Some Observations on Japan's Reform of the Law of Obligations: Much Ado About Nothing?[1)]

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1. Preface

I remember well one lovely summer day in Munich someday in 2007, when I was sitting with Makoto Arai on a garden terrace of a restaurant, enjoying a good lunch meal and an equally good conservation with him on issues of Japan, Germany, and law in both countries. Makoto Arai seemed to enjoy being in Germany very much, in particular in Munich, where he spent some years on his doctoral studies back in the 1970s. He obtained a *doctor iuris* degree from Ludwig Maximilian University of Munich in 1979 with a dissertation thesis on the transfer of the German concept of "*Rechtsgeschäft*"

1) This text is mainly based on a public lecture the author has delivered at Melbourne Law School on 30 October 2019. Deliberately, only a few references were added.

(juristic act) into Japanese civil law. He told me that ever since he would come to Munich once every year, at least, whenever his university in Japan and his personal schedule allowed it. At that time, I was working at a law firm in Munich and my work as an attorney had also some relation with Japan. It was, however, not particularly centered on Japanese civil law, which I had studied and researched at a Japanese university some years ago. Therefore, I particularly enjoyed having again an opportunity to talk on issues of civil law, and in particular with such a renowned expert in the field. One of the issues we certainly talked about was the upcoming reform of the law of obligations in Japan and the corresponding reform in Germany, which had come into effect some five years ago. At the time, I could not imagine to become someday one of his colleagues at Chūō University, which however became true in 2013; and I am particularly grateful for his support and guidance during my first years there.

2. Outline of the Development of Japanese Civil Law and the Law of Obligations

The modern development of Japanese civil law begins mainly with the enactment and coming into force of the Japanese Civil Code (民法 *Minpō*, CC) in 1898 (hereinafter: the "Civil Code"), about 120 years ago. It is common knowledge that the structure of the Civil Code was modelled after the first (1887) and second draft (1895) of the German Civil Code (*Bürgerliches Gesetzbuch*, BGB[2]), which itself was drawn upon the concept of the German Historical School of Jurisprudence[3] to compile a complete body of civil law

2) The BGB came into force on 1 January 1900. The entry into force was deliberately delayed to parallel this event with the begin of a new century in order to send the signal that a new era is going to start.

in a concise and precise format. In terms of content, the Japanese Civil Code was also greatly influenced by those drafts, but also by the French civil code (Civil Code of the French) and about thirty other foreign civil codes of the time. Family law and succession law in the beginning followed mainly Japanese traditions. The Civil Code is in force still today.[4)]

The Civil Code comprises five larger parts called books. The law of obligations is laid down mainly in the third book (Obligations/Receivables 債権*saiken*), complemented by general rules applicable also with regard to obligations, provided in the first book (General Provisions, 総則*sōsoku*). This includes general rules for the formation, structure, discharge and lapse of obligations, as well as special rules on obligations based on contracts, torts, unjust enrichment and management of another's affair (*negotiorum gestio*).

The law of obligations in the Civil Code subsequently underwent several but only small reforms. Most of the reforms of the Civil Code aimed

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3) The German School of Jurisprudence (*Historische Rechtsschule*), also referred to as the pandectists, were a group of likeminded German scholars who studied ancient Roman law and were fascinated by the idea that the complete set of civil law rules could be precisely arranged and compiled in one single body of law. This concept was based on the compilation of rules, decisions and legal doctrines produced on order of the Eastern Roman Emperor Iustinian I around the year 530, called the Corpus Iuris Civilis and one part of it, the Digesta. (Pandects).

