeree) — namely, from sending and during the whole transmission until the declaration is received — while the risk of the offer being withdrawn in the meantime is also disadvantageous for the offeree. Be this as it may, the fact that the communication methods to which the mailbox rule applies, such as e-mail or fax, have a fast transmission time, it is submitted that the risk in this situation is not as large as that under the postal rule. Nevertheless, it remains true that the offeror holds the greater advantage. In the end, all models have advantages and disadvantages, so that there is no perfect answer.

2376 On this criticism, see Shinomiya and Nōmi (fn 1944) 292.
2377 Compare ibid.
2378 Ibid.
2379 Ibid 293.

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3. Intention to be Legally Bound

It has already been mentioned during the discussion of the requirements for offer and acceptance in Sections 1. and 2. above that English, German, and Japanese law require that a person must have the necessary intention to contract. This is the intention to be legally bound — both by their statement and the consequences arising from the contract. What is interesting is that it is an aspect that is treated as a distinct requirement from offer and acceptance in English legal academic works, whereas it is discussed as an inherent part of declarations of intention in German and Japanese legal texts.[2380]

At the same time, all three countries' laws set out situations — including those discussed above in relation to invitations to treat — which are deemed not to give rise to legal rights and obligations. This is particularly true for acts of kindness (*Gefälligkeiten*; *kōi*, 好意), which can be defined as one-sided gratuitous acts by one person for the benefit of another, whereby no obligation is on the person to act.[2381] Rather than an exhaustive account of this topic, which would go beyond the scope of this dissertation, only a brief overview will be given to contrast the situation in the three legal systems considered in this work.

Circumstances such as a social (more significantly: a family) relationship often lead to particular acts being deemed not binding. One example might be giving someone a ride in a car.[2382] This issue can also arise in commercial contexts, although here the presumption will be that a legally binding arrangement is intended.[2383] Nevertheless, this does not invariably make all acts or statements in such a context binding. It always comes down to an interpretation of the situation. Accordingly, statements termed as sales talk or 'mere puffs' will not be deemed as offers, nor as

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2380 See, eg, Treitel/Peel (fn 65) paras 4-002 et seq, Wolf and Neuner (fn 48) 314–318 paras 17–28, and Yamamoto K, '*Minpō kōgi IV-1*' (fn 1646) 16–17 respectively.

2381 See Nobuhisa Segawa, *Kōi to keiyaku* [Acts of Kindness and Contracts], in: Taniguchi and Igarashi (fn 1819) 51, 52–53.

2382 In Germany, such an act can amount to a mandate (*Auftrag*), if the circumstances are pressing enough for the beneficiary, see Section B.III.3.a.iv. above. Conversely, in England, this has been deemed a mere social arrangement, see Treitel/Peel (fn 65) para 4-019.

2383 This is true for English and Japanese law at least, see Section B.II.3.a.iv. above and Segawa (fn 2381) 53 respectively.

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invitations to treat in English law.[2384] In contrast, providing a lorry driver for another company has been found to be a binding act in Germany.[2385] The issue can be even more complicated, for example, with LOI. These are usually not binding under English, German, and Japanese law, but may still be relevant to some extent, at least in particular circumstances.[2386] In the end, it comes down to an interpretation of the parties' intention in a particular situation on whether an act is legally binding.

4. *Indicia* of Seriousness

As has been seen in the discussion in Sections B. and C. above, English and Japanese law contain aspects and elements that are, or in some cases once were, what Hein Kötz terms '*indicia* of seriousness': a way of differentiating between enforceable and unenforceable contracts.[2387] These may be acts that are required in addition to a consensual agreement, like the payment of consideration, or (formerly) *tetsuke* (手付); or even that a particular form is used for an agreement.[2388] In this section, consideration and *tetsuke* found in England and Japan respectively will be contrasted. The German concept of *Draufgabe*, albeit comparable, will only be considered marginally, as it is no longer used in practice.[2389]

Both English consideration and Japanese *tetsuke* have a long tradition in the two legal systems. Under English law, the sign of earnestness known as consideration has been a constitutive requirement for contracts since the mid-sixteenth century, although its roots go further back in history.[2390] The origin of *tetsuke* may be older, as it is said to have arisen in the

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2384 See Section B.II.3.a.ii.bb) above.
2385 See BGH decision of 22 June 1956 (fn 1266), discussed in Section B.III.3.a.iv. above.
2386 On the position in English law, see Treitel/Peel (fn 65) para 4-024. On German law, see Wolf and Neuner (fn 48) 411–412 para 12. On Japanese law, compare Yasutomo Sugiura, *Column: CISG no moto de no kihon gōi-sho* [Column: Letter of Intent under the CISG], in: ibid and Kubota (fn 1639) 71–72. Note that while LOI may be deemed to be binding as a kind of contract in particular circumstances in England, this is not so in Germany. Rather than a contract itself, it is relevant for assessing *culpa in contrahendo*, see Wolf and Neuner, ibid 412. In Japan, these documents are not discussed in contract law texts.
2387 See Kötz, '*Europäisches Vertragsrecht*' (fn 17) 71.
2388 Ibid.
2389 See on this Section B.III.3.c.iii. above.
2390 On this, see the account in Section B.II.2.a.iii.cc) above.

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Ancient era (approximately first century AD), although the peak of its importance — ie, its wide-spread use and potential to serve as a constitutive requirement for contracts — was during the Tokugawa era (around the seventeenth century).[2391]

The practical relevance of these signs of earnestness is also comparable in a way. While consideration remains of importance today in contract theory and is therefore executed in practice, it is seldom an issue.[2392] Although *tetsuke* does not have to be paid today when concluding a contract, it is used regularly in connection with particular transactions, such as with real estate.[2393] As a consequence, it also does not generally become an issue in contracting practice. It is convenient to note at this point that German law knows of a figure that is similar to *tetsuke*, the *Draufgabe*; however, despite its long tradition (originating from Roman law) and continued use in the time of the *alte Reich* (sixteenth~nineteenth century),[2394] the provisions embodying the tradition (§§ 336–338 BGB) are rarely applied today.[2395] As it is no longer of practical relevance, it will not be considered further in the subsequent discussion.

The temporal development of these *indicia* of seriousness follows the same path as the reason they arose. In essence, both consideration and *tetsuke* are signs of earnestness that developed from a need to bind the parties to the promises they exchanged. Despite these similarities, both the function and the concept of the two figures differ in several respects. First and most importantly, consideration is a constitutive requirement for contracts under English law, whereas *tetsuke* is a purely voluntary act, executed due to continuing business practices.[2396]

Secondly, whereas *tetsuke* can be differentiated into three related yet different types with distinct functions, there is only one kind of consideration, serving one purpose only. The three kinds of *tetsuke* are *shōyaku tetsuke* (証約手付, 'earnest money as proof of contract'), *kaiyaku tetsuke*, (解約手付, 'cancellation earnest money'), and *iyaku tetsuke* (違約手付, 'earnest money for breach of contract'). As the denominations suggest, their primary function is to act as proof of a contract, as a mechanism for cancelling a contract, and as a kind of liquidated damages respectively.

2391 See on this Section C.III.1.c.iv. above.
2392 See Section B.II.3.a.v. above.
2393 For further examples, see Section C.IV.1.c.iii. above.
2394 On the origin of *Draufgabe*, see Section B.III.2.a.iii.ee) above.
2395 See Section B.III.3.c.iii. above.
2396 On this latter aspect, see Sections C.IV.2.b.–c. above.

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Having said this, the function of proving the existence of a contract is inherent in all types, whereas the default type of *tetsuke* is the cancellation earnest in accordance with art 557 para 1 *Minpō*. In order for *tetsuke* to be deemed to have the function of liquidated damages, the parties must have had an explicit intention to this effect at the time when *tetsuke* was paid.[2397] In contrast to these multiple functions, consideration apparently serves one purpose: to aid the courts in differentiating between gratuitous and non-gratuitous promises. This is important, as only non-gratuitous promises are deemed legally enforceable. By providing consideration, a promise can thus be made enforceable.[2398]

Thirdly, although *shōyaku tetsuke* in particular seems to echo the English doctrine of consideration in its form,[2399] the two practices are not in fact comparable. This is because while consideration could be said to form part of the contract for which it is paid, *tetsuke* is related but distinct from the contract. In fact, the payment of *tetsuke* establishes a *tetsuke*-contract (*tetsuke keiyaku*, 手付契約).[2400] As a consequence, a distinct agreement is concluded between the parties that relates to the main transaction in question. The content of this accord will be to either provide proof of the transaction agreement, furnish an uncomplicated cancellation mechanism, or constitute liquidated damages in case of a breach of contract, or even a combination thereof.[2401] This is a considerable difference between the two concepts.

Fourthly, differences also pervade in terms of what constitutes consideration and *tetsuke*. Due to its functions, Japanese *tetsuke* will necessarily be in the form of money or things of (monetary) value, whereas the scope of things that may constitute consideration, in contrast, is very wide: anything from money and other things of some value to the receiver, to the giving up of a right or bearing of some loss are sufficient. English courts

2397 For further details on these types and the intention that is required, see Section C.IV.1.c.iii. above.

2398 For further discussion of the function of consideration, see Section B.II.3.a.v. above. Note that the alternative is for a promise to be made in the form of a deed. This instrument is discussed in Section III.1. below.

2399 Especially when reading the description made by Wigmore, '*Customary Law*' (fn 1675) 32 concerning the practice in the former province of Echigo, today's Niigata: 'In Echigo *kuni*, [...] where residence land (in towns) is to be sold, the seller comes to an agreement with the buyer, and the latter then gives a temporary instrument (*kari-shōsho*) to the former, also paying as earnest money about ten per cent of the price.'

2400 On this, see Section C.IV.1.c.iii. above.

2401 See ibid.

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have been far more liberal in assessing the existence of consideration than their Japanese colleagues when these determined whether *tetsuke* was given. In England, even trivial things such as pepper or doing something as simple as going to a particular place have been held to be sufficient, although in these extreme cases the things provided or done were executed at the request of the offeror.[2402] In contrast, something more realistic, namely, standing timber, is an example of objects that have been held to be sufficient to constitute *tetsuke* in Japan.[2403] Where money is paid, *tetsuke* will usually constitute 10%–20% of the purchase price, whereas £1 is sufficient consideration.[2404] Leaving this issue of the value aside, both consideration and *tetsuke* are paid at the time when a contract is concluded.[2405] In contrast, where *tetsuke* acts as a cancellation mechanism, it will be returned if it is the offeror who wishes to cancel the contract. As consideration is not used for this purpose, anything given as consideration will not be returned if the contract is not concluded.[2406]

In conclusion, both consideration and *tetsuke* can be labelled as external signs of the offeree's earnestness. Nevertheless, this is as far as the similarities go. The most important point to note is that consideration is a constitutive requirement for contracts concluded under English law not in the form of a deed, whereas *tetsuke* is an optional act, albeit at times required under Japanese business practice. Consequently, mere promises are not enforceable in England. It could be argued that this is also not true for Germany or Japan in instances where the contract laws require an arrangement to be in a particular form in order to be effective. This is because in all such cases, the legal systems require something that goes beyond mere agreement between the parties, as noted at the beginning of this section. The instances of mandatory forms will be contrasted in the following section.

2402 For further details on this, see Sections B.II.3.a.v.bb)–cc) above.
2403 See on this Section C.IV.1.c.iii. above.
2404 For *tetsuke*, see ibid. For consideration, see Section B.II.3.a.v. above.
2405 See Section B.II.3.v.ee) above on the rule against 'past' consideration, and Section C.IV.1.c.iii. on *tetsuke* respectively.
2406 At least it would appear so as there is no discussion of this kind nor case law to this effect in England.

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III. The Form Requirements

As noted above, agreements made up of an offer, acceptance, and an *indicium* of seriousness may furthermore have to fulfil various kinds of formal requirements that English, Japanese, or German law foresee for different types of contracts in order to be legally effective or enforceable in court. While the standards and their strictness vary, they nevertheless form exceptions to the general rule that informal contracts are enforceable.[2407] A range of the instances of such required forms will be contrasted in the following.[2408]

In general, it can be said that English law has kept in line with its pro-commercial attitude when imposing form requirements. This is because such formalities are only imposed in particular circumstances, while commercial needs have also been addressed by minimising the cumbersomeness of the required forms.[2409] This means that oral contracts are generally enforceable, unless particular form requirements apply.[2410] In fact, while English law is famous for being liberal, Japanese law actually seems to be more deserving of this 'title' in this respect. This is because, as will become apparent, Japanese law contains even fewer and more lenient requirements for mandatory contract forms. In contrast, German law is more proscriptive, foreseeing strict forms in a range of circumstances.

2407 Indeed, this is true for all European contract laws. In commercial practice, however, contracts are normally fixed in some written form, see Kötz, '*Europäisches Vertragsrecht*' (fn 17) 106 and 108–109.

2408 Only a selection will be considered here for the purpose of highlighting some of the similarities and discrepancies found in the three legal systems. For more detailed discussions of the form requirements, see Sections B.II.3.b., B.III.3.b., and C.IV.1.b. above for English, German, and Japanese law respectively.

2409 Compare Simpson, '*History*' (fn 232) 113, who discusses the formalities for conditioned bonds.

2410 Such mandatory form requirements will often be imposed by statute; however, the contracting parties are free to make their agreement subject to a particular form, see McKendrick (fn 48) 281. Treitel notes that even the requirement of written form can be commercially inconvenient and that the general rule in English law is therefore that informality is sufficient, see Treitel/Peel (fn 65) para 5-003. In former times, English law had constitutive form requirements, such as the contract under seal; but after the advent of the freedom of contract, consensualism, and commercial liberalism, formalities were no longer viewed as being of utmost importance to the formation of a contract. See on this von Mehren, '*Formalities*' (fn 791) 6. See also the discussion in Section B.II.2. above.

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In terms of the level of formality, English law generally distinguishes between two categories of contracts: 'simple' and 'speciality' contracts. While the latter have to be in the form of a deed (or a bond) today, the former can take various forms, namely, written, oral, or by conduct.[2411] While both Japanese and German law equally allow oral agreements, only German contract law prescribes a special instrument beside a normal written form, namely, a notarial deed (*notarielle Urkunde*), created in a notarial authentication (*notarielle Beurkundung*). In contrast, Japanese contract law requires something to be in writing, but does not have a special instrument like the English deed. The following section will contrast these forms in further detail. Particular attention will be given to the method of authenticating written documents in Section 2. Below.

1. Written Forms and (Notarial) Deeds

All three legal systems foresee an array of different kinds of written forms for particular contracts in order for these to be effective or legally enforceable. In essence, one encounters three levels of formality, namely: first, an agreement may be concluded orally or otherwise, but must subsequently be put in writing (see Section a. below); secondly, a contract must be concluded in the standard written form (Section b.); thirdly, a special instrument containing the contractual arrangement has to be drawn up (Section c.). Each of these modes is closely related to an aspect that will be examined separately, namely, the document authentication method used by the parties (see Section 2. Below). Moreover, some of these forms have been adapted to the needs of e-commerce (considered separately in Section IV. Below).

Before turning to each of the written forms, one common issue to consider is the meaning of 'writing'. It seems that traditionally, English, German, and Japanese law all deemed this to mean something being marked on physical and more or less durable mediums, particularly paper. This can be deduced from the description that methods such as 'typing, printing, lithography, photography and other modes of representing or reproducing words in a visible form' are being understood to mean 'writ-

2411 Whincup (fn 34) 107 para 4.2.

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ing' in England.[2412] These methods are equally acceptable in Germany,[2413] and — despite not being discussed in academic literature — arguably also in Japan.[2414] This traditional understanding explains the need for making explicit provision for new technologies and the spread of e-commerce.

a. Simple Written Forms: Evidence in Writing and the *Textform*

There are two basic written requirements: what is known as 'evidenced in writing' in English law and the *Textform* found in German law. While both are the simplest kind of contract forms, they are radically different from one another in that the latter must be created when concluding the contract, whereas the former can be drawn up both before and after the time of formation. This is because 'evidenced in writing' basically means that a memorandum is made in writing of the previously or subsequently concluded agreement.[2415] At the same time, this note need not even be in the form of a memorandum in the usual sense, so that a letter or other written document referring to the contract (and/or its terms) is sufficient.[2416] Japanese law apparently does not know such a simple form.

German law has a simple written form known as the text form (*Textform*) in § 126b BGB. Rather than the declaration being recorded on paper, it can be stored on a 'durable medium' ('*dauerhafter Datenträger*'), such as a USB drive or a CD-ROM; however, it is not the medium itself but the electronic document contained on it that constitutes the text form.[2417] The flexibility that is thus provided makes this form easier to use than the standard German written from (see below). Instances of the simple written forms include contracts of guarantee in English law (see s 4 Statute of Frauds 1677, 'SOF 1677') and relate to tenancies in German law (see, eg, § 555c and 555d BGB (*Ankündigung* and *Duldung von Mod-*

2412 See s 5, sch 1 Interpretation Act 1978 and Section B.II.3.b.ii. above.
2413 The caveat is that the writing must be in alphabetic or other characters from a real language, but cannot be in pictures or other similar depictions. See on this Section B.III.3.b.ii.aa) above.
2414 It seems that the notion of something being in physical, ie, paper form, is presupposed and as such is not discussed as being a matter of course. For further details on the arguments supporting this hypothesis, see Section C.IV.1.b.ii.aa) above.
2415 On this, see Section B.II.3.b.ii. above.
2416 See ibid.
2417 See Section B.III.3.b.ii.aa) above.

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ernisierungsmaßnahmen, Announcement and Toleration of modernisation measures)).

