

Anna Katharina Suzuki-Klasen

# A Comparative Study of the Formation of Contracts in Japanese, English, and German Law

[Ostasien]



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## Foreword

This book was submitted as a PhD dissertation to the University of Hamburg in December 2019. It was defended by me in the Summer of the following year. The manuscript takes account of the law as of December 2019, so that the discussion is based on the law previous to the coming into force of the reform of the Japanese civil code (*Minpō*) on 1 April 2020. Nevertheless, the new Japanese rules pertinent to the formation of contracts are included in the analysis.

This comparative study was elaborated during my time as a Research Associate in the Japan Unit of the Max Planck Institute for Comparative and International Private Law in Hamburg, Germany. I am deeply grateful to Professor Dr Harald Baum, who supervised my PhD dissertation patiently and offered his kind guidance and numerous helpful suggestions during this time. I also thank my former colleagues for their support and constructive criticism and the whole staff of the Max Planck Institute for their support in a multitude of matters. Furthermore, I am obliged to Professor Dr Peter Mankowski, who acted as second examiner of my PhD dissertation.

The pertinent part of my research on Japanese law was conducted in 2015/2016 during my one-year research stay at the University of Kyōto in Japan. This would not have been possible without the generous funding of the Japan Society for the Promotion of Science through the JSPS Postdoctoral Fellowship (short term) for North American and European Researchers (FY 2015, PE 15768). In a similar manner, the publication of my PhD dissertation could not have been realised without the kind support of the Studienstiftung ius vivum. The author is immensely grateful for this funding.

My search for answers was greatly enriched through many discussions. In particular, I would like to express my gratitude to my host, Professor Dr Keizō Yamamoto, for his kind support, as well as for allowing me to participate in his classes and to contribute to his project to translate the modified provisions of the *Minpō* into German (see Keizō Yamamoto, Hiroyuki Kansaku, Gabriele Koziol et al, *Übersetzung des novellierten Zivilgesetzes 2020* [Translation of the Reformed Civil Code 2020] 45 (2018) *Zeitschrift für Japanisches Recht / Journal of Japanese Law* 183–305; Keizo Yamamoto and Gabriele Koziol (eds), *Das Reformierte japanische Schuldrecht* [The

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Reformed Japanese Law of Obligations] (Mohr Siebeck 2021) 177–363). These and other group discussions were simply enlightening.

All the individual interviews that I have conducted were similarly stimulating. I am indebted to all the people who kindly gave me some of their time, in particular: Professor Yamamoto; Professor Kunihiro Nakata (Ryūkoku University); Professor emeritus Dr Shōji Kawakami (University of Tōkyō); Professor Mika Yokoyama (University of Kyōto); and Mr Ryōsuke Naka (Attorney at law, Kitahama Hōritsu Jimu-sho). It is through these exchanges, in which much light was shed on the workings of Japanese law, that my dissertation has been greatly enriched. My gratitude goes to all the other people who cannot be named here but whose invaluable help is not forgotten.

My special thanks also go to my dear friends, who greatly encouraged me along the way. Last — but not least — I am deeply grateful to my husband and my parents for the vital support they have provided during this process. I dedicate this work to you.

Bielefeld, January 2022

Dr. Anna Katharina Suzuki-Klasen

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## Abbreviations

AC	Appeal Cases
AcP	<i>Archiv für die civilistische Praxis</i> [Archive of Civilian Practice]
ADHGB	<i>Allgemeines Deutsches Handelsgesetzbuch</i> [Common German Commercial Code]
AG	<i>Amtsgericht</i> [local court]
AGB	<i>Allgemeine Geschäftsbedingungen</i> [standard terms]
ALR	<i>Allgemeines Landrecht für die Preußischen Staaten</i> [General State Laws of the Prussian States] (1794)
art(s)	article(s)
B2B contracts	business to business contracts
B2C contracts	business to consumer contracts
BAG	<i>Bundesarbeitsgericht</i> [Federal Labour Court]
BAGE	<i>Entscheidungen des Bundesarbeitsgerichts</i> [Decisions of the <i>Bundesarbeitsgericht</i> ]
BauVertrRefG	<i>Gesetz zur Reform des Bauvertragsrechts</i> [...], [Law to Reform the Law on Construction Contracts [...]] (2017)
BEA 1882	Bills of Exchange Act 1882
BeurkG	<i>Beurkundungsgesetz</i> [Notarial Authentication Law] (1969)
BGB	<i>Bürgerliches Gesetzbuch</i> [German Civil Code] (1896; 2002)
BGBI	<i>Bundesgesetzblatt</i> [German Federal Law Gazette]
BGH	<i>Bundesgerichtshof</i> [Federal Court of Justice]
BMJV	<i>Bundesministerium der Justiz und für Verbraucherschutz</i> [German Federal Ministry of Justice and Consumer Protection]
BNotO	<i>Bundesnotarordnung</i> [Federal Ordinance on Notaries] (1937)