4) For details (in Western languages) about the emergence of the Japanese Civil Code and the German influence, see: G. Rahn, Rechtsdenken und Rechtsauffassung in Japan (Beck 1990) 80–113; Z. Kitagawa, Rezeption und Rechtsfortbildung des europäischen Zivilrechts in Japan (Metzner 1970) 30–43; R. Frank, Civil Code – General Provisions, in: Röhl (Hrsg.), History of Law in Japan since 1868 (Brill 2005) 169–188; P.-C. Schenk, Der deutsche Anteil an der Gestaltung des modernen japanischen Rechts- und Verfassungswesens (Franz Steiner Verlag 1997) 302–317; Y. Noda, Introduction to Japanese Law (University of Tokyo Press 1976) 43–54.

primarily at amending the family law, the law of succession or the property law. In 1999, the adult guardianship was restructured, which also slightly touched on the law of obligations. In 2004, the Civil Code was translated into modern Japanese and surety law was reformed. In addition, the wording of Section 709 CC (general tort provision) was slightly amended to reflect the long-standing legal practice and legal doctrine in interpreting this provision. Apart from this, for over hundred years the law of obligations, and more specifically the law of contracts inside the Civil Code did not see a comprehensive reform.

Outside the Civil Code, however, the law of obligations – more precisely contract law – was supplemented by numerous special laws, regulating some specific contracts, to strengthen protection of tenants,[5] money borrowers,[6] employees,[7] non-professional customers in in financial transactions,[8] and generally consumers.[9]

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5) Example: The Real Property Lease Act (借地借家法 *Shakuchi shakuya-hō*), Law No. 90/1991, and its predecessors.

6) Examples: The Interest Rate Restriction Act (利息制限法 *Risoku seigen-hō*), Law No. 100/54 (and its predecessors); the Acceptance of Investment, Money Deposits and Interest Rates Regulation Act (出資の受入れ、預り金及び金利等の取締りに関する法律 *Shusshi no ukeire, azukarikin oyobi kinri-tō no torishimari ni kansuru hōritsu*), Law No. 195/1954; Money Lending Industry Act (貸金業法 *Kashi kingyō-hō*), Law No. 32/1983.

7) Examples: The Labour Standards Act (労働基準法 *Rōdō kijun-hō*), Law No. 49/1947; the Labour Contracts Act (労働契約法 *Rōdō keiyaku-hō*), Law No. 128/2007.

8) Example: The Financial Products Sales Act (金融商品の販売等に関する法律 *Kin'yū shōhin no hanbai-tō ni kansuru hōritsu*), Law No. 101/2000.

9) Examples: The Consumer Contract Act (消費者契約法 *Shōhisha keiyaku-hō*), Law No. 61/2000; the Act on Specified Consumer Transactions (特定商取引に関する法律 *Tokutei shō-torihiki ni kansuru hōritsu*), Law No. 57/1976.

3. An Outline of the Reform Process – Much "Ado"

On 1 April 2020, the general reform of the law of obligations was finally completed upon entering into force. Depending on where to see the starting point, the reform process altogether spanned a period of about twenty-five, fourteen or, at least, eleven years.

a) The Pre-Stage of the Reform Process

Already in the 1990s, there was some discussion among legal academics in Japan influenced by the developments in Germany. In Germany, on the other hand, first calls for reform of the law of obligations were voiced already in the 1970s. In 1981/1983 several comprehensive expert opinions were published, mainly provided by German university professors on request of the German Ministry of Justice, which sparked a vivid debate.

In 1984, the German Ministry of Justice established a committee for the reform of the law of obligations, the so-called *Schuldrechtskommission*, which delivered its final reports in 1992. Partly based on this report and due to the necessity to implement some European Union (EU) directives, in 1999 a reform draft was prepared that after some discussion lead to a comprehensive reform of the German law of obligations, which came into force in 2002. In view of the traditional influence of German civil law and persistent interest in the developments in German law and legal theory among many Japanese academics, it is not surprising that these developments drew much attention in Japan.

A further impetus for debate among Japanese academics to reform the Japanese law of obligations were similar reform activities or discussions in many other countries around the world at the time, and the entering into

force of the United Nations Convention on Contracts for the International Sale of Goods (CISG) on 1 January 1988. Japan was actively involved in the drafting process of this convention, but (a little bit surprising) did not ratify the CISG before 2009.[10)]