The English written evidence form seems to echo the obligation of one party to provide particular documents concerning the contract's content to the other party after the contract's conclusion, as under Japanese law,[2418] or the provision of pre-contractual information to consumers under German law.[2419] Indeed, under both English and Japanese law, the document is created at a time other than that of the actual contract being concluded. Furthermore, in all three cases, the purpose is to protect one party, namely, guarantors and consumers respectively. Having said this, at least the requirements related to consumers have been treated as information duties (*setsumei gimu*, 説明義務; *Aufklärungspflichten*) and not as form requirements.[2420] Indeed, an information duty and the form of its execution are distinct, just as they are in turn distinct from the required contract form. It is therefore not surprising that the non-fulfilment of information duties does not affect the validity of the transaction, but will extend the cancellation period for the consumer in German law or have administrative consequences for the merchant under Japanese law.[2421] The effect of this extension of the cancellation period under German law is to increase legal insecurity, since the extended period of time during which a consumer may end the contract suspends the contract's bindingness — in effect for one party only.

b. The Standard Written Form

Turning to the standard written form, all three countries' laws differentiate it from electronic forms (see Section IV.2. below) on the one hand, and,

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2418 For example, art 3 para 1 *Shita'uke-hō* or art 4 para 1 *Kappu hanbai-hō*. See Section C.IV.1.b.ii.cc) above for further details on these provisions.

2419 See, eg, § 482 para 1 BGB for *Teilzeit-Wohnrechteverträge* (time-share agreements), *Verträge über langfristige Urlaubsprodukte* (contracts relating to long-term holiday products), and *Vermittlungsverträge und Tauschsystemverträge* (brokerage contracts and exchange system contracts). On this, see fn 1395 in Section B.III.3.b.ii.bb) above.

2420 On the Japanese regulation, compare Dernauer, '*Verbraucherschutz und Vertragsfreiheit*' (fn 1629) 173 and, eg, 305–306; see also Section C.IV.1.b.ii.bb) above. On the German regulation, see Franzen, '*Vor § 481 BGB*' (fn 1395) para 3 and ibid, '*§ 482 BGB*' (fn 1395) para 1.

2421 See §§ 356a para 3, 482 para 1 BGB for German law, and Section C.IV.1.b.ii.bb) above for Japanese law.

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where applicable, simpler written forms as outlined above on the other. As already mentioned in relation to the meaning of 'writing', the three legal systems concur in that this form is limited to declarations made on paper. Furthermore, it is always required that the document be signed (discussed in Section 2. Below). Apart from these specifications, the document's content tends to receive more attention in academic literature than the external form.

In this respect, the document must state the party's or, as the case may be, the parties' intention and contain the whole agreement, unless (some of) the terms are incorporated through some other express or implied means.[2422] In particular, Japanese and German law require that the parties to a contract of guarantee (*hoshō keiyaku*, 保証契約, and *Bürgschaftserklärung* respectively) be named.[2423] One great difference is that whereas a German *Urkunde* can only be in the form of a single document, the written memorandum of a contract in English law can be composed of any number of documents, as long as all refer to the same transaction and are signed.[2424] In addition, English law may also require that the consideration for the contract in question be detailed in the document.[2425]

Written forms are required for a number of contracts in the three legal systems, some of which are the same, while others are not. Contracts of guarantee are one example of agreements that must be made in writing in English, German, and Japanese law (see s 4 SOF 1677, § 766 BGB, and art 446 para 2 *Minpō* respectively). There are three caveats to this congruence: In Germany, this form is only obligatory for declarations made by private persons. Where merchants are concerned, § 350 HGB expressly provides that § 766 BGB and thus the written form does not apply to commercial contracts of guarantee.[2426] In England, guarantees do not need to be made in writing; it is one alternative provided in s 4 SOF 1677, whereby the other is to evidence the agreement in writing, as discussed in the foregoing section. Similarly, in Japanese law, an electro-magnetic record of a guarantee is sufficient to constitute writing (art 446 para 3 *Minpō*; see also Section IV.2.a. below).

2422 See Section B.II.3.b.ii. above for English law, Section B.III.3.b.ii.aa) for German law, and Section C.IV.1.b.ii.aa) for Japanese law.
2423 See Sections C.IV.1.b.ii.aa) and B.III.3.b.ii.aa) above respectively.
2424 On this, see Sections B.III.3.b.ii.aa) and B.II.3.b.ii. above respectively.
2425 See Section B.II.3.b.ii. above.
2426 For further details, see Section B.III.3.b.ii.bb) above.

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Other particularly interesting examples include sales of land in English law (see s 2 subs 1 Law of Property (Miscellaneous Provisions) Act 1989, 'LPMPA 1989'). These agreements are regulated differently in the other two legal systems. Dispositions of land under German law must be made in the form of a notarial deed (see Section c. below), whereas it is a formless transaction in Japanese law. Nevertheless, as will be seen in Section V. below, such contracts are nevertheless often concluded in written form in accordance with current Japanese business practice.

Another interesting example concerns two instances in which use of the written form is — effectively — optional. This is the case for a 'lease agreement for a longer period of time than one year' ('*Mietvertrag für längere Zeit als ein Jahr*', § 550 BGB) under German law, and gifts (*zōyo*, 贈与, arts 549–550 *Minpō*) under Japanese law. In both situations, the effect(iveness) of the contract is impinged if not made in the written form: Gifts are revocable until performed, unless made in writing (art 550 *Minpō*), whereas German leases not in writing are deemed to have been concluded 'for an indefinite period of time' ('*für unbestimmte Zeit*', § 550 BGB) and can be terminated in accordance with the regular rules contained in the BGB after one year.[2427] Gifts and leases are regulated differently in the other two countries, whereby both need to be in the form of a (notarial) deed.

c. Special Instruments: (Notarial) Deeds

English, Japanese, and German law all recognise special instruments beside the standard written form. These are deeds under English law and notarial deeds as found in German and Japanese law (termed '*notarielle Urkunde*' and '公正証書', *kōsei shōsho,* respetively). As their names suggest, they are created by individual persons (laymen) in the former case and by notaries (*Notare*; *kōshō-nin*, 公証人) in the latter case.[2428] As such, an English deed is a private document, while German and Japanese notarial deeds are public documents.[2429] Accordingly, the strictness of the requirements for executing these instruments is higher in German and Japanese law than

2427 See Sections C.IV.1.b.ii.bb) and B.III.3.b.ii.bb) above respectively.

2428 See generally Sections B.II.3.b.iii., B.III.3.b.iii.cc), and C.IV.1.b.iv. above for English, German, and Japanese law respectively. The role of notaries will be discussed in further detail in Section V.4.b. below.

2429 See ibid.

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in English law (see Section i. below). Moreover, the creation process is necessarily different. While this is true, it has been noted that the underlying aim of both English deeds and (German) notarial deeds is the same, namely, as proof that the creator seriously intended to undertake what is promised.[2430]

It has been suggested that the reason for the lack of notarial form like the German *Beurkundung* in English law is that the English courts, which developed English contract law throughout history, could not create such a form if the English legislator did not, particularly because the English institution of a notary public is not comparable to the German *Notariat*.[2431] This is different from the situation under Japanese law, which has a notarial form but has chosen not to make it constitutive for contracts.[2432] The cases in which this instrument is prescribed are discussed in Section ii. below.

i. Requirements of (Notarial) Deeds

Turning to the requirements, the first thing to note is that an English deed is said to be sufficient, rather than being a 'necessary' form. This means that the deed itself is enough to render a contract binding and effective, whereas a necessary form would additionally require the usual elements of an agreement, consideration, and an intention to create legal relations.[2433] From this definition, it would seem that the German form requirements are 'necessary' rather than 'sufficient' forms, since offer, acceptance, and an intention to be bound are required in addition to the form in question.[2434] Although this is not discussed in Japanese academic literature, it would seem that the same is true for Japan, ie, that all elements of an agreement plus the form in question is necessary. This is because the Japanese notarial system, like the German system, falls under the Latin type.[2435]

2430 Compare Zweigert and Kötz (fn 15) 390 and 394–395, speaking about promises of gifts.

2431 Compare von Mehren, '*Formalities*' (fn 791) 15, 55, who discusses the existence of consideration and contrasts this with the German notarial deed.

2432 See on this generally Section C.IV.1.b.iv. above.

2433 See Treitel/Peel (fn 65) para 5-002. See also McKendrick (fn 48) 261.

2434 On this, see Section B.III.3.b. above.

2435 On the notarial systems, see Kaiser and Pawlita (fn 2086) 164.

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Despite this difference, all three countries' laws require that the (notarial) deed contain the parties' declarations of intention.[2436] In Germany and Japan, it is also an explicit requirement that the parties to the notarial deed be identified in the instrument, whereby the identification method used must also be stated.[2437] Of course, the party or parties are also named in English deeds; however, this is more a consequence of conveyancing practice, rather than due to some legal requirement.[2438] All three kinds of deeds must also contain the date and place of execution.[2439] With regard to the implementation method, it has the formal name of *Niederschrift* (notarial record, § 8 BeurkG) in German law, whereas it is simply referred to as execution in English law (see, eg, s 1 subs 3 LPMPA 1989), or as 'creation of deeds' (*shōsho no sakusei*, 証書ノ作成, see Chapter 4 *Kōshō-nin-hō*) in Japanese law.

The individual requirements differ as well. The procedure is adapted to the fact that notaries are involved in Germany and Japan while no professionals are *a priori* involved in England. Accordingly, the finished text of the instrument is read out to the parties by the notary, and must be approved and signed or sealed by them (see § 13 para 1 BeurkG and art 39 paras 1, 3 *Kōshō-nin-hō* respectively). In contrast, English deeds must be signed and delivered (s 1 subs 3 LPMPA 1989).[2440] Nevertheless, the executor of a deed in England likewise ought to read it through before executing it.[2441] Two further points need to be noted on the execution of English deeds. First, the deed has to be signed before a witness attesting the signatory's signature (s 1 subs 3 (a) (i) LPMPA 1989). Secondly, the

2436 For England, compare s 1 subs 2 (a) LPMPA 1989, which requires that the instrument be created with the intention of making a deed; as for the content being, eg, the conveyance of property, see Section B.II.3.b.iii. above. For Germany, see § 9 para 1 no 2 BeurkG and Section B.III.3.b.iii.cc) above. See Section C.IV.1.b.iv. above for Japan, where this seems to be an implicit requirement.

2437 See §§ 9 para 1 no 1, 10 para 3 BeurkG and art 36 paras ii, iv, vi *Kōshō-nin-hō* respectively.

2438 See *Halsbury's Laws Vol 32* (fn 62) para 205.

2439 This is a strict requirement in German and Japanese law, see § 9 para 2 BeurkG and art 36 para x *Kōshō-nin-hō* respectively. For England, see *Halsbury's Laws Vol 32* (fn 62) para 205, who states that at the very least, the date of the deed's creation is one of the 'formal parts' of the instrument.

2440 Note that formerly, a deed required a seal impression as well, but since 1989, a signature alone suffices in England. See Whincup (fn 34) 107 para 4.2. The use of signatures and seals will be discussed further below.

2441 On this, see *Halsbury's Laws Vol 32* (fn 62) para 235.

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requirement of delivery of the deed does not mean that the instrument must be physically handed over to someone; rather, an act or conduct on the signatory's part is necessary to show their intention to be bound by the deed.[2442]

It is perhaps due to the nature of the execution process that German and Japanese law seem to presuppose that notarial deeds be created on paper, rather than on other materials.[2443] In contrast, while the English common law once specifically required paper — or very similar materials like parchment or vellum — to be used for the making of a deed, this restriction has since been lifted by s 1 subs 1 (a) LPMPA 1989. Similarly, German law usually requires that the notarial deed be contained in one document, although special provision is made for contracts, allowing the declarations of offer and acceptance to be recorded separately (see § 128 BGB). This seems to be true for deeds made under English and Japanese law as well, although no similar explicit rule exists in either legal system. The reason is that both Japanese and English law seem to presuppose that only one document will be made, whereby it is unproblematic if the document consists of several pages.[2444] While this may be true, it seems that references to and annexing of other documents is permissible in all three legal systems.

ii. Instances of (Notarial) Deeds

(Notarial) deeds are sometimes prescribed by law but are at other times chosen in contracting practice for the added legal security they afford in terms of bindingness and enforceability. Gifts or the promise of the same are one instance found in all three legal systems. While English and German law require a (notarial) deed in such cases, it seems to be due to

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2442 For details, see Section B.II.3.b.iii. above.

2443 This matter seems to be presupposed, since there is no discussion on this topic in either German or Japanese legal academic literature. Nevertheless, seeing as a normal *Urkunde* in Germany can be written on paper as well as on other materials, this might also be true for a notarial deed. On the *Urkunde*, see Section B.III.3.b.ii.aa) above. Similar considerations seem to apply to Japanese law, see Section C.IV.1.b.ii.aa).

2444 At least in Japanese law, there is the caveat that the notary must seal the intersections of all pages of the notarial deed, see art 39 para 5 *Kōshō-nin-hō*. For English law, see *Halsbury's Laws Vol 32* (fn 62) paras 201 et seq, in particular para 231, where it says '[...] *the* document as *a* deed [...]' (emphasis added).

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legal practice in Japan that gifts, in particular of real estate, are recorded as a notarial deed.[2445] This is because the promise of a gift only becomes effective by creating the instrument, or by performance of the promise.[2446]

Transactions concerning real estate are another example. Both Japanese and English law require leases of a particular duration (between eleven and over fifty years, and over three years respectively) to be made in the form of a (notarial) deed.[2447] In contrast, German law is very lenient and merely requires leases for more than one year to be made in writing in order to be deemed to be concluded for a finite term. This means that the lease contract will still be valid even if not made in writing, but will simply have a different effect, namely, as a contract with an indefinite term. On the other hand, a notarial deed is required under German law for agreements (promises) to sell or buy land (see § 311b para 1 BGB). This is in stark contrast with English law, which only requires a standard written form (see Section b. above), and even more so with Japanese law, which even allows oral agreements in these cases (see Section C.IV.1.b. above).

2. Seals, Signatures, and Other Forms of Signing

Having seen what kinds of different written forms exist in English, German, and Japanese law, attention is now given to one element of documents which is of particular comparative interest. This is the way in which agreements or instruments are authenticated by the parties. In accordance with what has been said above, documents have to be signed in some way for them to obtain a legally binding effect. This requirement is the same in England, Germany, and Japan. While this is so, differences in the typically foreseen forms of signing arise between the 'Western' and the 'Asian' rules.

2445 For England, see Section B.II.3.b.iii. above. For Germany, see § 518 para 1 BGB. For Japan, cf art 549 *Minpō*, which explicitly allows gifts to be made solely through the parties' manifestation of intention.

2446 See Section B.II.3.b.iii. above for English law, and § 518 para 2 BGB for German law. For Japanese law, see art 550 *Minpō*, providing gifts not in writing to be revocable until they are performed. By deduction, this means that such gifts will only become binding once performed or put into writing.

2447 For Japanese law, see arts 22–23, 25 *Shakuchi shakuya-hō*, which applies to any kind of non-renewable lease and commercial leases of between thirty and fifty years, and ten to thirty years respectively. For English law, cf ss 52 subs 1, 2 (d), 54 subs 2 Law of Property Act 1925, 'LPA 1925', which provide that leases for less than three years taking effect in possession may be concluded orally.

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Nowadays, only two such forms remain: (handwritten) signatures (see Section a. below) and sealing (see Section b.). The requirements for each will be analysed subsequently. It is also interesting to note that other forms of signing were once accepted. For reasons of completion, a brief excursus will give an overview of these (Section c).

a. Signatures

The provisions discussed in Section 1. above will explicitly or implicitly require that a document be signed in order for the requirement of writing or of a (notarial) deed to be satisfied.[2448] Accordingly, a German *Urkunde* — irrespective of whether it is a private or a notarial instrument — has to be signed by the party or parties[2449] (see § 126 para 1 BGB and § 13 para 1 BeurkG). Similarly, English statutory provisions sometimes expressly require that a contractual document be signed. The most prominent example is a deed under s 1 subs 3 (a) LPMPA 1989. Other examples are bills of exchange (s 3 subs 1 Bills of Exchange Act 1882, 'BEA 1882'), contracts for the disposition of interests in land (s 2 subs 3 LPMPA 1989), and contracts of guarantee (s 4 SOF 1677).

Although rarely used today, signing has a long tradition in Japan, having been used since the Ancient era (eighth century).[2450] Examples of signatures being explicitly required in Japanese law are rare in general and non-existent for standard contracts; however, there are cases of special contracts such as contracts for construction work (*kensetsu kōji no ukeoi keiyaku*, 建設工事の請負契約, art 19 para 1 *Kensetsu-gyō-hō*) and other commercial documents such as invoices for freight transports (art 570 *Shōhō*) and deposit receipts (art 599 ibid), for which a signature is required or at least allowed in lieu of a seal being used. Note that in some instances, the signature of third parties may be required: Notaries must sign (and, in Japan, seal) the notarial deed in Germany and Japan (see § 13 para 3 BeurkG and art 39 para 3 *Kōshō-nin-hō* respectively), whereas a witness is required to sign a deed in England (see s 1 subs 3 (a) LPMPA 1989).

2448 An exception is the German *Textform*, of course, as a signature is not required under that form. On this, see Section B.III.3.b.ii. above.