## Abbreviations

BVerfG	<i>Bundesverfassungsgericht</i> [Federal Constitutional Court]
BVerfGE	<i>Entscheidungen des Bundesverfassungsgerichts</i> [Decisions of the Federal Constitutional Court]
BVerfGG	<i>Gesetz über das Bundesverfassungsgericht</i> [Act on the Federal Constitutional Court] (1993)
C2C contracts	consumer to consumer contracts
CA	Court of Appeal
cf	confer (compare)
CESL	Common European Sales Law
Ch	Chancery
Chūkan shi'an	<i>Minpō (saiken kankei) no kaisei ni kansuru chūkan shi'an</i> [Interim Tentative Plan for the Reform of the Civil Code (Law of Obligations)] (2013)
CISG	United Nations Convention on Contracts for the International Sale of Goods (1980)
CJ	Chief Justice
CJEU	Court of Justice of the European Union (previously: ECJ)
CLC	Commercial Law Cases
CLJ	Cambridge Law Journal
CoA 2006	Companies Act 2006
Consumer Distance Selling Regulation 2000	Consumer Protection (Distance Selling) Regulations 2000
CPR 1998	Civil Procedure Rules 1998
CRA 2015	Consumer Rights Act 2015
CUP	Cambridge University Press
DCFR	Draft Common Frame of Reference for European Contract Law
Denshi keiyaku-hō	<i>Denshi shōhi-sha keiyaku oyobi denshi shōdaku tsūchi ni kansuru minpō no tokurei ni kansuru hōritsu</i> [Act on Special Provisions to the Civil Code Concerning Electronic Consumer Contracts and Electronic Acceptance Notice] (2001)

Denshi shomei-hō	<i>Denshi shomei oyobi ninshō gyōmu ni kansuru hōritsu</i> [Act on Electronic Signatures and Certification Business] (2000)
DNotZ	<i>Deutsche Notar-Zeitschrift</i> [German Notary Journal]
Draft Proposal Outline	<i>Minpō (saiken kankei) no kaisei ni kansuru yōkō-an no tatakidai</i> [Draft Proposal for the Motion Outline in Relation to the Reform of the Civil Code (Law of Obligations)]
EC Act 1972	European Communities Act 1972
ECHR	European Convention on Human Rights (1953)
ECJ	European Court of Justice (now: CJEU)
E-Commerce Regulations 2002	Electronic Commerce (EC Directive) Regulations 2002
ECR	European Court Reports
ed(s)	editor(s)
EDI	electronic data interchange
edn	edition
EGBGB	<i>Einführungsgesetz zum Bürgerlichen Gesetzbuche</i> [Introductory Act to the Civil Code] (1994; 1997)
eIDAS Regulation 2014	Regulation (EU) 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC
ER	English Reports
EU	European Union
EU Distance Selling Directive 1997	Council Directive 97/7/EC on the protection of consumers in respect of distance contracts
EU Withdrawal Act 2018	European Union (Withdrawal) Act 2018
ex p	ex parte (on behalf of)
FA 2003	Finance Act 2003
fn(s)	footnote(s)

Abbreviations

FormAnpG	<i>Gesetz zur Anpassung der Formvorschriften des Privatrechts und anderer Vorschriften an den modernen Rechtsgeschäftsverkehr</i> [Act on the Amendment of Provisions of Form in Private Law and Other Provisions in Accordance with Modern Legal Transaction Methods] (2001)
FormAnpG Draft Law	<i>Gesetzentwurf der Bundesregierung: Entwurf eines Gesetzes zur Anpassung der Formvorschriften des Privatrechts und anderer Vorschriften an den modernen Rechtsgeschäftsverkehr</i> [Draft Law of the Government: Draft of a Law to Adapt the Form Requirements in Private Law and other Provisions to Modern Legal Transactions] (2000)
GBO	<i>Grundbuchordnung</i> [Land Registration Law] (1994)
GbR	<i>Gesellschaft bürgerlichen Rechts</i> [civil law partnership]
GG	<i>Grundgesetz</i> [Basic Law for the Federal Republic of Germany] (1949)
GVG	<i>Gerichtsverfassungsgesetz</i> [Court Constitution Act] (1975)
HC	High Court
HGB	<i>Handelsgesetzbuch</i> [German Commercial Code] (1897)
HoL	House of Lords
ibid	ibidem
ICJ	International Court of Justice
ICJ Statute	Statute of the International Court of Justice
J	Judge
JuS	<i>Juristische Schulung</i> [Legal Education]
JZ	<i>Juristenzeitschrift</i> [Legal Journal]
KB	King's Bench
Kaisei-kai	<i>Hōsei Shingi-kai Minpō (Saiken Kankei) Bukai</i> [Japanese Civil Code (Law of Obligations) Reform Commission]
Kaisei kankei-hō	<i>Minpō ichibu wo kaisei suru hōritsu no shikō ni tomonau kankei hōritsu no seibi-tō ni kansuru hōritsu</i> [Law to Maintain Laws Affected by the Enforcement of the Law to Amend one Part of the Civil Code] (2015)