In 2006, shortly after implementation of some main parts of the large reform of the judiciary and legal education system in Japan (司法改革 *shihō kaikaku*) and after the 100th anniversary of the Civil Code, which involved the publication of numerous academic books and articles on the state of the Civil Code, two main topics of debate at the annual civil law assembly of the prestigious Japan Association of Private Law (私法学会 *Shihō Gakkai*) were contract law responsibility and the results of the German reform of the law of obligations. This 2006 conference of the Japanese Association of Private Law produced the specific impetus for the pre-stage of the formal legislative process. As a result, at least three study groups for a reform of the law of obligations were established by legal academics. Many leading figures of the legal academia in Japan were involved in the activities of one or more of these groups. The most important one of these study groups was the so-called (Japanese) Civil Code (Law of Obligations) Reform Commission (民法(債権法)改正検討委員会 *Minpō (Saiken-hō) Kaisei Kentō I'in-kai*, hereinafter: the "Reform Commission"), which was headed by Takashi Uchida as chairman, and in which many other well-known academics of Japan's most famous universities were actively involved, such as for example Keizō Yamamoto (Kyōto University), Kaoru Kamata (Waseda University),

10) For some details on Japan's delayed ratification of the CISG see N. Kashiwagi, Accession by Japan to the Vienna Sales Convention (CISG), ZJapanR/J.Japan.L 25 (2008) 207–214; M. Bälz, Japans später Beitritt zum UN-Kaufrecht, in: Rabels Zeitschrift für ausländisches und internationals Privatrecht No. 4 (2009) 683–702.

Hiroyasu Nakata (Waseda University), and Atsushi Ōmura (Tōkyō University). Altogether, the Reform Commission comprised thirty-five core members, among them twenty-six civil law professors, five commercial law professors, two professors of the law of civil procedure and two officials of the Ministry of Justice, one of them Takeo Tsutsui who remained actively involved in the reform process until its accomplishment. Nonetheless, there was a clear predominance of legal academics in the composition of this study group. In 2009, the Reform Commission proclaimed a reform proposal and presented it with great fanfare on a conference. It was named Basic Policy of the Reform of the Law of Obligations (債権法改正の基本方針 *Saiken-hō kaisei no kihon hōshin*). It was also published as a book.[11)]

The two other groups were the Study Group for a Reform of the Civil Code (民法改正研究会 *Minpō Kaisei Kenkyū-kai*), led my Masanobu Katō and others, and the Study Group for a Reform of the Rules of Prescription (時効研究会 *Jikō Kenkyū-kai*) with a limited focus. Both groups also presented a written report, and both reports were equally published as a book.[12)] Like the Reform Commission, both groups also were mainly composed of legal academics as members.

Consequently, the special features that characterize the initial phase of

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11) 民法 (債権法)改正検討委員会 *Minpō* (*Saiken-hō*) *Kaisei Kentō I'in-kai* (ed.), 債権法改正の基本方針 *Saken-hō kaisei no kihon hōshin* [Basic Policy of the Law of Obligations], Bessatsu NBL No. 126 (商事法務 Shōji Hōmu 2009). Even an English translation was for a while available at http://www.shojihomu.or.jp/saikenhou/English/index_e.html.

12) 民法改正研究会 *Minpō Kaisei Kenkyū-kai* (ed.), 日本民法典改正案 I, 第一編 総則 — 立法提案・改正理由 *Nihon minpōten kaisei-an I, dai-ichi hen sōsoku – rippō teian, kaisei riyū* [Reform Proposal for the Japanese Civil Code I, First Part with General Principles – A Legislative Proposal and Reasons for the Reform] (信山社 Shinzansha 2016), based on 民法改正研究会 *Minpō Kaisei*

the reform process are the following: First, legal scholars, not the Japanese government or a group of lawmakers initiated the reform process. Second, the reform proposals were not a patchwork, but a comprehensive piece of work. Third, the Basic Policy proposal of the Reform Commission was the most important and a particularly ambitious reform proposal.