2449 In this case, the parties must sign the same contractual document, see § 126 para 2 BGB.

2450 For further discussion, see Section C.III.1.c. above.

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The meaning of 'signing' is essentially the same in the three countries considered in this dissertation. In England, the meaning is broad: 'signing' generally 'includes making one's mark on the instrument' (s 1 subs 4 LPMPA 1989) and can be made by the party themselves or by their representative ('an individual in the name or on behalf of another person', s 1 subs 4A LPMPA 1989. Similar: s 91 BEA 1882). Moreover, a signature in a contract relating to land may consist of the handwritten name of the person, or their initials.[2451] The interpretation of the term in relation to contracts of guarantee is much wider, so that a person's initials or even a printed signature may suffice.[2452] The meaning in Germany is similar, with a handwritten signature generally being understood to be a sign of authentication.[2453] In like manner, there is a presumption in Japanese civil procedural law that signed (or sealed) private documents are authentic (see art 228 para 4 *Minso*). It can be deduced from this that the signature (or seal impression) acts as an authentication method. Indeed, the term used in the provision, *shomei* (署名), means writing one's name in Japanese characters (kanji, hiragana, katakana) or using the Latin alphabet.[2454] The signature need not be of the contracting party themselves, but can be that of an agent.[2455] This is not to say, however, that English law does not deem a signature as an authentication. In fact, it is normally seen as making the document (and its terms) binding for the signatory.[2456] Indeed, the general common law test for a signature is simply whether the act (signing) was done in order to authenticate the document.[2457]

2451 See Treitel/Peel (fn 65) para 5-009. See also the cases of *Firstpost Homes Ltd v Johnson* [1995] 1 WLR 1567 (CA) and *Newell v Tarrant* [2004] EWHC 772 respectively.

2452 Treitel/Peel (fn 65) para 5-024.

2453 On this, see Section B.III.3.b.ii. above.

2454 cf the terms *jisho* (自署), which encompasses more stylised signatures, and *kimei* (記名), which includes the printing of names. See Section C.IV.1.b.iii.aa) above for details on these terms.

2455 See Section C.IV.1.b.iii. above, in particular fn 2046.

2456 Compare McKendrick (fn 48) 316–317 See also Treitel/Peel (fn 65) para 8-086. This is true irrespective of whether the document's content has been read or is known to the signatory or not. An exception was developed under the *non est factum* (it is not my deed) doctrine for illiterate, incapacitated persons, or those 'ignorant of the language' of the document, see Treitel/Peel, ibid para 8-086 et seq for details. See further McKendrick (fn 48) 563–568.

2457 Compare Treitel/Peel (fn 65) para 5-030, who applies the test to electronic signatures. The issue of electronic transactions is discussed in Secton IV.2.b. below. For further details on the meaning of a signature in England, see Section B.II.3.b.iv. above.

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A signature made under German law must be individualised, yet identify the signatory, and be difficult to forge. This is in total contrast with English law, which does not require these characteristics.[2458] As this is not discussed in Japanese legal academic literature, it seems that such requirements also do not exist under Japanese law. The discrepancy may exist due to the differentiation in German law between signatures (*Unterschriften*) and mere marks (*Handzeichen*), which seems not to be made in England (nor Japan). This is because a simple 'X' has been deemed sufficient as a signature in English law, while it would be deemed to be a mere mark in German law.[2459] A mark in the form of an 'X' probably would not usually be used in Japan, because the Japanese script is different; however, as will be seen in Section c. below, signs other than signatures and seal impressions have, at least in the past, been accepted in Japan.

b. Seals

From a 'Western' point of view, the use of seals in contemporary Japan is an exoticism. While this is not true with regard to public institutions, the fact that private individuals in Japan regularly rely on sealing rather than handwritten signatures might seem mystifying. Similarly, seen from a 'Western' legal perspective, the employment of seals in lieu of handwritten signatures when concluding contracts is equally unexpected. It is interesting to note, however, that until around two hundred years ago, seals were also in common use among private individuals in European countries.

In Europe, seals were already employed during Roman times. Before the third century AD, the custom of sealing letters and contracts developed in the Roman Empire from the lack of a script with a level of development that would have allowed the identification of a person by their signature.[2460] In like manner, the high rate of illiteracy in Medieval Europe made the employment of seals necessary.[2461] The reason for the employment of seals in Asia seems to be similar: While the Chinese script had already been invented by the time the first seals were brought to Japan,

2458 Contrast Section B.III.3.b.iv. above on German law and Section B.II.3.b.iv. on English law.

2459 Ibid. See also the definition of 'sign' found in s 1 subs 4 LPMPA 1989, given above.

2460 Martin Henig, *Roman Sealstones*, in: Collon (fn 807) 88.

2461 Compare Gertrud Seidmann, *Personal Seals in Eighteenth- and Nineteenth-Century England and their Antecedents*, in: Collon (fn 807) 143, 153.

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knowledge of this script was only for those of highest rank.[2462] In fact, commoners in Japan did not have surnames, as this was prohibited until 1870.[2463] The low rate of literacy, which would only rise rapidly in the Tokugawa era (fifteenth–nineteenth century),[2464] precluded the development of handwritten signatures and favoured other means of 'signing', like sealing; although other forms of authentication also developed in Japan (see Section c. below). The reasons why seals fell into disuse in Europe while they continue to play a significant role in Japan will be explored in the following discussion.

i. The Use of Seals in England, Germany, and Japan until Modern Times (19th Century)

The importance of seals (*inkan*, 印鑑; or *inshō*, 印章)[2465] in Japan becomes evident when considering the following historical anecdote: The famous Japanese National Treasure of the 'King of Na's Golden Seal' ('漢委奴国王金印', *kan wa na koku'ō kin'in*) [2466], a golden seal bestowed upon the King of Na by the Chinese Emperor Guangwu in 57 AD, is often referred to as

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2462 This was not only true for the nobility or the warrior class. Persons having important (administrative) functions, such as the headmen of villages, were literate, see Henderson and Torbert (fn 1662) 7. This may correlate with the fact that education was traditionally restricted, namely, during the Classical era, to the nobility. The warrior class began to be educated in non-military matters in the Middle Ages, while merchants would only receive education beginning in the Tokugawa era. On this, see Encyclopaedia Britannica, *Education* (Online Academic Edition 2017), http://academic.eb.com/levels/collegiate/article/education/105951#47520.toc at 'Japan'.

2463 See the table showing the 'selected chronology for the 1870s', in: Jansen, '*Introduction*' (fn 1693).

2464 Compare Marius B Jansen, *Japan in the Early Nineteenth Century*, in: ibid (fn 1693) 50, 57.

2465 To be precise with the terminology, *inkan* can mean both seal (as in the object) and sealing (the action), while *inshō* only refers to the seal object, see Dictionary of Standard Japanese Legal Terms (fn 9) 33. See further Ino'ue (fn 2072), who states that the term *hanko* also refers to the object. Accordingly, the terms *inshō* or *hanko* will be used here to refer to the object. Note that during the Tokugawa era, seals were also referred to as *oku'in* (奥印), see Wigmore, '*Customary Law*' (fn 1675) 1 and 2. Kanji taken from the respective entries in the Japanese online dictionary Goo at http://dictionary.goo.ne.jp.

2466 http://museum.city.fukuoka.jp/gold/index.html.

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proof for the (coming into) existence of a nation in Japan.[2467] Indeed, it is said to be the oldest known seal in Japan,[2468] and has been described as the beginning of the history of seals in Japan.[2469] Furthermore, this seal may have been one of the first objects to introduce the Chinese character-script to Japan, which would later, in the seventh century, be adopted as kanji (漢字, literally meaning 'Chinese/Sino-' and 'Character' respectively).[2470] As will be seen in the subsequent section (ii.), they remain of great relevance today.

While these facts might not be surprising, it may be astonishing that seals were of great importance in England and Germany in many respects until the nineteenth century as well.[2471] Moreover, several types of seals existed, fulfilling different functions (see Section aa) below), which included contracting (Section bb)). Nevertheless, due to the limited accessibility of seals (Section cc)), the practice of sealing did not percolate all strata of society. The development of the sealing practice was not parallel in Japan and England and Germany, but rather opposite (see Section dd)).

2467 http://museum.city.fukuoka.jp/en/exhibition.html. Na was a kingdom in Ancient Japan, then referred to as Wa, located in the area of today's prefecture of Fukuoka, see www.fukuoka-art-museum.jp/english/eb/html/eb01/2011/kin_in/kin_in.html.

2468 Ishii K (fn 1699) 21.

2469 Masao Kume, *Mono to ningen no bunka-shi 178: hanko* [The Cultural History of Objects and Humans No 178: Hanko] (Hōsei Daigaku Shuppan-kyoku 2016) 49. cf the website by the *Zen-Nihon Inshō Gyō-kyōkai* at www.inshou.or.jp/rekishipage/japanpage/nihon1.html, where it is stated that a systematic order for seals was only established in the *ritsuryō* laws under the Taika reforms. Kume, ibid, 140, goes on to say that Japanese seals began to be bestowed upon public authorities by Japan itself in the Ancient era. This marks a change in two senses. First, seals had previously been bestowed on the monarchs of Japan by China, whereas now it was the Japanese monarch who conferred the right to use seals. Japan had therefore determined its own independent (political) authority in this matter. Secondly, as a consequence, it was no longer solely the Japanese Tennō who employed a seal as a sign of administrative power. For further details on this change, see Kume, ibid, 140–142.

2470 Compare Wolfgang Hadamitzky, *Handbuch und Lexikon der japanischen Schrift: Kanji und Kana 1* [Handbook on the Japanese script: Kanji and Kana 1] (Langenscheidt KG 1995) 9.

2471 See Stieldorf (fn 969) 34–35. cf Seidmann (fn 2461) 153, focusing on the use in private correspondence.

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aa) Types and Functions of Seals

In all three countries, there were then — and in Japan, continue to be — both private uses of seals, as well as employment of seals in business situations or when acting in an official role. Nevertheless, the borders between private and business were sometimes blurred. This fluidity already becomes evident from the kind of seals that existed, with some being private (*private Siegel*; *shi'in*, 私印), others of institutional or official nature (*institutionelle Siegel* including *Amtssiegel*; *kō'in*, 公印, official seals),[2472] and yet others with a kind of dual nature, such as *personale Amtssiegel* (personal official seals), employed by a person in the German territories by reason of their office, whereby these seals were not passed on to the person's successor in office.[2473]

There was also no clear borderline with some functions of seals. One example is the sealing of documents: the employment could be for private or business correspondence, contracts, and other business documents such as receipts.[2474] The most prominent use was for sealing (and thus authenticating) such documents,[2475] or closing the same (called '*versiegeln*' in German, sealing).[2476] Whether the seal impression was for official or private matters seems to have depended on the situation. Beside this, seal impressions were also used to verify different matters, such as the veracity of weights and measures used by merchants through the town's seal,[2477] or the quality of particular kinds of manufactured goods, such as cloth.[2478] In the Tokugawa era, seals were also employed in Japan to indicate that

2472 For Japan, see Mori'in-bō (fn 1690), who notes that the production and use of private seals was prohibited in the Ancient era (sixth–eighth century).

2473 On this, see Stieldorf (fn 969) 21–22.

2474 For further examples, see Dominique Collon, *Introduction*, in: ibid (fn 807) 9.

2475 von Mehren, '*Formalities*' (fn 791) 45. See also Stoljar (fn 194) 6, who goes on to note that this formalisation brought legal certainty to the agreement. Similarly, Stieldorf (fn 969) 36 states that the document obtained its legal validity ('*Rechtskraft*') through the act of sealing.

2476 Stieldorf (fn 969) 32, 3. The seals used for this purpose were known as *Sekretsiegel* or *Missivensiegel*, ie, privy seals, ibid 22.

2477 Frances E Baldwin, *Sumptuary Legislation and Personal Regulation in England* (PhD thesis, Johns Hopkins University 1923) 8 in note 28.

2478 On this, see Stieldorf (fn 969) 33; John Cherry, *Medieval and Post-Medieval Seals*, in: Collon (fn 807) 124, 132. The seal impression (*Aufdruck*) on such goods is generally known as a *Besiegelung* (sealing), see Stieldorf, ibid 32. cf Cherry, ibid, who notes that a lead tag was normally affixed to cloth having the approved quality.

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the content of documents had been verified or approved by a person of authority, like a village headman.[2479] Another example of a use that might be of private or official nature is the closing of containers or rooms, or the marking of property.[2480] Again, it depended on the role of the sealing person whether the act was private.

In a manner similar to the authentication of documents, a piece of material with a seal impression called a 'messenger seal' (*Botensiegel*) was used to raise the level of trustworthiness (*Glaubwürdigkeit*) of oral messages transmitted by way of a messenger.[2481] The handing over of the seal itself acted like a power of attorney, in that being in possession of the seal carried an authority to act on behalf of the seal's owner.[2482] The seal itself also had the function of acting as an identity for the person using it.[2483]

A seal also had — and continues to have — similar functions in Japan. First, it has always been a form of identifying the author of or otherwise related party to a written document.[2484] Secondly, placing one's seal impression on a document entailed the taking on of some form of responsibility.[2485] This correlates with an understanding in Europe that a person sealing a document might do so from a range of contractual positions: as the creator of the document containing some obligation, whereby the bindingness of the obligation is verified by the placing of a seal on the document; as the counterparty to an agreement, whereby the placing of the seal on the document then connotes consent to the content; as a witness or arbitrator; or even as an unrelated third party, who has lent their seal to a

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2479 Compare Henderson and Torbert (fn 1662) 9 and fn 28.

2480 See Stieldorf (fn 969) 32, 33. See also Cherry (fn 2478) 132. The last function was achieved by dripping melted wax onto the object to be sealed and impressing the wax with a personal mark, or even just a scratch, see Stoljar (fn 194) 6.

2481 Stieldorf (fn 969) 35.

2482 See ibid.

2483 See ibid 36.

2484 To enable the first function, local authorities kept seal books, in which a seal was registered to a person. On this, see Wigmore, '*Customary Law*' (fn 1675) 7.

2485 Responsibility could be in the form of becoming a 'primary' party to a legal undertaking, ie, as obligee and obligor, or as a 'secondary' party, such as a guarantor. The latter is evidenced in the term 'sealer' (*kahan-nin*, 加判人) being employed to 'witnesses' contracts in the region of Iwashiro and Uzen (today's prefectures of Yamagata and (roughly) Fukushima respectively) during the Tokugawa era. It should be noted that a 'witness' was treated as being both an observer and a guarantor in that period, see Wigmore, '*Customary Law*' (fn 1675) 7–8. Exceptionally, responsibility in a transaction might arise from acting as a witness, even if no sealing took place by that person, see ibid 10.

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person not owning their own seal (referred to as a *Siegelkarenz*, dispension of seal[2486]).[2487] Furthermore, a person that wielded another person's seal in Japan was understood to be acting as that person's agent.[2488]

Due to its general importance and its function as a kind of power of attorney in particular, misuse might easily occur where the seal fell into the hands of another party. In order to avoid such scenarios, some regional rules in Tokugawa Japan required a person to keep their seal in their possession always and not to entrust it to another person, although certain exceptions were permissible.[2489] In a similar manner, regulations existed in the German territories requiring the seal's owner to ensure its exclusive access. Consequently, a seal may have been required to be kept in a locked room or container, whereby, in the case of institutions or a city, different keys were to be given to several persons, so that the seal could only be used by these persons jointly.[2490] While not discussed in relation to England, both misuse and forgery of seals was arguably also a problem there.[2491]

bb) Sealing in Contracting

Sealing thus had a range of functions, including a legal one. Indeed, as was seen in Section B.II.2.a. above, formal contracts in medieval England had to be made 'under seal', ie, a seal had to be affixed to fulfil the form requirements.[2492] Where no seal was affixed, the contract would be denominated as a 'simple contract', with the word 'simple' taking on the sense of 'unadorned' or 'informal' during the fifteenth century.[2493] Even before, in the fourteenth century, contracts or other legal documents not bearing

2486 The term *Karenz* must be understood in the sense of the Latin term *carentia*, meaning to not have (own) or to do without something, see the entry for '*Karenz*' in Duden online at www.duden.de.
2487 See Stieldorf (fn 969) 36–37.
2488 See Wigmore, '*Customary Law*' (fn 1675) 7.
2489 For example, handing over one's seal was allowed to close relatives (parents, brothers, sons), see ibid 7.
2490 See Stieldorf (fn 969) 57.
2491 Compare in this respect ibid 58, noting that forging of the English Great Seal (*Königssiegel*) was punishable by execution, as the act was said to be one of high treason. On this seal, see also Baker, '*English Legal History*' (fn 63) 114–115.
2492 Compare Stoljar (fn 194) 6, who notes that a seal was 'imperative' for covenants, beginning in the fourteenth century.
2493 Simpson, '*History*' (fn 232) 190.

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a seal impression were deemed 'suspect'.[2494] Perhaps as a consequence of this, persons not owning a seal would borrow one for concluding transactions.[2495] Simple agreements would bear the seal(s) of the party or parties, whereas important transactions would additionally be sealed by witnesses or arbitrators in order to afford the contract with 'greater force'.[2496] For similar reasons, transactions concluded between persons from lower classes might include the seal impression of institutions or persons of higher standing.[2497] Although a seal impression made the agreement more formal, it may be surprising that it 'did not confer any other superiority upon the covenant', but that it was simply an authentication method and proof of the parties' consent.[2498] Indeed, a seal did not substitute consideration, so that both were necessary.[2499] Nevertheless, seals formed an essential part of deeds and covenants until modern times (see subsequent section). Furthermore, debt instruments like bonds were held to be invalid where the seal was missing or had (ostensibly) been tampered with.[2500] Although this seems to be covered with the dust of antiquity, the requirement of sealing formed a necessary part of the execution of deeds until the late twentieth century. In fact, it was only through the LPA 1925 that the signature was first introduced as a formal requirement for a deed, whereby the rule in s 73 (1) LPA 1925 required both a signature (or a mark) and sealing.[2501] The part of the rule on sealing was abolished through s 4, Sch 2 LPMPA 1989, however, so that private individuals no longer 'seal' legal documents.