Kaisei hō'an	<i>Minpō ichibu wo kaisei suru hōritsu</i> [Law to Amend one Part of the Civil Code] (2017)
Kenpō	<i>Nihon-koku Kenpō</i> [Japanese Constitution] (1946)
Kyū-shōhō	[Former Japanese Commercial Code] (1890)
LG	<i>Landgericht</i> [Regional Court]
LJ(SC)	Lord Justice (Supreme Court)
(L)MR	(Lord) Master of the Rolls
LOI	Letter(s) of Intent
LPA 1925	Law of Property Act 1925
LPMPA 1989	Law of Property (Miscellaneous Provisions) Act 1989
LQR	Law Quarterly Review
LR	Law Reports
LRA 2002	Land Registration Act 2002
METI	Ministry of Economy, Trade and Industry, <i>Keizai Sangyō-shō</i>
Minpō	<i>Minpō</i> [Japanese Civil Code] (1896)
Minso	<i>Minji soshō-hō</i> [Japanese Code of Civil Procedures] (1996)
MMR	<i>MultiMedia und Recht</i> [Multi-media and Law]
NJW	<i>Neue juristische Wochenschrift</i> [New Legal Weekly Journal]
no(s)	number(s)
OJ	Official Journal of the European Communities
OJLS	Oxford Journal of Legal Studies
OLG	<i>Oberlandesgericht</i> [Higher Regional Court]
OLGR	OLG-Report
OUP	Oxford University Press
P&CR	Property(, Planning) & Compensation Reports
para(s)	paragraph(s)
PC	Privy Council
PECL	Principles of European Contract Law
PICC	UNIDROIT Principles of International Commercial Contracts

## Abbreviations

pt(s)	part(s)
QB	Queen's Bench
QC	Queen's Counsel
r(s)	rule(s)
RabelsZ	<i>Rabels Zeitschrift für ausländisches und internationales Privatrecht</i> / The Rabel Journal of Comparative and International Private Law
Reg	(EC/EU) Regulation
reg(s)	regulation(s)
Repeal Bill White Paper	Legislating for the United Kingdom's withdrawal from the European Union (White Paper)
repr	reprint
RG	<i>Reichsgericht</i> [Imperial Court]
RGZ	<i>Entscheidungen des Reichsgerichts in Zivilsachen</i> [Decisions of the Imperial Court in Civil Matters]
s(s)	section(s)
SA 1891	Stamp Act 1891
sch(s)	schedule(s)
SGA 1979	Sale of Goods Act 1979
SGSA 1982	Supply of Goods and Services Act 1982
Shita'uke-hō	<i>Shita'uke daikin shibarai chi'en tō bōshi-hō</i> [Act against Delay in Payment of Subcontract Proceeds, etc to Subcontractors] (1956)
Shōhō	<i>Shōhō</i> [Japanese Commercial Code] (1899)
SI	Statutory Instrument
SOF 1677	Statute of Frauds 1677
subs(s)	subsection(s)
subpara(s)	subparagraph(s)
Takuchi-gyō-hō	<i>Takuchi tatemono torihiki-gyō-hō</i> [Building Lots and Buildings Transaction Business Act] (1952)
TFEU 2012	Consolidated Version of the Treaty on the Functioning of the European Union
TMG	<i>Telemediengesetz</i> [Tele-media Law] (2007)

Tokutei shō-torihiki-hō	<i>Tokutei shō-torihiki ni kansuru hōritsu</i> [Act on Specified Commercial Transactions] (1976)
tr(s)	translator(s)
UK	United Kingdom
UKSC	United Kingdom Supreme Court
ULFC	UNIDROIT Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (1964)
UN	United Nations
UNTS	United Nations Treaty Series
UTP	(The) University of Tōkyō Press
vol(s)	volume(s)
WLR	Weekly Law Report
WM	<i>Wertpapier-Mitteilungen</i> [Investment News]
ZEuP	<i>Zeitschrift für europäisches Privatrecht</i> [Journal of European Private Law]
ZJapanR / JJapanL	<i>Zeitschrift für Japanisches Recht</i> / Journal of Japanese Law
ZPO	<i>Zivilprozessordnung</i> [German Code of Civil Procedure] (2005; 2006)