Some further items can be mentioned as reform impetus. The already mentioned 100th anniversary of the Civil Code in 1998 generally brought about a deeper reflection on the present state of the Civil Code, which lead to the conclusion among many academics that the Civil Code is not up-do-date anymore. Moreover, the also mentioned large reform of the judiciary and legal education system in Japan, beginning in 1999. This demonstrated that the Japanese government could be convinced that fundamental legal reforms were necessary. Probably there also were a lingering discontent and envy among civil law scholars in Japan, usually not being able to exert as much influence on legal practice and legislation as their European, in particular German colleagues, who were deeply involved in and a driving force behind the German reform of the law of obligations and the development of civil law practice in Germany. Watching their German colleagues shaping the new law of obligations in Germany in particular might have inspired Japanese academics to take the initiative in reforming the law of obligations in Japan.

Kenkyū-kai (ed.), 民法改正と世界の民法典 *Minpō kaisei to sekai no minpōten* [The Reform of the Civil Code and the Civil Codes of the world] (信山社 Shinzansha 2009). 金山直樹 N. Kanayama (ed.), 消滅時効法の現状と改正提言 *Shōmetsu jikō-hō no genjō to kaisei teigen* [The Contemporary State of the Law of Prescription and a Reform Proposal], Bessatsu NBL No. 122 (商事法務 Shōji Hōmu 2008).

b) The Formal Legislative Process

Influenced by the ongoing debate, in October 2009, the at the time Minister of Justice in the first Abe Cabinet, Jin'en Nagase, formally requested the Legislative Council (法制審議会 *Hōsei Shingi-kai*) within his ministry to provide an opinion about necessary reforms to cope with the many changes in society and economy since the enactment of the Civil Code in the field of the law of obligations. In addition, the opinion should also extend to opportunities to make this field of law easier to understand for ordinary citizens.

In view of this request, the Legislative Council established the Special Subcommittee of experts for the Reform of the Civil Code (hereinafter: the "Reform Committee").[13] Members of the Reform Committee were eighteen legal academics, mostly identical with the founders of the informal Reform Commission, but in addition it comprised seven ministry officials, four judges, four attorneys, and five representatives of lobby groups (industry associations, trade unions, consumer associations), altogether thus twenty legal practitioners and other non-academics. Therefore, the proportion between legal academics and non-academics changed, legal academics counted only less than half of the Reform Committee's members.

The discussions in the Reform Committee mainly took the Basic Policy proposal of the informal Reform Commission as the starting point. In April 2011, the Reform Committee published the Interim Report on the Points at Issue (民法(債権関係)の改正に関する中間的な論点整理 *Minpō (saiken kankei) no kaisei ni kansuru chūkan-teki na ronten seiri*), based on twenty-six meetings, and gave the general public an opportunity to provide comments. In June 2011, the Reform Commission resumed discussions and decided

13) 民法(債権関係)部会 *Minpō (Saiken Kankei) Bukai.*

after the 27th meeting to draft the opinion in the form of a reform proposal. This draft proposal was published after long discussions over a period of almost two years (30th – 71st meeting) in February 2013 as the Interim Draft Reform Proposal (民法(債権関係)の改正に関する中間試案 *Minpō (saiken kankei) no kaisei ni kansuru chūkan shian*). After its publication, the public was given once more an opportunity for submitting comments. Based on these comments, the discussion in the Reform Committee resumed and continued for about a further year (72nd to 96th meeting) until in August 2014 the Preliminary Draft Reform Proposal (民法(債権関係)の改正に関する要綱仮案 *Minpō (saiken kankei) no kaisei ni kansuru yōkō kari-an*) was adopted and published. After a few further meetings (97th to 99th meeting), in February 2015 the Preliminary Draft Reform Proposal was finalised as the Draft Reform Proposal (民法(債権関係)の改正に関する要綱案 *Minpō (saiken kankei) no kaisei ni kansuru yōkō-an*), which was as such adopted by the Legislative Committee and submitted as Reform Proposal (民法(債権関係)の改正に関する要綱 *Minpō (saiken kankei) no kaisei ni kansuru yōkō*) to the Minister of Justice (at the time). Besides, all meetings are meticulously recorded and accessible on a website of the Japanese Ministry of Justice.[14)]

On 31 March 2015, the Cabinet adopted the Reform Proposal and submitted it the following day to the Parliament as reform bill. Although at that point in time intense discussions inside and outside the formal panels have been continued for already six years, it was more than a little bit surprising that it took the House of Representatives more than another year to start its discussions on the reform bill. The government and the legislators of the government coalition finally seemed to have second