A similar development occurred in the German territories, where instruments were required to be sealed in practice from the second half of the

2494 Cherry (fn 2478) 128.
2495 See ibid.
2496 See ibid.
2497 See ibid.
2498 See Stoljar (fn 194) 6.
2499 Compare ibid.
2500 Simpson, '*History*' (fn 232) 90. An illustrative example of documents being invalidated by removal of the seal is of a group of peasants from Norfolk, who had gained their freedom in a charter sealed by their lord. Their act of removing the seal impression from the document and destroying it led them to fall back into servitude, as the charter had lost its legal effect. Compare on this Cherry (fn 2478) 124.
2501 David C Hoath, *The Sealing of Documents. Fact or Fiction* (1980) 43 No 4 The Modern Law Review 415–416. He suggests that the alternative requirement of a mark was intended for illiterate people or those otherwise incapable of signing, see ibid 416.

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twelfth century.[2502] The trend continued for around six centuries, until form requirements increasingly prescribed a signature instead of sealing in the eighteenth century.[2503] One example is the *Allgemeines Landrecht für die Preußischen Staaten* ('ALR') from 1794, which already foresaw a signature and not sealing as the authentication method of written contracts (see Vol I Title 5 §§ 116, 119 ALR). Similarly, it was stated in the motives to the BGB that sealing was not a requirement for written documents.[2504]

In Japan, contractual documents of the Tokugawa era were only enforceable if they had been attested through the seal impressions of the local authorities, or where permission to contract had been granted by them.[2505] This was the general rule for the most prominent contracts of the time, like transactions of sale, or those relating to land or buildings.[2506] In contrast, other, ie 'ordinary', contracts were governed by local custom only, leading to great variations in terms of what kind of documents necessitated the seal impression of which authorities, and even as to the sealing that was required.[2507]

cc) The Accessibility of Seals

Despite the practice of sealing being widespread in all three countries, not every person had access to them. Rather, the use of seals was historically restricted to particular strata in the social hierarchy in Japan, Germany,

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2502 See Stieldorf (fn 969) 45.

2503 On this, see ibid 52, who also notes that the spread of the office of *Notare* was a factor for the decrease in the use of seals by private as opposed to official persons from the sixteenth century.

2504 See Mugdan (fn 883) Vol 1 455 at § 93.

2505 See Wigmore, '*Customary Law*' (fn 1675) 1 and 35, 39 respectively.

2506 See ibid 1. Nevertheless, local customs foresaw a range of variations of this rule. Thus, in Ugo (roughly today's Akita prefecture), the contract would often bear the seal impressions of the seller of land and of a middleman, who had facilitated the sale transaction, see ibid 27. In other parts, like Shima (in today's Mie prefecture) and Iwaki (in today's Fukushima prefecture), all that was required was for the deed of title of the land to be handed over to the buyer, see ibid 16 and 24. Sometimes, third parties had to be consulted before a transaction could be carried out. Hence, the sale of land had to be previously announced to the neighbourhood and its members consulted concerning the buyer before the transaction could be finalised in Settsu (today's Ōsaka prefecture), see ibid 14.

2507 Ibid 1. For further details, see Section C.III.1.c.iii. above.

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and England. It seems that the practice eventually trickled down from persons in power to commoners during the Middle Ages. In Japan, seals were initially employed only by the Emperor and the Imperial Court for administration purposes, as is reflected in the four-tiered seal-system that was established through a series of legislation during the Ancient era in 701 AD; gradually, however, other institutions such as temples or villages, and, still later, in the Classical era (Heian, eighth ~ twelfth century), feudal lords (*daimyō*) would also come to use seals as signs of authority.[2508] In parallel, the Japanese nobility began to use private seals in form of 'family seals' ('家印', *iejirushi*,),[2509] which were used to mark a family's possessions and were also sometimes used as tradenames or trademarks.[2510] In a similar manner, monarchs and popes were the first men of power to use seals in the German territories for official purposes, although the practice slowly extended to institutions of the church, the nobility, as well as to cities.[2511] During the twelfth century, the circle extended to include corporations (*Korporationen*) such as universities and merchant guilds.[2512] Other institutions, namely, judges and courts, as well as commoners only began to use seals starting from the thirteenth century, whereas government offices (*Behörden, Ämter*) followed one century later and peasants in another two.[2513]

It seems that the practice of sealing advanced more quickly in England. It has been noted that sealing was 'a widespread fashion among all classes' by the twelfth century; however, it seems that primarily elite members of the church or nobility used seals even before then.[2514] Sealing only became common practice in the thirteenth century, at the same time that cities seem to have started to use seals.[2515] In Japan, merchants only began to employ seals in the course of their business much later, namely, sometime in the Tokugawa era.[2516] Common people did not use seals and would instead write down their names at times when a signature was required —

2508 For details on the four-tier seal-system, see Ishii K (fn 1699) 22–23. On the periodisation of Japanese history, see Steenstrup (fn 1587).

2509 Mori'in-bō (fn 1690).

2510 See the entry for '家印' in the Japanese online dictionary Goo at http://dictionary.goo.ne.jp. Transcription adapted from this source.

2511 For details, see Stieldorf (fn 969) 37–44.

2512 Ibid 48–49.

2513 See ibid 50–52, 46–48 for details on this development.

2514 Cherry (fn 2478) 124–125. See also ibid 126–127.

2515 Compare ibid 127–128.

2516 For example, to acknowledge the receipt of delivered goods, see Wigmore, '*Introduction*' (fn 1650) 92.

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if they were literate.[2517] An exception was made for commoners in official positions, like the chief of the village-groups.[2518] This was not to change until the Modern era (see Section ii. below).

dd) The Development of the Sealing Practice

The foregoing exposition notwithstanding, the practice of sealing was not on a constant rise in all three countries. In Japan, the use of official seals declined in the Classical era (eighth ~ twelfth century) and was replaced by a form of signing known as *kaō* (花押; see Section c. below).[2519] Later, in the Middle Ages, at least the use of private seals would become popular once again.[2520] Meanwhile, commoners resorted to different methods of authorising documents (see Sections a. above and c. below). The modern system of seals in Japan was established at the beginning of the Meiji era through a decree of the Grand Council of State (*daijō-kan*, 太政官).[2521] Beside the Japanese State and the Emperor, whose seals are referred to as the 'Great Seal of Japan' ('国璽', *Kokuji*) and 'Imperial Seal' ('御璽',

2517 See Steenstrup (fn 1587) 150, who states: 'villagers […] who could read, should attest in writing that they had understood [the duties that had been laid upon them], and those who could not read, should attest by their thumb-marks'. This form of attesting 'in writing' is understood to mean a hand-written signature since it is contrasted with 'thumb-marks'. Note that while 80% of the population during the Tokugawa period were peasants, they were prohibited from conducting non-agricultural, ie, commercial, activities, see Encyclopaedia Britannica, '*Tokugawa Period*' (fn 1653). An explanation for commoners not using seals may lie in the fact that commoners did not have surnames until the nineteenth century, see Section b. above.

2518 See Wigmore, '*Introduction*' (fn 1650) 18–19.

2519 Mori'in-bō (fn 1690) at '*kan'in-sei ni kawaru kaō no hajimari*' [The Beginning of the Replacement of Official Seals Through Handwritten Signatures].

2520 At least with military commanders, see Mori'in-bō (fn 1690) at '*sengoku bujō no in*' [The Seals of Military Commanders]. One prominent example is the seal of Nobunaga Oda, on whose seal the words 'unification of military power' (*tenka fubu*, 天下布武) were inscribed: Naka, Legal Practice Lecture 2017 (fn 2047).

2521 The Zen-Nihon Inshō Gyō-kyōkai [Pan-Japan Seal Association] states the year to be 1873, see www.inshou.or.jp/inshou/about/message.html. Contrast Pardieck (fn 2045) 183, who cites a decree from 1871 (Edict No 456/1871).

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Gyoji)[2522] respectively, all Japanese people — both natural and legal — could now use seals to conduct business.[2523]

This development is also true for England, and, to some extent for Germany as well. While people's interest in written documents increased in the German territories during the twelfth century, the use of seals by private persons went into decline four centuries later, culminating in the requirement of a signature being accepted in legislation instead of sealing in the eighteenth century.[2524] Seals were not only valued as practical objects in England, but also as jewellery and were viewed as 'indispensable items of everyday use' even in the seventeenth and eighteenth centuries.[2525] The introduction of postage stamps and gummed envelopes in 1840 seems to have led to the decline in the use of seals, particularly in (private) correspondence.[2526] In this sense, it has been remarked that sealing was an important practice while English society was illiterate and classes strictly divided; but that, as literacy and egalitarianism increased, the seal lost its importance as a formal requirement.[2527] Indeed, this seems to be a logical development, although this raises the question of the fate of seals in modern times.

ii. Today's Use of Seals in England, Germany, and Japan

The foregoing analysis has already foreshadowed the fate of seals in current times: At least in England and Germany, seals are no longer used by private parties, although (public) institutions and companies continue to use seals today.[2528] Instead, seals have been substituted by signatures, as already discussed above. In contrast, *inshō* have maintained their relevance in relation to private but even more so in formal matters in Japan. Indeed,

2522 Jones (fn 2045). Kanji taken from the respective entries in the Japanese online dictionary Goo at http://dictionary.goo.ne.jp.
2523 See Pardieck (fn 2045) 183.
2524 See Stieldorf (fn 969) 44, 52.
2525 Seidmann (fn 2461) 143.
2526 Compare ibid 143, 153.
2527 See von Mehren, '*Formalities*' (fn 791) 45. See also Seidmann (fn 2461) 153.
2528 For Germany, see Stieldorf (fn 969) 52, 53. For England, compare Collon, '*Introduction*' (fn 2474) 10.

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while sealing is currently not the only form of making legally binding declarations of intention, it predominates over handwritten signatures.[2529]

The lingering importance of seals in Japan is evidenced by the 1 October, which is designated as '*inshō no hi*' ('印象の日', Day of the Seal).[2530] It commemorates the day from which all Japanese — including commoners — were allowed to employ seals instead of signatures: 1 October 1873 (Meiji 6).[2531] Today, seals that are no longer used are burned on this date at Shinto shrines or Buddhist temples during a ceremony showing gratitude and respect, *kuyō* (供養).[2532] While being a ceremony, this tradition may also have originated from the practical need to dispose of the *inshō* of deceased persons in a way that would ensure they could not be misused.

The widespread use of seals in Japan has occasioned the existence of a whole series of different kinds of seals. Before turning to these types (in Section bb) below), the current situation in England and Germany is analysed briefly.

aa) Seals in England and Germany

In England and Germany, no abundance in seal types exists today. In Germany, there are *Dienstsiegel* for selected public officials or institutions, such as notaries (see Section B.III.3.b.iv.aa) above), while ink stamps (*Stempel*) are often used by companies or freelancers in business practice.[2533] These stamps are used in many ways, including to show the author or address of a person or company,[2534] and as such sometimes even replace

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2529 Westhoff (fn 2067) 190 para 8. But see the information given on, eg, the website of the Kyōto City International Foundation, www.kcif.or.jp/HP/guide/mainichi/en/communication.html at 4-1, where it is stated that contracting in Japan normally requires both sealing and a handwritten signature.

2530 Jones (fn 2045). Kanji taken from the website of the Zen-Nihon Inshō Gyō-kyōkai [Pan-Japan Seal Association] at www.inshou.or.jp/koryupege/ivent1.html.

2531 Mori'in-bō (fn 1690) at '*genzai no inkan seido*' [The Present Seal System].

2532 See fn 2530. While this (Buddhist) ceremony is one that is usually conducted for deceased persons, variations exist for other living things, such as cows (*ushi-kuyō*, 牛供養), and inanimate objects, such as *kane-kuyō* (鐘供養, ceremony for newly-cast temple bells) or *hashi-kuyō* (橋供養, ceremony for newly-constructed bridges, conducted before the opening ceremony), see the respective entries in the Japanese online dictionary Goo at http://dictionary.goo.ne.jp.

2533 See, eg, https://das-unternehmerhandbuch.de/firmenstempel/.

2534 See ibid.

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a signature, albeit not on contracts.[2535] Thus, although business practice seems to afford company stamps a legitimising effect in that a person using a stamp is deemed to be authorised by the company or institution, a signature is still required under the written form.[2536]

In contrast, companies in England are required to use a company seal in certain situations, namely, when executing instruments such as deeds (see s 74 LPA 1925). This is only true if the legal entity has a seal, however, since the rule that companies are obliged to have a company seal has been abolished.[2537] As a consequence, the signature by two authorised persons suffices to substitute a company seal (see s 44 subss 1, 2 Companies Act 2006, 'CoA 2006').[2538] Similar to German notaries, sealing is still practiced in England by notary publics and normally involves red paper wafers being stuck onto a document next to the signature,[2539] and a metal seal embossing both the paper of the document and the wafer.[2540] Furthermore, courts seal procedural documents such as claim forms (r 2.6 Civil Procedure Rules 1998, 'CPR 1998'), in order 'to indicate that the document has been issued by the court' (Glossary of the CPR 1998).

The abolishment of the requirement of sealing in England followed legal discussions in which the declining importance of seals was asserted, with one Judge even calling the practice of sealing to be 'very much in the nature of a legal fiction.'[2541] The courts were thus often lenient and found ways of allowing deeds not properly sealed, ie, without a wafer, to be valid at law.[2542] Where a deed was not duly executed in terms of sealing, it was not entirely without effect if consideration had been provided, since it was still valid in equity, creating 'equitable interests'.[2543] This is thus another

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2535 See, eg, www.stempelshop4you.de/blog/firmenstempel-pflicht/.

2536 Compare BGH decision of 23 January 2013, XII ZR 35/11, NJW 2013, 1082–1083, para 14. The case concerned the issue whether it was sufficient for the conclusion of a lease contract under § 550 BGB by a company if one authorised person of the company signed the contract. The court found that this was so if the signing person's sole authority was made clear by some addition (*Zusatz*) to the signature, like the impression of a company stamp.

2537 On this, see Section B.II.3.b.iv. above.

2538 In contrast, s 91 subs 2 BEA 1882 allows a company seal impression to substitute a signature on instruments executed under that Act.

2539 Hoath (fn 2501) 415.

2540 See, eg, http://citycoseals.co.uk/company-and-notary-seals/c1/ for pictures of embossers and wafers.

2541 Goddard J, cited by Hoath (fn 2501) 416.

2542 For more information on these judicial approaches, see ibid 417–426.

2543 Ibid 419.

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example of how consideration was employed as a means of giving effect to contracts without the form of a deed.

bb) Seals in Japan

Several categories of seals exist in Japan that stem from the importance attached to the seal itself, or rather from the use of the particular type of seal. Similarly, the material from which the seal is made, as well as its size and the design of the seal's face vary according to the seal's function.[2544] While the categories of seals for natural and legal persons are similar in their function, denominations vary.[2545] The different seals used by private individuals will be discussed briefly below.[2546]

A natural person in Japan — including foreigners — can own the following three types of seals: First, a *jitsu'in* ('実印', literally 'real seal', 'registered seal'). Secondly, there is a *ginkō-in* (銀行印, literally 'bank seal') and thirdly, a *mitome'in* (認印, also known as a *sanmon-ban*, 三文判, a 'common' or 'off-the-shelf' seal).[2547] The *jitsu'in* is the most important category, since this kind of seal is used for legal transactions of utmost significance, such as the conclusion of contracts, sales of land, testamentary dispositions, or on documents of the land- or civil register.[2548] A person can only have one of these seals, as the seal must be registered.[2549] After registration of the seal, a 'proof of registration' card ('印鑑登録証', *inkan tōroku-shō*) bearing a registration number is issued by the competent administration authority, which can later be used to obtain a certificate showing the registration of the seal (*inkan shōmei* or *inkan tōroku shōmei-sho*, 印鑑登録証明書), containing the personal data identifying the owner

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2544 For an overview over the materials, sizes, and designs of the different seals, see, eg, www.hankoya.com/guidance/ at '*Hajimete no kyakusama e osusume kontentsu*' [Suggested content for first-time customers]. For an overview of the rules regarding the design of the face of the seal, see Ino'ue (fn 2072) at 'Making and registering your seal at your local municipal office'.

2545 Unless otherwise stated, Japanese denominations and kanji characters for the different seal-types in the following are taken from Ishii K (fn 1699) 8–14.

2546 For details, see Section C.IV.1.b.cc) above.

2547 These types were already discussed in Section C.IV.1.b.cc) above.

2548 See Westhoff (fn 2067) 190 para 8 and Ishii K (fn 1699) 8.

2549 This registration system seems to have been established in the Meiji era, see Pardieck (fn 2045) 183. Details of the registration were already been discussed in Section C.IV.b.iii.cc) above.

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of the seal and a seal-imprint.[2550] An imprint of the *jitsu'in*, together with the seal's certificate, are seen as a legally binding signature of the seal's owner, and is functionally equivalent to a signature authenticated by a notary.[2551]

While the primary use of seals in Japan today is to substitute or complement a signature on documents, they may be employed in other ways in connection with contracts. One is the sealing of text alterations after the execution of a contract (called *teisei-in*, 訂正印,[2552] 'correction seal'),[2553] which is functionally equivalent to the marking of one's initials next to an alteration in Europe. One example is in notarial authentications, in which case all the parties and the notary are required to seal the amendment (art 38 paras 2–3 *Kōshō-nin-hō*). Another use is the application of divided seals (*wari'in*, 割印) on several original copies of a document. In a similar manner, the adjacent pages of a bound contractual document may be sealed at the page intersections (*kei'in*, 契印,[2554] literally 'contract seal') to prevent the document being altered through replacement of any of the pages.[2555] An example of this being prescribed by law is in art 41 para 2 *Kōshō-nin-hō*, according to which the notary must seal the page intersections. A seal may furthermore indicate the end of a document, so that further additions of text after the execution are inhibited.[2556] Finally, in relation to stamp tax, it was mentioned above (in Section C.IV. 1.c.ii.) that the stamp must be imprinted with a seal after being affixed to a document (art 8 para 2 *Inshi-zei-hō*) so that it may not be re-used. Not invalidating the stamp may lead to a monetary fine of up to ¥300,000 (art 23 para 1 *Inshi-zei-hō*; approx. €2,500). This imprint is known as a 'stamp cancellation mark' ('消印', *keshi'in*).[2557]

2550 For further details and pictures of the forms and the seal-certificate, see Ishii K (fn 1699) 8–10. Note that it is not necessary to bring the seal itself to obtain the certificate, see Chūō Kūyaku-sho (fn 2073) at '*Inkan tōroku shōmei-sho no kōfu*' [Issuance of Proof of Seal Registration Certificate].

2551 Ishii K (fn 1699) 11, 8. See also Westhoff (fn 2067) 190–191 para 8.

2552 Kanji taken from Götze, '*Rechtswörterbuch*' (fn 10) 550, 171.

2553 Pardieck (fn 2045) 186.

2554 Kanji taken from Götze, '*Rechtswörterbuch*' (fn 10) 262.

2555 See Pardieck (fn 2045) 186.

2556 Jones (fn 2045).

2557 Naka, Legal Practice Lecture 2017 (fn 2047).

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c. Excursus: Other Forms of Authenticating Documents

Signing and sealing were not the only forms of authenticating documents that were known in England, Germany, and Japan. This excursus will briefly explore these methods for completeness. As was stated above, s 1 subs 4 LPMPA 1925 defines a signature to include a mark.[2558] A signature could therefore be replaced with a simple mark, which implies that the latter is a sign other than writing out one's name by hand. Indeed, it is generally understood to mean a simple cross, the mark often made by illiterate persons.[2559] Something similar exists in Germany in the form of a *Handzeichen*, which can consist of a person's initials or an X.[2560] In contrast to English law, it is not generally sufficient as a substitute for a signature in German law, unless the mark is certified by a notary.[2561]

While only one method seems to still exist in Germany and England, several forms of signing or otherwise authenticating documents have been known at least since the Ancient era in Japan.[2562] First and foremost, there were handwritten signatures (*kaō*, 花押).[2563] These consisted of stylised depictions of kanji, so that the shape sometimes resembled plants or flowers.[2564] This form of signing was particularly popular in the Classical era (ninth ~ thirteenth century) to the extent that seals were rarely used, but the increasing complexity of the designs made a signing by hand impractical, so that people reverted to using seals.[2565]

There were also 'fingernail-stamps' ('爪印', *tsume'in*), which were banished after the Meiji-reforms; and, from the Edo period, what are referred to as 'blush-imprint' ('紅印', *kō'in*), fingerprints not in ink but cosmetic

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2558 See Section 2.a. above.

2559 Compare entry number 13.b. for 'mark' in the Oxford English Dictionary Online at www.oed.com.

2560 See Section B.III.3.b.iv. above for further details.

2561 See ibid and Section B.III.3.b.iii.bb) above.

2562 See Mori'in-bō (fn 1690) at '*inshō seido no hajimari*' et seq.

2563 This is also known as 'written seal' ('書き判', *kakihan*) and is a form of writing one's real name (*jitsumei*, 実名) at the end of a document in any of various script styles. It appeared at the end of the Classical era. See the entry in the Japanese online dictionary Goo at http://dictionary.goo.ne.jp. cf Mori'in-bō (fn 1690) at '*kan'in-sei ni kawaru kaō no hajimari*', where it is stated that these signatures were already widely used from the middle of that era. Several example images are also shown.

2564 Examples can be seen in Ishii K (fn 1699) 23. Perhaps it is due to this reason that these signatures obtained the name 'pressed flower'.

2565 See ibid 23–24.

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blush, used by women.[2566] Moreover, sometimes thumb prints (*bo'in*, 拇印) or handprints (*te'in*, 手印) were used instead of seals.[2567] A contemporary example of these being used is by prisoners.[2568]

IV. Contracts in the Digital Economy: Online Transactions and Beyond

The ability to span the temporal and spatial distance between individuals by using the internet and new technologies has made a reconsideration of the traditional contract law rules necessary in all three legal systems examined in this dissertation.[2569] As has been rightly pointed out, the issue is not if, but how the rules once created for traditional contracting methods are to be applied to digital contracts[2570], ie, transactions concluded online, either on websites or through exchanges of e-mails or messages in chats.[2571] Nevertheless, such online transactions are no longer the only instance of digital contracts. Technological advances have brought forward new contracting methods in the form of automated and autonomous systems. While the latter is characterised by the system (computer (programme) or other machine) acting independent of human intervention, based on an algorithm and independent learning through data, the former act in accordance with settings configured by humans.[2572] An example of a half-

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2566 Ibid 26 and 27 respectively. Fingernail-stamps were used by illiterate villagers for example, see Section C.III.1.c.iii. and fn 2517 above.

2567 See Steenstrup (fn 1587) 150, cited in fn 2517 above. For further details on the development and use of these forms of authenticating a document, see Minahiko Ogino, *Inshō* [Seals] (repr, Yoshikawa Kōbun-kan 1995) 346–355.

2568 Jones (fn 2045). The reason for using this substitute method is because prisoners are not allowed to have *inkan*, ibid.

2569 See generally Matsumoto, '*Denshi shakai*' (fn 1819) 290.

2570 One definition of these kinds of contracts is that they are 'agreements entered into by two or more parties over an electronic communication line', whereby the contract is purely electronic and not in physical form. Rolf H Weber, *Contractual Duties and Allocation of Liability in Automated Digital Contracts*, in: Sebastian Lohsse and Reiner Schulze and Dirk Staudenmayer (eds), *Trading Data in the Digital Economy: Legal Concepts and Tools* (Nomos 2017) 163, 165.

2571 Furmston and Tolhurst (fn 440) 150–152 paras 6.03–6.05. See also Murray (fn 440) 18; Weber (fn 2570) 186.

2572 A succinct description of both of these forms can be found in, eg, Louisa Specht and Sophie Herold, *Roboter als Vertragspartner? Gedanken zu Vertragsabschlüssen unter Einbeziehung automatisiert und autonom agierender Systeme* [Robots as Contracting Partners? Thoughts on the Conclusion of Contracts by Way of Systems Acting Autonomously] (2018) MMR 40–41.

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automated system is Amazon's 'Dash Button',[2573] a small device that allows a specific product to be ordered by simply pressing the button.[2574] Another example is automated electronic agents, such as Amazon's 'Echo', a device that allows all kinds of products to be purchased from the Amazon platform through oral communication between the user and the device.[2575] Finally, there are fully automated processes, namely, smart contracts.[2576] The legal situation with regard to the latter two situations is not yet settled.[2577]

Several aspects of contract formation need to be considered. First, the classification of digital communication in terms of declarations of inten-

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2573 Specht and Herold (fn 2572) 41, who refer to it as an 'electronic ordering assistant' (*elektronische Bestellhilfe*).

2574 The German courts have held the use of these devices to contravene (EU) consumer protection regulation, ie, § 312j paras 2–3 BGB (*Besondere Pflichten im elektronischen Geschäftsverkehr gegenüber Verbrauchern*; Special obligations vis-à-vis consumers in electronic commerce). See OLG München decision of 10 January 2019, 29 U 1091/18, MMR 2019, 532–535. Paragraphs 3–4 of the decision contain a succinct description of the order process using the Dash Button. On the Dash Button ordering process and for an analysis of the clash of innovation and EU consumer law, see also Christoph Busch, *Case Note: Does the Amazon Dash Button Violate EU Consumer Law?* (2018) 7 No 2 Journal of European Consumer and Market Law (EuCML) 78–80. Note that the Dash Button seems not to have been marketed by Amazon in Japan.

2575 It seems that the process begins with the user giving a corresponding command to the device. The device will respond by asking for confirmation of the purchase of a specific article at a named price, which the user can accept by saying 'yes' or by using a codeword. The user then has fifteen minutes within which the order can be cancelled or amended in the app or on the website. On this process, see the description provided in *Amazon.co.uk Alexa and Alexa Device FAQs* no 8, www.amazon.co.uk/gp/help/customer/display.html?nodeId=201602230 (retrieved 20 September 2019); *Amazon.de Alexa Nutzungsbedingungen* [Alexa Terms of Use] no 1.4 (17 May 2019), www.amazon.de/gp/help/customer/display.html?nodeId=201809740. According to Specht and Herold (fn 2572) 41, these agents have a certain freedom to act ('*Handlungsspielraum*') that simpler devices like the Dash Button do not.

2576 See Weber (fn 2570) 165. There are also 'Internet of Things automated contracts', which come about when an electronic device detects an item running low and ordering the re-supply of that item. This application is used increasingly by businesses in an ongoing relationship under a framework contract. Problems do not often seem to arise in this context, but rather in relation to private parties. On this, see ibid 178–180.

2577 For an analysis of the contractual situation with automated agents, see Specht and Herold (fn 2572) 41–42. For smart contracts, see, eg, Weber (fn 2570) 165–167. See also Section 3. below.

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tion or legally irrelevant statements, as well as the coming into effect of any electronic declarations of intention (see Section 1. below). Secondly, the contractual form, in particular, the authentication method (Section 2.). A final point to deliberate is the further future development of contracting in general, namely, under what is termed 'legal tech' (Section 3.).

1. Declarations of Intention and Formation of Contracts in Online Transactions

Several issues arise in connection with declarations of intention made in the context of online transactions. First, it needs to be considered whether statements or acts made 'online' are legally relevant (see Section a. below). If this is so, the second question is when these declarations come into effect (Section b.). Before giving attention to this, a quick note needs to be made on the issue of consideration from English contract law. As with traditional contracts, consideration is a necessary requirement for contracts concluded electronically. Having said this, this aspect should not be problematic in most cases, seeing as the provision of the offeree's personal information can be sufficient, so that acts like monetary payments are not necessary.[2578]

a. The Classification of Statements made Electronically as Legally (Ir)relevant

As far as the attribution of legal relevance to statements made online or through electronic means is concerned, English, German, and Japanese contract law generally recognise the legal effect of declarations made in such a manner;[2579] however, the question is what constitutes an offer and what amounts to acceptance if made in the form of an e-mail, in an electronic document, when statements are displayed on websites or made orally to automated agents. In other words, the issue is at what point 'online *interactions* […] becom[e] online *transactions*'.[2580] In relation to offers, the

2578 See Furmston and Tolhurst (fn 440) 153–154 para 6.08. On the wide scope of consideration, see Section B.II.3.a.v. above.

2579 For England, see Section B.II.3.a.i. and ii.bb) above. For Germany, see Sections B.III.3.a.ii.aa) and iii.aa). For Japan, see Section C.IV.1.a.i.

2580 Furmston and Tolhurst (fn 440) 149 para 6.01 (original emphasis).

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differentiation is mainly between offers and invitations to make an offer (invitations to treat, *Aufforderung zur Abgabe eines Angebots*, and *mōshikomi no yūin* (申込みの誘引) in English, German, and Japanese respectively), whereas acceptance is mainly distinguished from confirmations.

It has already been noted in Section II.1.a.ii. above that advertisements made online are generally considered to be mere invitations to treat under all three countries' contract laws.[2581] Of course, exceptions exist where a statement is more concrete than a mere advertisement, such as where delivery dates are specified.[2582] Amazon's Dash Button device, a half-automated system, has also been said to be a mere invitation to treat; so that the offer is made by the user when pressing the button.[2583] Applying the same logic to automated agents like Amazon's Echo, the device itself ought to be seen as an invitation to treat, meaning that the user would make the offer.[2584] Nevertheless, it has been argued convincingly that websites about tangible goods and, arguably, services rendered offline, must be differentiated from websites about intangible products and online services.[2585] Due in particular to the issue of goods being in stock or a service provider being available for providing the service, advertisements of tangible goods or services ought to be treated analogously to advertisements in non-digital

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2581 The terms and conditions of some websites thus state that the order made by a website's user is an offer, which is accepted by the website's operator when sending out the confirmation of dispatch of the order. See, eg, *Amazon.co.uk Conditions of Use & Sale: Conditions of Sale* no 1 (10 July 2019), www.amazon.co.uk/gp/help/customer/display.html?nodeId=1040616; *Amazon.de Allgemeine Geschäftsbedingungen: Verkaufsbedingungen* [Amazon.de General Terms: Conditions of Sale] no 2 (26 June 2019), www.amazon.de/gp/help/customer/display.html/ref=footer_cou?ie=UTF8&nodeId=505048. On a different issue related to advertisements, namely, how influencers make hidden advertisements for certain products — a topic outside the scope of this dissertation — see Catalina Goanta, *How Technology Disrupts Private Law: An Exploratory Study of California and Switzerland as Innovative Jurisdictions* (Stanford-Vienna TTLF Working Paper No 38/2018) 30–44, available online at https://ssrn.com/abstract=3256196.

2582 Weber (fn 2570) 175.

2583 See Cyril Hergenröder, *Die Vereinbarkeit sogenannter "Dash Buttons" mit den zivilrechtlichen Regelungen zum E-Commerce* [The Compatibility of what are known as 'Dash Buttons' and Private Law Rules of E-Commerce] (2017) Verbraucher und Recht (VuR) 174–178.

2584 Incidentally, this would match the stipulation in Amazon's standard terms, see fn 2581 above.

2585 This distinction is strongly advocated by Furmston and Tolhurst (fn 440) 157–159 para 6.13.

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form, so that the advertising party is protected from having to perform when no items are left to sell or the service cannot be rendered as requested. Conversely, such protection is unnecessary for intangible goods, such as digital content (programs, music, videos, e-books, etc) which can be reproduced infinitely and therefore cannot run out.[2586] Similarly, services rendered online might not require human intervention due to processes being automated or because recorded audio or video fies are being provided, so that the problem of availability of personnel does not apply. It is therefore better to deem websites for digital content or online services to contain offers, because the contract can be executed immediately without the need for mental reservations on either side, just like with vending machines.[2587]

In cases of websites not displaying offers but mere information about products or services, the statement made by the user of the website, eg, by placing an order for goods or services through filling out an online form, is deemed to be the offer, which then needs to be accepted by the other party.[2588] Although not discussed in legal academic literature, similar considerations ought to apply to statements made in e-mails: where the product or service is for tangible goods or offline services, the e-mail's content ought to be deemed as an invitation to treat, whereas e-mails about intangible goods or online services ought to be generally deemed as offers.

Similarly, the differentiation between declarations amounting to acceptance and legally irrelevant statements is not confined to online transactions and is treated analogously to traditional communication methods. Accordingly, acceptance is distinguished from mere confirmations, as already noted in Section II.2.a. above. Nevertheless, it seems that this is not an overly serious issue; discussions in legal academic literature instead focus on the method of acceptance and its effectiveness.

b. Coming into Effect of Electronic Declarations of Intention

Declarations of intention that are offers, made in England, Germany, or Japan by electronic means will come into effect upon receipt (*Zugang*;

2586 Compare ibid 158 para 6.13.
2587 Compare ibid 159 para 6.13.
2588 On this, compare Sections B.II.3.a.i.bb) (in particular fn 440), B.III.3.a.ii.bb), and C.IV.1.a.ii.aa) above for England, Germany, and Japan respectively.

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tōtatsu, 到達), just as if they had been made by traditional communication methods (see Section II.1.c. above). In this respect, 'receipt' means that the e-mail has been saved on the offeree's e-mail provider's server and can be downloaded, and, consequently, read, at any time. Similarly, online offers — such as those made on websites or in chats — are received once they are accessible to the offeree.[2589] Access is therefore the key requirement, whereas knowledge by the offeree is not necessary.[2590] The same is true for acceptance in all three countries. Thus, under German and English law, the case is the same as with offers, ie, acceptance by electronic communication comes into effect upon being received.[2591] In Japan, acceptance communicated electronically (including through e-mail and online) are not governed by the general rules for acceptance communicated by traditional means, but falls within the scope of special regulation, to the effect that it becomes effective upon its arrival or receipt (see art 4 *Denshi keiyaku-hō*, art 97 *Minpō*).[2592] Receipt has the same meaning as noted above.

Special mention needs to be made of a particularity of Japanese consumer law that relates to online transactions. When conducting business with a consumer electronically in Japan, the merchant has to take a precaution: the merchant must ensure that measures are in place to verify the consumer's presumable declaration of intention to contract at the time of concluding a contract, ie, that the consumer did not make the offer unintentionally (*ito shinai mōshikomi*, 意図しない申込み; literally 'offer without intention').[2593] A lack of such means of control can lead to the contract not having been formed due to a mistake on the consumer's part in that the consumer did not intend to conclude a contract at all or at least not in that form (art 3 *Denshi keiyaku-hō*). The required measure of seeking confirmation (*kakunin wo mitomeru sochi*, 確認を求める措置) has to consist of a substantial investigation that allows the merchant to

2589 For English law, see Section B.II.3.a.ii.ee) above. For German law, see Section B.III.3.a.ii.dd) above. For Japanese law, see Sections C.IV.1.a.ii.bb) and C.IV.1.a.iii.cc) above.

2590 See ibid.

2591 See Sections B.III.3.a.iii.dd) and ii.dd) above for Germany, and Section B.II.3.a.ii.dd) for England.

2592 See Section C.IV.1.a.iii.cc) above for further details on this. Note that this regulation but not the result changes under the *Minpō* reform, see Section C.V.3.a. above.

2593 See E-Commerce Interpretation Guideline (fn 1873) i.8, the example given being that the consumer has clicked on the 'order' button by mistake, either while still contemplating whether to purchase the goods in question, or due to having confused it with the 'cancel' button.