14) At the time of the writing of this manuscript all records are available at *http://www.moj.go.jp/shingi1/shingikai_saiken.html*

thoughts on the proclaimed need, or at least on the urgency of the need to reform the law of obligations. Suddenly, other bills apparently became more important. Finally, in autumn of 2016, the formal debate in parliament began, which was, however, at no point in time particularly intense. The reform bill was eventually adopted by the House of Councillors on 26 May 2017 (the House of Representatives had accepted it first on 14 April 2017). After a further three-year transitional period, the reform law at last could enter into force.

c) Ado Outside the Formal Reform Panels

Especially the formal legislative process of around eleven years was again further orchestrated by countless academic events, publications of articles in general magazines and law journals, publications of books, seminars for legal practitioners (lawyers and other licensed legal professionals, employees in private companies), and public comments by various organisations, such as bar associations and consumer organisations in Japan. Informed circles abroad also became interested in the reform plans in Japan. During the many years, the author of this paper alone had the opportunity to continuously report and comment about the state and content of the upcoming reform, three times with public lectures at venues in Germany[15] and Australia[16] and once by means of a publication of a paper in a law

15) On 19 August 2015 at a public lecture event at the University of Münster with a speech in German entitled *"Aktueller Stand der japanischen Schuldrechtsreform"* [Present State of the Japanese Reform of the Law of Obligations].

16) On 26 March 2018 in Sydney with a public lecture entitled "The 2017 Reform of the Law of Obligations: Impetus, Rulemaking Process, and Outcome", on invitation of the Law School of the University of Sydney and the Australian Network for Japanese Law (ANJeL), and the lecture at the University of Melbourne on 30 October 2019, on which this paper is based.

journal.[17] Chūō University[18] was also engaged in discussing the reform proposals by organising a symposium in collaboration with the German-Japanese Association of Jurists (DJJV), held on 21 and 22 February 2014 in Tōkyō,[19] at which the author of this paper also had a chance to comment on the envisaged reform in Japan.[20]

4. The Result: "Nothing"?

As a whole, the reform process is characterised by very long deliberations and discussions, and intensive exchange with the public, in particular by giving the general public multiple opportunities for comment. One can certainly say that there was in fact much "ado". But what was the outcome of the reform?

a) General Observations

In a general evaluation of the outcome of the reform, one may concede that the process started with very high ambitions, in particular of a majority of legal scholars. Evidence of these ambitions is in particular the above-

17) M. Dernauer, Der Schuldrechtsrefom-Entwurf: Eine Bewertung, ZJapanR/J.Japan.L. No. 39 (2015) 35–72.

18) More precisely the Institute of Comparative Law in Japan (ICLJ) at Chūō University.

19) The lectures were published in the following book: M. Tadaki / H. Baum (eds.), 債権法改正に関する比較法的検討—日独法の視点から *Saiken-hō kaisei ni kansuru hikakuhō-teki kentō—nichi-doku-hō no shiten kara* [A Comparative Analysis of The Reform of the Law of Obligations – From the Perspective of Japanese and German Law] (Chūō University Press 2014).

20) Title of the speech in German: Der Schuldrechtsreform-Entwurf: Versuch einer Bewertung, in: Tadaki / Baum (supra note 19) at pp. 412–429.

mentioned impressive Basic Policy Proposal that had been drafted by the unofficial Reform Commission of mostly legal scholars, and which mainly represents the starting point for the discussions in the later by the Ministry of Justice established Reform Committee. Having a closer look at the changes in content the formal reform process brought about, it is apparent that the scope of the reform was gradually and largely reduced.