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judge whether the consumer intended to contract (as declared), eg, by the website making it clear to the consumer that clicking a specific button will mean making an offer to purchase.[2594] The consumer can explicitly waive the opportunity to confirm the declaration made electronically, whereby art 3 *Denshi keiyaku-hō* and art 96 *Minpō* do not apply (art 3 *Denshi keiyaku-hō*).[2595] While such a waiver may release the merchant from civil liability where no confirmation measures are in place, there may yet be administrative consequences pursuant to art 14 *Tokutei shō-torihiki-hō*,[2596] especially paras ii (inducing the consumer to enter into a contract against their will) or iii (merchant's conduct prejudicing the transaction's fairness), or in conjunction with art 11 (provision of information on the contract upon request).[2597] These cases should not be confused with those of what are known as 'one-click billing' (*wan kurikku seikyū*, ワンクリック請求) and which border on fraud: clicking a link in an e-mail will display a message leading the consumer to believe that they have automatically registered for a service incurring fees.[2598]

2. Contractual Form and Methods of Authentication in Online Transactions

As has already become apparent from the discussion in Section III. Above, there are not many instances in which English, German, or Japanese law foresee a mandatory form for contracts. While this is true, one important question with respect to online transactions is whether electronic docu-

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2594 Ibid i.6. Visual examples of both sufficient and insufficient measures are given at ibid i.7, i.8–i.9. The common practice nowadays is for a website to display a final confirmation screen after leaving the input page, see ibid i.9.

2595 See ibid i.9–i.10 for further details. Also see ibid i.7 for visual examples of void and invalid waivers.

2596 See ibid i.9, with more details at i.14–i.16. For visual examples, see ibid i.11–i.13.

2597 A specification of what the phrase 'act of causing customer to make application for contract against his/her will' ('顧客の意に反して契約の申込みをさせようとする行為', *kokyaku no i ni hanshite keiyaku no mōshikomi wo saseyō to suru kōi*) encompasses is found in art 16 para 1 *Tokutei shō-torihiki ni kansuru hōritsu shikō kisoku*: namely, *inter alia*, a failure to indicate clearly to the consumer that they are about to make an offer (no i).

2598 This issue will not be treated further, as it goes beyond the scope of this dissertation. Interested readers are referred to E-Commerce Interpretation Guideline (fn 1873) i.17–i.22.

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ments, e-mails, or simply displaying text on a screen, etc can satisfy existing form requirements where no electronic contract form as such exists (see Section a. below). Moreover, seeing as a signature or a seal impression is usually required in written forms, the second question is whether there are electronic equivalents for these authentication methods (Section b.).

a. Electronic Contract Forms

As statutory legislation requiring contracts to be in writing were enacted as late as the end of the nineteenth century, it is logical that electronic communication was not envisaged and therefore not included within the meaning of 'writing' of that time.[2599] This has necessitated the legislators and the courts to reconsider the existing framework and to adapt it to the new technologies.

Out of the three legal systems considered in this dissertation, German law has embraced the digitalisation process the most, explicitly providing for two forms that relate to online transactions: one is the *Textform*, already discussed in Section III.1.a. above; the other is a formal *elektronische Form* (electronic form), found in § 126a BGB (discussed in detail in Section B.III.3.b.iii. above). Since § 126a para 1 allows the standard written form (*Schriftform*) to be substituted by this electronic form, this means that electronic transactions conducted under German law are facilitated by the provisions. This is not true, however, with respect to the notarial authentication. The notarisation of a contract cannot be made in electronic form and while § 39a BeurkG does allow '*einfache Zeugnisse*' (simple certifications) to be made electronically, the provision does not apply to authentications of declarations of intention or of other circumstances.[2600] Simple certifications are used most often in relation to the association- or

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2599 In this respect, see Minpō (Saiken-hō) Kaisei Kentō I'in-kai, *Japanese Civil Code (Law of Obligations) Reform Commission Draft Proposals* (2010) proposal [3.1.1.04], according to which the definition of writing ought to be amended so as to include 'electronic records'. The proposal is available online at http://wwr7.ucom.ne.jp/sh01/english/draft_en.html. Interestingly, this suggestion was not adopted in the discussions on the *Minpō*'s reform, on which see Section C.V. above.

2600 See Alexander Lutz, *§ 39a Einfache elektronische Zeugnisse* [Section 39a Simple Electronic Certifications], in: Beate Gesell and others (eds), *beck-online.GROSSKOMMENTAR: BeurkG* [beck-online.Comprehensive Commentary: Notarial Authentication Law] (online edn, CH Beck 2017) paras 1, 9.

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the commercial register (*Vereinsregister* and *Handelsregister* respectively).[2601] Having said this, it is possible — and is in fact frequent in practice — to have a copy of a contract (*Abschrift*) or of a notarial instrument authenticated electronically, as this is within the scope of §§ 39a, 39 BeurkG.[2602]

In contrast, there is no electronic statutory form to be found in English nor Japanese law. Nevertheless, both legal systems have made allowance for electronic contracting. Consequently, Japanese law has generally provided for special regulation of electronic notices of acceptance under the *Denshi keiyaku-hō*, which also applies to commercial contracts (see Section C.IV.1.a.iii.cc) above). One example found in England is electronic conveyancing: In accordance with s 91 subss 1–5 LRA 2002, electronic documents effecting a disposition of, say, an estate in land, are recognised sas deeds if the documents contain the electronic signature(s) of the party or parties — of both natural or legal persons — and the date and time of coming into effect. Similarly, the view that commercial contracts concluded through e-mail or websites ought to be deemed to satisfy the requirement of writing has been expressed both by the Law Commission and the English courts.[2603] The cases in question acknowledged that e-mails were capable of constituting a memorandum of a contract of guarantee for the purposes of s 4 SOF; however, there was also the issue of whether these memoranda were signed.[2604] This aspect is considered in the subsequent section.

In a similar manner, art 446 para 3 *Minpō* allows a guarantee (*hoshō keiyaku*, 保障契約) to be made in Japan by way of an electromagnetic

2601 Lutz (fn 2600) para 4, who expects electronic notarial documents to gain importance in future. In this respect, see also Michael Bohrer, *Notarielle Form, Beurkundung und elektronischer Rechtsverkehr* [Notarial Form, Authentication and Electronic Legal Transactions] (2008) DNotZ 39, 50–59.

2602 See Lutz (fn 2600) paras 9–10, 12.

2603 See Law Commission, '*Electronic Commerce*' (fn 502) para 3.9, in which it is stated further that another form of online transactions, electronic data interchange (hereinafter 'EDI') does not constitute writing. Explanations are given in paras 3.10 and 3.17 (e-mail), 3.18 (website trading), 3.19–3.20 (EDI). The reason, in summary, is that the contract('s content) will be visible with e-mails and on websites and thus satisfy the need for there to be some 'visible representation', whereas this will not be the case for EDI, as this consists of an automatic exchange of data messages (protocols) that are not (intended to be) read by a person. The court cases are discussed below.

2604 See *J Pereira Fernandes SA v Mehta* (fn 799) [11]–[17] (Pelling J) and *Golden Ocean v Salgaocar* (fn 413) [20]–[22], [28]–[30] (Tomlinson LJ).

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record (*denjiteki kiroku*, 電磁的記録).[2605] Apart from this, there are only few Japanese statutory provisions explicitly allowing electronic forms. For example, the contract document can be transmitted to the other party by electronic means under art 19 para 3 *Kensetsu-gyō-hō*, and art 3 para 2 *Shita'uke-hō*.[2606] This is comparable to the duties imposed to service providers in England under rr 9, 11 E-Commerce Regulations, in accordance with which information about the electronic contracting process and acknowledgement of the order must be sent to the other party — who can be a consumer, or, if the parties have not opted out, a merchant — in electronic form. This is also required in § 312i para 1 nos 2–3, § 312j paras 2–3 BGB.

Apart from the contract form, endeavours have also been made in all three countries to promote electronic transactions with public institutions. As has already been alluded to above, in the case of Germany, this is true for business conducted with the public registers. In particular, business with the land register (*Grundbuchamt*) is handled by notaries through an electronic procedure.[2607] In this respect, the business e-services portal of the English Land Registry enabling electronic conveyancing is similar, although it is not notaries but other professionals, namely, solicitors, who deal with the registration of land and any changes in title, and so on.[2608] A system of e-notarisation has also been introduced to the *Kōshō-nin-hō* in 2000,[2609] allowing a *kōshō-nin* to perform a range of services electronically, including the authentication of electronic documents, supplying certified copies of such documents if deposited with the notary, or certifying that an electronic document in the possession of a person who is not a notary is identical with the deposited document.[2610]

2605 See also Section C.IV.1.b.ii.aa) above.

2606 See Section C.IV.1.b.ii.aa) above. Another example is art 4-2 *Kappu hanbai-hō*.

2607 Although it seems that the system is not without problems. See on this Matthias Frohn, *Elektronischer Rechtsverkehr in Grundbuchsachen* [Electronic Legal Transactions in Matters of Land Registration] (2016) DNotZ Special Edition 157–165, noting in particular the complications arising from deviating regulation within Germany, ie, in each *Bundesland*.

2608 On this system, see Section B.II.3.c.i. above. The role of solicitors in transactions concerning land will be considered in Section V.4.a. below.

2609 Pardieck (fn 2045) 189.

2610 See Japanese Notaries Guide (fn 2091) 11–12. An authentication is requested by a party online and forwarded through the website administered by the *Hōmu-sho* to a *kōsho-nin*. The party must then appear in person before or send an agent to the notary, who then adds the authentication certificate to the electronic document if all the requirements are satisfied. See ibid 12.

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b. Electronic Forms of Authentication: Electronic Signatures and Seals

Having established that electronic contract forms exist in English, German, and Japanese law, focus is now turned to the authentication of the contract, namely, the signature or seal imprint. The question is what can suffice as electronic equivalents to traditional signatures and seals, ie, what constitutes an electronic signature or digital seal impression.

Seeing as no statutory electronic form exists in English law, there is also no single statutorily defined electronic signature. Instead, a number of ways of signing one's name have been considered as signs of authentication in online transactions. It has been noted that electronic signatures are generally admissible and that a 'scanned manuscript signature' is a sufficient form of authentication in electronic communication.[2611] This does not mean, however, that signatures need to be handwritten. In one instance, the English CA considered a contract of guarantee that was contained in a series of e-mails as being signed, with the signature consisting of the first name of the defendant.[2612] In another case, the English HC had to decide a similar matter. While the court in this second case recognised that not just a (full) name, but even 'a pseudonym or a combination of letters and numbers' could constitute a signature for the purposes of s 4 SOF, it denied an e-mail address to be sufficient, as it had been inserted automatically by the programme and not the sender, so that it was not 'inserted into the document in order to give, and with the intention of giving, authenticity to it.'[2613]

This coincides with s 7 subs 1(a) Electronic Communications Act 2000, which requires that an electronic signature be 'incorporated into or logically associated with a particular electronic communication'. It has even been said that the clicking of a button on a website is 'the technological equivalent of a manuscript "X" signature' and thus a valid form of authentication of one's intention to contract.[2614] It can be concluded from all of

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2611 See Section B.II.3.b.v. above, where the rules regarding civil litigation are discussed. On the latter, see Law Commission, '*Electronic Commerce*' (fn 502) 14 paras 3.32–3.33.

2612 See *Golden Ocean v Salgaocar* (fn 413), discussed in Section B.II.3.b.v. above. A similar opinion has been advanced by the Law Commission, '*Electronic Commerce*' (fn 502) 14 paras 3.34–3.35, who would even recognise automatically inserted names or initials as signatures. Cf fn 2613 below.

2613 *J Pereira Fernandes SA v Mehta* (fn 799) [18]–[31] (Pelling J), in particular [27]. This case was discussed already in Section B.II.3.b.v. above. cf fn 2612 above.

2614 Law Commission, '*Electronic Commerce*' (fn 502) 15 para 3.37.

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the above that while the scope for electronic signatures is perhaps wider than for traditional, handwritten signatures, the important point is not what is used as a signature, but that it be used deliberately and with the intention of authenticating the document in question. Indeed, it seems that whether an electronic 'signature' is sufficient ultimately depends on the general common law test for signatures, namely, whether it is made with the intention of authenticating the document or transaction.[2615]

While this is true, the eIDAS Regulation 2014 established a systematic framework of electronic signatures (and seals) that has applied in EU Member States since 2016[2616] — and thus, in Germany as well. It provides for two types of signatures, 'advanced' and 'qualified' signatures, and establishes their legal effect, including as evidence in civil litigation (see art 25 eIDAS Regulation 2014). The minimum requirements for advanced electronic signatures are a unique link to the signatory by identifying that person, and that it is 'created using electronic signature creation data' under that person's 'sole control' in a way that inhibits subsequent changes (art 26 ibid). The prerequisites for qualified signatures are stricter, requiring a certificate with the signing person's name (or pseudonym), a unique code, and a set period of validity, among others (art 28 para 1 and Annex I ibid).

There have also been endeavours in Japan to create a legal framework for electronic signatures and seals. The *Denshi shomei oyobi ninshō gyōmu ni kansuru hōritsu* (hereinafter '*Denshi shomei-hō*'[2617]) came into force in April 2006[2618] and established a system for accrediting providers of electronic signature services (see arts 6 et seq *Denshi shomei-hō*). It aims to provide a 'legal basis for making electronic signatures and seals equivalent to hand-

2615 Compare Treitel/Peel (fn 65) para 5-030.

2616 On the background of this Regulation, see, eg, Dan Puterbaugh, *E-signatures and the Realization of the EU Single Digital Market* (Adobe Blog, 24 April 2016), https://blogs.adobe.com/documentcloud/e-signatures-and-the-realization-of-the-eu-single-digital-market/. See also the website of the European Commission on this topic at https://ec.europa.eu/digital-single-market/en/trust-services-and-eid.

2617 電子署名及び認証業務に関する法律, Act on Electronic Signatures and Certification Business, Law No 102/2000 as amended. An English translation is available online at www.japaneselawtranslation.go.jp/law/detail/?id=109&vm=04&re=2&new=1.

2618 It seems that this law originally came into force on 1 April 2000, see Hōmu-shō, *Denshi shomei-hō no gaiyō to nintei seido ni tsuite* [Concerning an Overview of the Electronic Signatures Act and the Certification System], www.moj.go.jp/MINJI/minji32.html.

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written signatures and seals'.[2619] An electronic signature is required to indicate that it was created by the signatory and that it contains 'measure[s] to confirm whether such information has been altered' (art 2 para 1 *Denshi shomei-hō*).[2620] An electronic signature made in accordance with this law is assumed to be genuine, ie, made with the intention of the signing person to authenticate the document.[2621] In this way, the law will enhance trust in using electronic signatures certified by accredited signature certification businesses.[2622]

3. Excursus: The Future of Contracting in Online Transactions through Legal Tech and Smart Contracts

Technological developments, in particular the internet, have changed the way contracts are concluded.[2623] E-mails and online transactions (in browsers[2624]) are two methods that have already been considered above. Now, a whole new dimension to contracting is emerging from 'legal technology', usually referred to simply as 'legal tech', which seems to have three evolutionary stages.[2625] The first stage is 'legal technology 1.0' and

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2619 See Hōmu-shō, '*Denshi shomei nintei seido*' (fn 2618): '電子署名が手書きの署名や押印と同等に通用する法的基盤が整備されました' (*denshi shomei ga tegaki no shomei ya ō'in to dōtō ni tsūyōsuru hōteki kiban ga seibisaremashita*).

2620 The original provision reads: '当該情報について改変が行われていないかどうかを確認することができるもの' (*tōgai jōhō ni tsuite kaihen ga okonawareteinai ka dō ka wo kakuninsuru koto ga dekiru mono*).

2621 See art 3 *Denshi shomei-hō*. See also Hōmu-shō, '*Denshi shomei nintei seido*' (fn 2618).

2622 An illustration of how the system works in practice can be found in Hōmu-shō, *Denshi Shomei-hō no gaiyō ni tsuite* [Concerning an Overview of the Electronic Signatures Act], www.moj.go.jp/MINJI/minji32-1.html.

2623 On this change, see Goanta (fn 2581) 1, 17–19.

2624 Ibid 18 differentiates between two methods using browsers, 'click-wrap' and 'browse wrap': the former entails the consumer clicking a button in order to conclude a contract, whereas the latter simply requires that the consumer visits ('browses') a website for a contract to be concluded. No examples are given; however, it is conceivable that the first method is used in a web-store, while the second might be used for gratuitous services, such as social networks.

2625 The exposition following in this paragraph draws from Oliver R Goodenough, *Getting to Computational Jurisprudence 3.0*, in: Amedeo Santosuosso and Oliver R Goodenough and Marta Tomasi (eds), *The Challenge of Innovation in Law: The Impact of Technology and Science on Legal Studies and Practice* (Pavia University Press 2015) 3, 4–8. See also Ralph Baxter, *Legal Tech*

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consists of technology supporting lawyers in their work, eg, legal research in online databases or document drafting with the aid of word processors. The stage we are currently in, 'legal technology 2.0', has seen legal technology become 'disruptive, not just enabling' in that technology replaces lawyers in part, so that non-experts can, say, create contractual documents through use of a specific contract drafting software.[2626] The third and final stage, 'legal technology 3.0', is characterised by standard legal processes being fully replaced by technology, so that '[c]ontracts, compliance systems, and dispute resolution systems […] are able to operate within their own encoded systems.'[2627]

It could be argued that we are entering the third stage already, albeit the second stage perhaps not yet being completed. This is because a new kind of contract is beginning to emerge:[2628] This can be found in what are called 'smart contracts', self-executing arrangements of electronic functions called blockchains, which can eliminate the need for intermediaries and increase security in contracting, as the self-executing feature removes fear and distrust towards the other contracting party.[2629] This is due to the

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2.0: The World We Live in Now (Thomson Reuters Legal Executive Institute, 24 March 2015), www.legalexecutiveinstitute.com/legal-tech-2-0-the-world-we-live-in-now-by-ralph-baxter/.

2626 For information on how the process of contracting evolves, see Kingsley Martin, *Contract Maturity Model (Part 2): Technology Assembly Line – from Active to Passive Systems* (Thomson Reuters Legal Executive Institute, 16 June 2016), www.legalexecutiveinstitute.com/contract-maturity-technology-assembly-line/. On technological developments being disruptive for 'challenging established legal practices', see also Goanta (fn 2581) 1.

2627 Baxter (fn 2625).

2628 Already in 2015, the prognosis was that smart contracts would be 'most likely to appear in your daily life soon' as an application of blockchains, see Bill Marino, *Smart Contracts: The Next Big Blockchain Application* (Cornell Tech News, 2 December 2015), https://tech.cornell.edu/news/smart-contracts-the-next-big-blockchain-application/. Approximately three years on, in 2018, several platforms have been established that facilitate smart-contracting, such as Ethereum. On this, see Goanta (fn 2581) 47.

2629 Compare the definition given by Oliver Herzfeld, *Smart Contracts May Create Significant Innovative Disruption*, Forbes (online, 22 February 2016), www.forbes.com/sites/oliverherzfeld/2016/02/22/smart-contracts-may-create-significant-innovative-disruption/#56aa6cfd2702. See also *Blockchains: The great chain of being sure about things*, The Economist (London, 31 October 2015); Goanta (fn 2581) 47, who also gives a succinct description of how blockchains work at 44–45. For a brief technical explanation of blockchains, see Kai Brünnler, *Blockchain kurz & gut* [Blockchain short and good] (dpunkt.verlag 2018).

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nature of the blockchain allowing programmed commands to be enforced automatically, so that obligations that are determined in the blockchain will be self-executed.[2630] This self-enforcement without interference guarantees that the smart contract will be executed without fail,[2631] if the conditions for starting the chain of commands are met. In this way, once one party has performed their duty, so will the other, as fulfilment is achieved through an action in the blockchain. A good illustration is the example of accommodation being rented out: A digital key (code) to the house and the rental fee (in cryptocurrency) may be put into the smart contract, whereby the information is to be stored until the commencement of the rental period. At that time, the rent will be sent to the lessor, and the code will be sent to the tenant, enabling the latter to access the house — but only if both conditions (input of the code and the fee) have been met; if they have not, the information provided by one party will not be released to the other.[2632] A simpler application is the tracking of a package through GPS and the release of the purchase price to the seller once the package has arrived.[2633]

While this may sound like an utopian-like state for contract lawyers, there are in fact several legal issues that may nevertheless arise. On a very general level, there is the question of whether smart contracts fit into existing contract models so as to be given legal effect under English, Japanese, or German law.[2634] This is indeed a legitimate concern, since smart contracts are entirely digital and, due to being contained in a blockchain as a series of commands, are arguably not 'in writing' as they are not recorded visibly.[2635] Pending regulation on the matter, smart contracts may therefore fail to fulfil form requirements. Beside this, a smart contract may already fall short of being legally effective on other counts, namely,

2630 See Goanta (fn 2581) 48; Marino, '*Smart Contracts*' (fn 2628).

2631 Brünnler (fn 2629) 77 notes that a smart contract 'can practically not be manipulated or stopped' (*praktisch nicht zu manipulieren oder zu stoppen*), as explained at 46–56.

2632 Example and explanation based on Marino, '*Smart Contracts*' (fn 2628). Of course, such an application presupposes the necessary equipment. On such an 'infrastructure', see European Institute of Law (ELI), *Preliminary Report 'Blockchains, Decentralized Autonomous Organizations (DAO) and Smart Contracts*' (28 August 2019) 1, 20.

2633 Weber (fn 2570) 180.

2634 Compare Goanta (fn 2581) 48, calling this one of the challenges of this legal innovation and suggesting that any legal regulation is best done by way of transnational harmonisation. On the method of regulation, see ibid 51–58.

2635 Compare the discussion of electronic contract forms in Section IV.2. above.

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on the ground of the basic elements of offer, acceptance, and consideration not being identifiable in the code.[2636] Moreover, there may be issues in or related to the performance of the contract, since the blockchain cannot be stopped once started.[2637] Similarly, the contract cannot be modified after the blockchain has been programmed.[2638] It has been suggested that some of these issues can be avoided by inserting clauses ('functions') into the smart contract that correspond to the basic elements of contract law theory (offer, acceptance, consideration), as well as an 'off-switch' in order to be able to halt the execution if necessary.[2639] Although this sounds like a solution, the question of whether existing requirements of (written) form can be met by smart contracts remains. There is, furthermore, a potential problem for consumers, especially if they are not familiar with the blockchain technology. Thus, they might not be aware that a contract is being concluded and that it will be executed when they press a button on a website. The suggestion to extend merchants' information duties, in particular so as to make the consumer aware that the smart contract technology will be used, seems appropriate for this problem.[2640]

In respect to the other issues, it is submitted that inserting special functions in order to mimic the elements of a contract may not necessarily be required, especially where a contract can be concluded in any form. This is because the contract conclusion method of click-wrapping, ie, of clicking a button in a browser, can be applied by analogy: smart contracts may already have been programmed, so that concrete exchanges of cryptocurrency and other intangible things may be suggested in an application.[2641] These 'suggestions' can be deemed to be offers rather than mere statements displayed on websites, since the intention of the statement maker is different. The manager of an online store wanting to reserve the ultimate decision on whether to enter into a contract with a person who reacts to

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2636 Compare Goanta (fn 2581) 48, focusing on the question of the parties' intention.

2637 On this, see Marino, '*Smart Contracts*' (fn 2628).

2638 See Bill Marino, *Agreement Making in Ethereum – A Legal Perspective* (Lecture, Ethereum Devcon 1, Gibson Hall, London, UK, 13 November 2015).

2639 See Marino, Agreement Making Lecture 2015 (fn 2638), who suggests ways in which this can be achieved.

2640 This suggestion was made in ELI (fn 2632) 36.

2641 See, eg, www.ethereum.org for examples of what kind of contracts are possible. For a list of ethereum applications, see www.stateofthedapps.com/rankings/platform/ethereum, showing that things from games to exchanges and even marketplaces exist.

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their statement, eg, in order to ensure the requested item is in stock, may be said to be making an invitation to treat only. In contrast, someone who solicits an exchange by providing a smart contract ought to be deemed to be making an offer, since the immutable nature of the blockchain technology means that the parties will be bound: Once the application's user clicks a button to start a transaction, the smart contract cannot be stopped so that there is no room for the parties to change their mind. A definite intention of the parties to be bound can therefore be presupposed under these circumstances. This must be even more true where no smart contract is pre-programmed, as the parties would arguably first communicate in some way before a smart contract fitting their needs is created. In this way, the agreement between the parties will have arisen before or at the latest once the smart contract is executed. Even this analysis does not resolve the issue of contract form, however, so that it must ultimately be seen how the legislators, the courts, legal academics, and practitioners classify smart contracts, and, moreover, whether they recognise these as legally binding agreements.

V. The Formation of a Sales Contract Concerning Real Estate

The differences between contract law as practiced in England, Germany, and Japan can be illustrated well by looking at transactions involving real estate, since both the requirements for a legally effective contract and the legal and business practices vary with sales of land. The differences begin with one fundamental aspect, namely, the legal classification of land and buildings (see Section 1. Below). Focus is then turned on the real estate transaction process in practice (Section 2.). The contractual requirements already mentioned in Sections B. and C. above will be briefly summarised and then contrasted in Section 3. Below. One particularly interesting aspect of the transaction process is the professionals supporting the contracting parties. Special attention is thus given to these persons, who will be identified and compared in Section 4.

1. The Classification of Real Estate in Terms of Property

One fundamental aspect of the three legal systems is the classification of things. It has already been mentioned in Sections B. and C. above that subtle differences exist in this differentiation process. Of interest here is

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the definition of land or real (immovable) property. In fact, this varies in all three countries' laws. While English and Japanese law adopt the approach of considering that all things not real property (*fudō-san*, 不動産, immovable property) to be personal property (*dōsan*, 動産, movable property), thus making the latter a residual category, German law does not give a definition at all; the BGB simply speaks of two different kinds of movable things (*bewegliche Sachen*) in §§ 91–92 (*vertretbare Sachen* or fungible things, and *verbrauchbare Sachen* or consumable things respectively), and of *Grundstücke* (plots of land) in, eg, § 94 BGB.

There is, moreover, another difference beyond this semantic aspect. German law provides in § 94 para 1 BGB that:

> [t]he essential parts of a plot of land include the things firmly attached to the land, in particular buildings, and the produce of the plot of land, as long as it is connected with the land […].[2642]

Similarly, English law provides in sch 1 Interpretation Act 1978 and s 205 subs 1 (1)(ix) LPA 1925 that buildings or parts thereof form part of the definition of 'land'.[2643] In contrast, Japanese law foresees in art 86 para 1 *Minpō* that '[l]and and any fixtures thereto are regarded as real estate' ('土地及びその定着物は、不動産とする', *tochi oyobi sono teichaku-butsu ha, fudō-san to suru*), whereby the connotation of the word 'and' ('及び', *oyobi*) between the words land and fixtures is that the connected terms are on the same level.[2644] It is interesting to observe that the civil and common law traditions found in Germany and England, while always said to be very different, are in fact in agreement on the point of buildings forming part of land, whereas the hybrid system found in Japan takes a different approach. Looking at the traditional structure of houses in Japan, namely, of these being built on platforms on top of pillars protruding from the ground, the contrast could be said to be even greater. This is because it might be argued that both German and English law might deem such buildings not to be immovable property at all, due to their construction. It goes beyond the scope of this dissertation to pursue this idea further; however, it is plausible that English and German law would deem such

2642 The original provision states: '*Zu den wesentlichen Bestandteilen eines Grundstücks gehören die mit dem Grund und Boden fest verbundenen Sachen, insbesondere Gebäude, sowie die Erzeugnisse des Grundstücks, solange sie mit dem Boden zusammenhängen*. […]'. For further discussion, see Section B.III.3.b.i. above.

2643 For further discussion, see Section B.II.3.b.i. above.

2644 Compare the entry for '及び' in the Japanese online dictionary Kotobanku at https://kotobank.jp/. For further discussion, see Section C.IV.1.b.i. above.

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buildings as part of land, notwithstanding the platform-like construction, because the buildings will not have been erected for a temporary purpose, and as such would thus not be deemed as severable fixtures but as a part of the land on which it is built.

2. The Course of a Real Estate Transaction in Practice

It is natural that legal and business practices vary across the globe. The important question is by how much the practices differ. The aim of this section is to raise awareness of some important deviations found in this respect in England, Germany, and Japan.[2645] Seeing as the focus of this dissertation is on Japan, that country's conveyancing process will form the basis of the following account.

The first point to note is that in Japan, the transaction process for sales of land or existing buildings is similar, while the process for newly constructed or not yet finished buildings differs in practice. This seems not to be the case in the other two countries considered in this dissertation: While there seems to be no apparent differentiation at all in Germany, there does seem to be slight variations in England, depending on whether the property in question is registered or unregistered land.[2646]

In the case of the object being land or an existing building, the owner in Japan, just like in England or Germany, is often a private individual. The process will begin by that person employing the services of a real estate agent (*fu-dōsan gyōsha*, 不動産業者, see Section 4.c. below) in order to sell the land or building. A price will be set, depending on the location and size, as well as the condition and any encumbrances, among others, but this will usually be re-negotiated during the transaction process. The agent will then advertise the object and act as the contact person for interested parties. They will also conduct viewings of the object. In ensuing negotiations, the agent acts as intermediary between the seller and prospective buyers — a cultural necessity, as the parties would not otherwise negotiate to the same extent in order not to affront or displease the other party.

2645 The following account of the practices in Japan is based on a personal interview with Mika Yokoyama, Professor, Faculty of Law, University of Kyoto (Kyōto, Japan, 9 September 2016), unless indicated otherwise.

2646 This seems to concern investigations in relation to the land, in particular the Index Map and the Land Charges Department searches, see *Halsbury's Laws Vol 23* (fn 729) paras 95, 97.

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Where the real estate in question is either a newly-constructed or not yet finished building, the owner will be either an individual owner or, more commonly, a construction and development company (called a *takuchi tatemono torihiki gyōsha*, 宅地建物取引業者, real estate broker in the *Takuchi-gyō-hō*). In either case, the sale is initiated through advertisements by the seller, who acts as the contact person for interested parties and conducts viewings of the building or, in case of an unfinished construction, a model. Where the building is an apartment block, prospective buyers will indicate their interest in a particular unit. If there are several interested parties for the same unit, these are grouped together, and one party is chosen by lottery as the buyer. It is only at this point that negotiations will begin, including alterations to the building plans of the interior, such as wall positions, floor materials, etc. It ought to be noted that the price of the object will have been set by the seller from the beginning and will not be negotiable, whereby the price will vary for different units according to certain factors, in particular the direction of the main windows,[2647] and the location of the unit within the building complex.[2648]

Once the negotiations are underway, the buyer pays a small sum of money between ¥50,000 to ¥100,000 (approx. €400–€800) to show the seller that they are entering negotiations with a serious intention to buy. This is called '*mōshikomi shōko-kin*' ('申込証拠金', literally 'application earnest money'), a distinct concept from *tetsuke*, although it can sometimes be combined at a later stage.[2649] Furthermore, a provisional contract (*karikeiyaku*, 仮契約) may be entered into at this point, or after the negotiations have been completed. Note that where the sale does not occur, the application money will normally be returned to the buyer,[2650] and another prospective buyer will be drawn from the pool of candidates, whereby the process just explained will begin anew.

After the conclusion of negotiations in Japan, the next step is (usually) the conclusion of a (final) sales contract. In case of existing buildings, this

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2647 Apparently, South is most desired, followed by East, then West, and, finally, North.

2648 In particular, Japanese are concerned about which floor the unit is in. Normally, the second-most top floor is most expensive because it is light but is not heated by the sun directly and relatively quiet, whereas the disadvantage of the top floor is that it can be overly hot.

2649 For general information on this 'application money' and the distinction from *tetsuke*, see Muramoto (fn 2166).

2650 See Muramoto (fn 2166).

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will almost always happen through the real estate agent,[2651] whereas in sales of new constructions, the seller will provide the contract documents. At this point, the buyer will pay *tetsuke* to the seller, which usually consists of an amount of money between 10%–20% of the purchase price. Depending on whether the sale is of a new or an old(er) building, its function varies slightly: Whereas *tetsuke* will act as a proof of the buyer's serious intention to purchase a new(ly constructed) building, it is meant to act as a kind of insurance in case of defects in the building or problems arising in the course of the transaction with old(er) buildings.[2652] The seller or their agent will then engage a *shihō shoshi* (司法書士, Judicial scrivener, see Section 4.d. below) to effect the registration of the ownership change (see Section 3. Below), whereby this will only be done in case of a new building complex once all units of a building have been sold. Furthermore, contracting parties often make the full payment of the purchase price a condition for the transfer of property.[2653] Therefore, registration of the ownership change will only be effected after the payment has been made.[2654] Where a *fudō-san-ya* is involved in the transaction, they will be present when the payment has been made, as will the *shihō shoshi*.[2655]

The payment of the purchase price in a Japanese transaction and the symbolic delivery of the real estate by, eg, handing over of the house keys, are usually effected together in the presence of the parties, the estate agent and the *shihō shoshi*.[2656] After this event, registration of the ownership change will be made at the Japanese land register.[2657]

In England and Germany, an estate agent will normally be involved in the transaction process as well, although this is apparently more often the case in Germany than in England.[2658] They are hired by buyers or sellers

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2651 The real estate agent has several important functions in relation to this as well as the duty to explain a series of matters to the other party (ie, the party that is not the agent's principal). See Section 4.c. below for further details.

2652 This seems to roughly correspond to the two functions of *shōyaku-tetsuke* and *kaiyaku-tetsuke*, discussed in Section C.IV.1.c.iii. above.

2653 See Kaiser (fn 1976) para 61.

2654 Compare Kaiser and Pawlita (fn 2086) 178.

2655 Ibid, who state no further details on how this is conducted. Bearing in mind the amount of money involved, it seems that the most viable procedure would be a meeting of the parties, the agent and the scrivener at the buyer's bank, where the transfer will be effected by the clerk at the buyer's direction.

2656 On this, see Kaiser (fn 1976) 706 para 71 and 705 para 64.

2657 Compare Kaiser and Pawlita (fn 2086) 178. See also Sections 3. and 4. below.

2658 According to statistical data, 83% of sellers and buyers of real estate in the UK used an estate agent in 2013–2015, while over 90% seem to engage

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and, when acting for the former, will evaluate the property and provide information to any potential buyers.[2659] Contact with the other party and viewings of the real estate in question will be facilitated by the agent, as will the negotiations of contract terms.[2660] The negotiations may also be conducted through the seller's solicitor or *Rechtsanwalt*.[2661] Similar to the application-earnest in Japan, an interested person in England may pay a pre-contract deposit to the agent or other party when making their offer as a sign of their earnest intent.[2662] The offer will be made either to the seller directly, or to their estate agent or solicitor.[2663] Note that these are not legally binding,[2664] which seems to cause insecurity for a portion of both buyers and sellers.[2665] It may happen that the price is altered by either the buyer or the seller, but this seems to be rare.[2666] After acceptance of the offer, the contract document (deed) will be drawn up (see Sections 3. And 4.a. below) and a deposit of approximately 10% of the purchase price is paid by the buyer, either to the seller's estate agent or the solicitor.[2667]

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agents in Germany. On England, see Department for Business, Energy & Industrial Strategy, *Research on Buying and Selling Homes* (Research paper No BIS/283, 22 October 2017) 4–5, 18, available online at www.gov.uk/government/publications/buying-and-selling-homes-consumer-experience-study (hereinafter 'House Sales Research Paper'). On Germany, see Christoph Hamm and Peter Schwerdtner (Founder), *Maklerrecht* [The Law of Agency] (6th rev edn, CH Beck 2012) 1–2 para 3, who note that it was 99% (!) in the 1990s and is unlikely to have changed much.