There are mainly two reasons for that: First, it is clear that the influence of practicing lawyers, bureaucrats – in particular officials from other ministries than the Ministry of Justice –, and lobby groups was much stronger during the formal reform process. This is apparent if one looks at the composition of the Reform Committee in comparison to the informal Reform Commission. More than half of the members of the Reform Committee were no legal academics, which is an essential difference to the composition of the Reform Commission, in which the vast majority of members were legal academics. Second, it is very probable that during the long lasting discussions it became clearer and clearer that most of the initially proposed amendments are in fact not necessary, even among legal scholars. But not only that, although the reformed Civil Code, as it entered into force in April 2020, still features extensive amendments in those parts that contain the core provisions of the general law of obligations (i.e., Book 1 and 3), it is reasonable to state that most of these amendments were not necessary either.

Therefore, during the formal stage of the Reform Process, more and more critics of the whole reform plan got to have their say. Apart from critical comments on particular details of the discussed reform proposals and general opinions that many proposals were unnecessary, some even denounced the whole plan to reform the law of obligations as a playground for academics and as an attempt of the Ministry of Justice to increase its

influence and to extend its competencies over other ministries. In support of their view that there is generally no need to reform the Civil Code, critics argued that the Code in general uses abstract language that is sufficiently open for broad interpretation, and that legal practice in Japan has developed a good tradition to make use of this feature, by applying the provisions of the Civil Code broadly and flexibly in order to find a fair and reasonable solution for the parties in most legal disputes. Thus, the Civil Code does generally allow legal practitioners to find appropriate solutions in view of the interests and for the sake of the involved parties. Moreover, the many existing special laws, which supplement the Civil Code, in particular in the field of consumer law, were sufficient in resolving issues not directly addressed by the Civil Code itself. It was further argued that the provisions of the Civil Code pose no obstacle for business and law practice, even if they are outdated, because under the recognised principles of contractual freedom and private autonomy, and in view of the fact that most provisions of the Code are non-mandatory law provisions, businesses and lawyers can easily draft contracts suitable for legal practice. Many critics hence held that the provisions in the Civil Code in the field of the law of obligations are generally not so important.

Altogether, the Basic Policy Proposal of the informal Reform Commission listed 589 detailed, individual reform proposals, accompanied by extensive explanations. When the formal Reform Committee of the Ministry of Justice convened for the first time in 2009, the discussions started with 500 reform proposals, mostly taken from the Basic Policy Proposal. These were put in a different order and form, resulting in the Interim Report on the Points at Issue published in 2011. In the following stage up to the Interim Draft Reform Proposal published in February 2013, almost half of the proposed reform items were deleted The Preliminary Draft Reform Proposal

published in August 2014 showed another reduction of around 15% of the proposed reform items. The Reform Proposal, which the Minister of Justice submitted to the Cabinet, dropped three further proposals. Finally, about two hundred individual reform proposals were upheld, but became rather slim in content.

Looking at the reform of the law of obligations from the perspective of a law professor at Chūō University, one is willing to say that the results are in fact not so far-reaching and important as some proponents once claimed or still claim. During the interim period of three years after the adoption of the reform law, when the law was not yet in force, that is between 2017 and 2020, for law professors that have to give classes on general law of obligations, contract law, and on the law of statutory obligations (e.g. tort law), the question one had to ask oneself is, how could one address appropriately both, the law still in effect at the time of the lecture and the law after the reform, in one and the same class. In fact, many students that were aware of the upcoming reform seemed to worry about the many changes the reform was to bring about. Knowing the contents of the reform I personally found it quite easy to handle this issue. I always told my students that most of the amendments concern merely details or that they only reflect the common law practice of the Supreme Court or courts in general, not yet expressly written in the Code, so that there is no need to worry. In most instances, the Civil Code thus became easier to apply. As a result, during the interim period I generally continued to teach the "old" law of obligations and after each topic just added a short session with an overview on the specific amendments in regard of the topic that had been just explained. This caused not much trouble and took not much extra time.