2659 For statistical data on these activities, see House Sales Research Paper (fn 2658) 5–6.

2660 The role of the estate agent will be considered in detail in Section 4. below. For a general description of their function in England, see, eg, https://targetjobs.co.uk/careers-advice/job-descriptions/279481-estate-agent-job-description and House Sales Research Paper (fn 2658) 5–6. For Germany, see generally Hamm and Schwerdtner (fn 2658) 4 para 12.

2661 Compare *Halsbury's Laws Vol 23* (fn 729) para 2.

2662 Compare s 12 subss 1 and 3 Estate Agents Act 1979.

2663 See www.gov.uk/buy-sell-your-home/offers.

2664 See ibid.

2665 The House Sales Research Paper (fn 2658) 7 states 33% of buyers and 46% of sellers were concerned about the other party changing their mind about the transaction.

2666 Only 2% or sellers but 18% of buyers change their asking/bidding price after an offer has been made, see House Sales Research Paper (fn 2658) 7.

2667 See ss 12 subss 1–2, 13 Estate Agents Act 1979 and *Halsbury's Laws Vol 23* (fn 729) para 2.

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3. The Legal Requirements for a Contract Concerning Real Estate

The formal requirements for contracts have already been discussed separately for each country in Sections B.II.3.b., B.III.3.b. and C.IV.1.b. above. The focus in this section will therefore be on contrasting the main form used for conveyances of real estate in England, Germany, and Japan while pointing out some aspects from legal practice. It is in this respect that we encounter the strongest divergences between the three countries' laws. This is due to the fact that while English and German law require formal documents, namely, a deed and a notarial deed (*notarielle Urkunde*) respectively, sale contracts of real estate in Japan are concluded only in writing. Moreover, German law requires that the change in property rights be entered into the *Grundbuch* (land register, § 873 para 1 BGB) in order for the transfer to become legally effective (see Section 4. below).

In England, a contract to sell real estate (an executory act) must be made in writing, while a conveyance (an executed act), ie, a transfer of the legal title (property), must be made by deed.[2668] Similar to this latter requirement, a notarial deed (*notarielle Urkunde*) is necessary in Germany, as a *notarielle Beurkundung* is required under § 311b BGB for contracts of sale of real estate. As with the English deed, the legal requirements for this document are strict. In contrast, art 176 *Minpō* expressly allows a sales contract for real estate to be made consensually in Japan, free of form. Nevertheless, the parties normally opt for a written contract of their own accord for various reasons.[2669] While this is true, a template form will normally be used for the contract, rather than free-text documents.[2670]

For real estate contracts being concluded in England, the document is drawn up by the seller (or their solicitor) and must contain the contract's terms (s 2 subs 1 LPMPA 1989), particularly, details of the contracting parties and the real estate to be sold, as well as the price or other consideration to be provided.[2671] The parties must be identified through the description provided so that 'their identities cannot fairly be disputed'.[2672] As for the contract's content, information of the contractual object might include

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2668 Contrast ss 2 LPMPA 1989 and 52 subs 1 LPA 1925. On the difference between executory and executed acts, see fn 173 above.

2669 These will not be reiterated here. See Sections C.IV.1.b. and 2.b.–c. above.

2670 Compare Kaiser (fn 1976) para 57.

2671 See www.gov.uk/buy-sell-your-home/transferring-ownership-conveyancing and *Halsbury's Laws Vol 23* (fn 729) para 37. On identifying the property sufficiently, see *Halsbury's*, ibid, para 39.

2672 *Halsbury's Laws Vol 23* (fn 729) para 38.

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a description of the property boundaries, a list of fixtures and fittings included in the sale, how the building is serviced (water, gas, drainage, etc), notice of encumbrances on the land, such as public footpaths, and planning restrictions.[2673] If no statement as to the completion of the transaction is made in the document, a reasonable period may be implied by law.[2674] A peculiarity of the English deed is that it needs to be intended as a deed, be signed by the parties in the presence of a witness, and be executed and delivered (s 1 subss 2 and 3 LPMPA 1989).[2675]

These requirements are not dissimilar to those of a German notarial deed, since the *Niederschrift* must identify the parties and the notary clearly so as to avoid confusion with other persons and state the date and time of the authentication (§ 9 BeurkG). Furthermore, it will describe the contract's object, the real estate. The document will be drafted and executed by the *Notar* and signed by the notary and the parties after the document is read out and approved by the latter (compare § 13 para 1 BeurkG).[2676]

4. The Professional Parties Involved in a Real Estate Transaction

As has been alluded to above, the contracting parties will normally be aided by a number of different (legal) professionals when concluding a contract. This is particularly true for conveyances of real estate, because these transactions are subject to the most stringent form requirements — at least under English and German law. That said, at times the contracting parties themselves will also be professionals. This is particularly true where a building that is to be sold has been newly-developed. In this situation, the seller may be the developer, as is normally the case in Japan,[2677] or a real estate agent, acting on behalf of either of the parties. This section will explore those professionals supporting the contracting parties and their roles in more detail. Where similar types of professionals exist in any of the three countries, these will be grouped together.

2673 www.gov.uk/buy-sell-your-home/transferring-ownership-conveyancing.
2674 See *Halsbury's Laws Vol 23* (fn 729) para 37.
2675 On these requirements, see further Section B.II.3.b.iii. above.
2676 For further details of this process, see Section B.III.3.b.iii.cc) above.
2677 See Section 2. above.

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a. The Role of Solicitors, *Rechtsanwälte*, and *Bengo-shi* (弁護士)

In Germany and England, *Rechtsanwälte* and solicitors have active roles in real estate transactions, whereas *bengo-shi* (弁護士) in Japan are not regularly consulted by individuals during negotiations to or drafting of contracts. Rather than being part of these processes directly, they will work behind the scenes in most cases and only become involved directly in matters of litigation.[2678] Instead, the Japanese estate agent (see Section c. below) is very active in Japanese real estate transactions. In contrast, German lawyers will negotiate and therefore shape the content of the contract of sale, while informing their client on their rights and duties at the same time. In terms of their function, the English solicitor could be said to be a blend of the German *Rechtsanwalt* and the *Notar*: Not only will they negotiate the contract, but will furthermore furnish the documents (including the deed) necessary to effect the transfer and apply for the change in ownership at the Land Register — the latter of which is something that a *Notar* in Germany will do (see below). The solicitor can therefore be said to be the professional of most importance in English transactions on real estate, while German and even more so Japanese lawyers only play a marginal role.

b. The Role of Notaries Public, *Notare*, and *Kōshō-nin* (公証人)

It is the German *Notar* who plays a central role in German sales of real estate. This is not only due to the fact that German law requires a notarial authentication for the sale contract's form, but also because they will handle the registration of the ownership change at the German land register. In accordance with their function, notaries are obliged under § 10 para 1 BeurkG to establish the identities of the parties and must record

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2678 See Gray (fn 1633) 110, 101. For some statistical data from 1983, see ibid 110: Over 50% of lawyers questioned about their participation in contract negotiations replied that they were seldom or not at all involved directly, although 80% stated that they had often been involved 'behind the scenes'. Note that the same is not true for Japanese lawyers employed in companies or banks: they seem to be involved in the drafting process regularly. See ibid 111, giving 86% as the statistical number in his survey. While this data is old, the information can nevertheless be seen as essentially being true, as the practice has not generally changed much in this respect. This will become apparent in the following discussion.

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the method of identification in the *Urkunde* (§ 10 para 3 BeurkG), ie, whether the person(s) is or are known to them personally, or what kind of document is used for the identification (passport, driver's licence, etc).[2679] This function of the notary lends (legal) certainty to the transaction, as the verification of the parties' identities and recording of their details (name, date of birth, place of residence)[2680] is made by a third party, who needs to take particular care in doing so.[2681] They will also advise the parties on particular points of law during the authentication (compare § 17 BeurkG) and make the application to the German *Grundbuch* to reflect the change in ownership.[2682]

In contrast, Japanese and English notaries (*kōshō-nin*, 公証人; notaries public) are not involved in the sale of real estate. This may be a consequence of the fact that no notarial form is prescribed in Japanese and English law for such (or any) contracts; however, a *kōshō-nin* may become involved where the transaction is not a sale, but a gift of real estate.[2683] In the case of English notaries public, it will also be related to their general function: Notaries public are not usually involved in drafting or authenticating documents for domestic purposes, but rather for use

2679 Contrast the requirements under the *Gesetz über das Aufspüren von Gewinnen aus schweren Straftaten* [Law on Tracing of Profits from Serious Criminal Offences] of 23 June 2017, also known as *Geldwäschegesetz*, BGBl 2017 I 1822. See on the requirements under the 2008-version Otto (fn 1342) 8, 9–10. A concise general overview over the law in German and English can further be found at http://plattform-compliance.de/uebersetzungen-g-k/gwg-englische-uebersetzung-des-geldwaeschegesetzes-2/.

2680 Note that § 10 BeurkG does not specify the details or method of identification; para 3 merely requires that '*die Person der Beteiligten so genau bezeichnet werden, daß Zweifel und Verwechslungen ausgeschlossen sind*' (the parties involved be identified as precisely as possible in order to avoid doubts or mistakes as to the person; translation by this author).

2681 cf Otto (fn 1342) 8. Where identification is not possible, the notary may nevertheless proceed with the recording if this is requested by the parties. In such cases, the non-verification of a party's identy must be stated in the *Urkunde* (§ 10 para 3 BeurkG); however, the verification may be made later and a corresponding note be affixed to the *Urkunde* by the notary. See ibid 9.

2682 Compare Kaiser (fn 1976) 701 para 48. For further details on the notarial authentication, see Section B.III.3.b.iii.cc) above.

2683 See Kaiser (fn 1976) 701 para 48.

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abroad, although this may include a sale of real estate located outside England.[2684]

c. The Role of Real Estate Agents, *Immobilienmakler*, and *Fudō-san-ya* (不動産屋)

Real Estate Agents (*Immobilienmakler* in German; *fudō-san-ya* (不動産屋) or *fudō-san gyōsha* (不動産業者) in Japanese[2685]) are involved in the conveyance of real estate to a different extent in each country. It is true to say that they are central to the conveyancing process in Japan, while this is not so in England or Germany. Nevertheless, their role will always be one of an intermediary, including bringing together potential buyers and potential sellers.[2686] Other tasks, as discussed, are the advertising of the object, providing information to interested persons, and organising viewings, sometimes also the negotiation of the contract terms.[2687] In Japan, the agent also has other important functions. One is to act as a witness upon the conclusion of the contract by sealing the document in addition to the parties.[2688] This seems to be a task that is unique to Japan, as there is no mention of German or English agents acting in this function.

A perhaps more important function is the obligation to explain particular matters to the party who is not the agent's principal (hereinafter 'other party'), as provided in art 35 para 1 *Takuchi-gyō-hō*. These encompass details of the real estate and their owner, planning restrictions, as well as the condition of service facilities such as electricity and water (ibid subparas i–vi). They further comprise contractual matters, such as monetary payments other than the purchase price, including *tetsuke* (ibid subparas vii, x–xii), and explaining regulations such as penalty clauses and how to cancel the

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2684 Compare www.thenotariessociety.org.uk/pages/the-notarial-profession. For a range of examples of the notaries publics' tasks, see www.thenotariessociety.org.uk/pages/what-a-notary-does.

2685 See the respective entries in Götze, '*Rechtswörterbuch*' (fn 10) 71.

2686 Compare personal interview with Mika Yokoyama, Professor, Faculty of Law, University of Kyōto (Kyōto, 7 September 2016) for Japan, s 1 subs (1)(a) Estate Agents Act 1979 for England, and Hamm and Schwerdtner (fn 2658) 1 para 1 and 4 para 12 for Germany.

2687 For Germany, compare Hamm and Schwerdtner (fn 2658) 1 para 1, 4 para 12. For Japan, see Kaiser and Pawlita (fn 2086) 178. For England, see https://targetjobs.co.uk/careers-advice/job-descriptions/279481-estate-agent-job-description.

2688 See Kaiser and Pawlita (fn 2086) 178.

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contract, (ibid subparas viii–ix). This information must be provided in writing, in a document sealed by the seller (ibid paras 1, 5). It seems that while an estate agent in England or Germany normally will provide information on the property and perhaps particular contractual aspects to the other party in the course of their work, they are under no legal obligation to do so. This is not to be confused with the information duties to their principal. Thus, agents must provide information about themselves and their services to potential principals prior to concluding a contract with them.[2689] Further similar duties arise from the fiduciary relationship (in German: *Treueverhältnis*) between agent and principal.[2690]

Another important obligation of the *fudō-san-ya* is the provision of a document, after the conclusion of the contract, to the buyer that is sealed by the seller and contains the most important terms of the sales contract, such as the parties' personal data, a description of the object for sale, the purchase price, the time of delivery of the real estate, the time frame of registering the change in ownership, the possibility to cancel the contract, any liquidated damages or contractual penalties, and the regulation of liability in cases of force majeure and the payment of taxes (see art 37 paras 1 and 3 *Takuchi-gyō-hō*).

d. The Role of *Shihō shoshi* (司法書士, Judicial Scriveners)

Beside *bengo-shi* and *kōshō-nin*, a third important profession had existed in Japan since the beginning of the Meiji era to support the administration of legal Justice: *shihō shoshi* (司法書士, judicial scriveners).[2691] They have a legal qualification, as they need to pass a state examination (国家試験,

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2689 See Daniel Greenberg, *Estate Agents* (Westlaw UK Insight, 19 November 2018) for England and § 2 para 1 *Dienstleistungs-Informationspflichten-Verordnung* [Ordinance on the Information Duties in Services] of 12 March 2010, BGBl 2010 I 267 for Germany. Note that for the latter, § 5 TMG may apply to electronic communication and websites.

2690 For England, see Goode and McKendrick (fn 48) 190–192. For Gemany, see Hamm and Schwerdtner (fn 2658) 81–89 with details on the agent's duties to provide information (*Aufklärungspflicht*), give advice (*Beratungspflicht*), and to refrain from certain conduct (*Unterlassungspflicht*).

2691 For details of the historical development since their establishment in 1872 as scribes (*daisho-nin*, 代書人), see the website of the Japan Federation of Shihō Shoshi's Associations (日本司法書士会連合会, *Nihon Shihō Shoshi-kai Rengō-kai*) at www.shiho-shoshi.or.jp/consulting/history.html, where it is noted that the denomination was changed to *shihō shoshi* in 1935.

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kokka shiken) set by the *Hōmu-sho* that tests a candidate's knowledge in constitutional, private, and commercial law, as well as in relation to the registration of real estate or companies, amongst other things.[2692] In accordance with this knowledge, their tasks are geared towards 'contributing to the proper and smooth implementation of procedures concerning registration, deposits, and litigation' (art 1 *Shihō shoshi-hō*, Judicial Scriveners Act, 司法書士法 [2693]).[2694] Their work encompasses preparing documents that are to be submitted to the (District) Legal Affairs Bureau or the courts (see art 3 paras 2, 4 *Shihō shoshi-hō*), apply for registrations in registration offices in relation to real estate or companies (ibid para 1), give legal advice on the aforementioned (ibid para 5),[2695] and, since 2002, they may represent persons in civil litigation in summary courts.[2696] Their role may thus be equated to that of an English solicitor, although the tasks of the latter are wider in scope.[2697]

In conveyancing practice, a *shihō shoshi* will be involved closely in the drafting of documents for and the registration of the change in property rights over real estate in the Japanese land or building register.[2698] It seems

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2692 See www.shiho-shoshi.or.jp/consulting/exam.html for further information on this exam. See also Tanaka and Smith (fn 2) 563, who give a brief overview of the qualification process.

2693 Law No 197/1950 as amended.

2694 The whole provision reads:
この法律は、司法書士の制度を定め、その業務の適正を図ることにより、登記、供託及び訴訟等に関する手続の適正かつ円滑な実施に資し、もつて国民の権利の保護に寄与することを目的とする。
Kono hōritsu ha, shihō shoshi no seido wo sadame, sono gyōmu no tekisei wo hakaru koto ni yori, tōki, kyōtaku oyobi soshō-tō ni kansuru tetsuzuki no tekisei katsu enkatsuna jisshi ni shishi, motte kokumin no kenri no hogo ni kiyosuru koto wo mokuteki to suru.
This Act establishes a system for judicial scriveners and contributes to the proper and smooth implementation of procedures concerning registration, deposits, and litigation etc, thereby contributing to the protection of citizens' rights.

2695 Tanaka and Smith (fn 2) 563, who go on to note that *shihō shoshi* practically take on the role of a lawyer in areas of Japan in which a shortage of *bengo-shi*, such as villages, exists.

2696 Judicial scriverners need to obtain an additional certification for this. See www.shiho-shoshi.or.jp/html/global/english/index.html and art 3 para 6 et seq *Shihō shoshi-hō*.

2697 Compare the succinct description by The Law Society at www.lawsociety.org.uk/law-careers/becoming-a-solicitor/.

2698 See Kaiser (fn 1976) para 46. See also Tanaka and Smith (fn 2) 563; Kaiser and Pawlita (fn 2086) 178; Rokumoto, '*Institutionen*' (fn 1638) para 72.

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that they and the *fudō-san-ya* are even present when the balance of the purchase price is paid.[2699] This further underlines the scrivener's importance in a Japanese transaction in relation to real estate.

2699 See Kaiser and Pawlita (fn 2086) 178.

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