b) Specific Observations

One of the suggested main objectives of the reform of the law of obligations was to make the Civil Code easier to understand for ordinary citizens. This reflects the broader notion that had become more popular in recent years to make law more accessible for citizens. To leave no doubt in this regard, this idea was right from the beginning nothing but a wishful thinking. The Japanese Civil Code is a highly functional and systematically structured code of law. For legal experts, this makes the law easy to apply, but difficult to understand for ordinary persons. Most serious law students have a similar experience over the many years of legal training. As a freshman at university and beginner in civil law, the Civil Code seems to be a closed book. Later on, however, the in-between trained lawyer at one point in time, after he or she finally has come to understand its overall structure, often suddenly discovers all the advantages of this structure: conciseness, clearly expressed basic principles, a precise but nonetheless open wording of the provisions, consistency. It is hardly possible to make such a code of law easier to read for ordinary persons, while at the same time keep up the whole functionality that makes it easy to apply for legal experts. And what is the result of the reform? While the given target was missed by far the result should be nonetheless endorsed. The Civil Code did not become easier to understand for ordinary people, but easier to understand and to apply for legal experts. Just to give two successful reform examples: The provision on mistake (Section 95 CC) and the provisions regarding the warranty of the seller for defects of the purchase object (new Sections 561 to 572 CC).

From the wording of Section 95 CC before the reform, it was impossible to infer what the nature of the mistake is and what types of mistakes the provision covers. While the legal practice of the Supreme Court and the other courts over more than hundred years have made it quite clear, what

type of mistakes under what conditions should fall under this provision, the new wording of the same provision clearly reflects this legal practice with only one exception. Where the Reform Committee found that the Supreme Court went one step too far in allowing the application of the provision to one specific situation where a generally irrelevant mistake in motivation could be considered to be relevant by way of exception, the new wording of Section 95 deliberately and clearly precludes just the application in this specific instance.[21] On the other hand, leaving aside the decision to disapprove this one exception accepted by the Supreme Court, which is not truly an essential issue, the former legal practice of the courts in regard of the provision on mistake could always be easily looked up in a standard textbook on civil law. Therefore, while the reform in this case makes it easier to apply the law even for law students in their first year, for ordinary people the law will not become much easier to understand. And the need for this specific reform of Section 95 CC is clearly small.

The requirements, the scope and content of the warranty of the seller, on the other hand, had been never fully clarified by the Supreme Court and the other courts, even not after more than hundred years of legal practice following the enactment of the Civil Code. This surprising fact caused a problem not only for ordinary citizens to learn of their rights as a purchaser, but also for legal experts who could not easily render a judgment or give reliable and clear advise to their clients in relevant cases. After the reform, the scope of and the requirements for the application of the warranty provisions have become very clear. By defining the passing of the risk

21) For details see M. Dernauer, Information Duties under Japanese General Contract Law and Japanese Law of Consume Contracts, in: Dernauer / Baum / Bälz (eds.), Information Duties: Japanese and German Private Law, ZJapanR/J.Japan.L Special Issue 11 (2018) 49, 62–64.

from seller to purchaser concerning performance and counter-performance in new Section 567 CC, the reformed Civil Code now also provides a clear criterion to distinguish between a special warranty liability (after passing of the risk, e.g. after the handing-over of the purchase object to the purchaser) and the more general liability of the seller for non-performance (e.g. before the handing-over of the purchase object), in case the purchase object has a defect. Also the specific warranty rights of the purchaser became clear after the reform: a claim for supplementary performance (general claim, Section 562 CC), a claim for reduction of the purchase price (under certain conditions, Section 563 CC), an additional claim for compensation of damages and a right to rescind the contract under the general provisions of liability for non-performance (i.e. Section 415 and Sections 541 et seq. CC). Also the liability for non-performance itself has been reformed with regard to various important details (e.g. the deletion of fault of the debtor as a requirement) and better coordinated with the rules on the bearing of the risk for counter-performance in case of impossibility to perform (new Section 536). All these amendments are useful, but to different degrees. While the overhaul of the seller warranty provisions is very important, the provisions about the liability for non-performance of the debtor and those on risk for counter-performance in case of impossibility were sufficiently functional already before the reform. All these amendments nonetheless bring about a modernisation (second reform objective, see below) of the Civil Code and make the law easier to understand and to apply, but mostly only for legal experts. Ordinary citizens still will not be fully capable to comprehend their rights as a purchaser, or more generally as a creditor.

Most other amendments of the Civil Code in this regard only pertain to details that reflect and codify the legal practice of the Supreme Court (or the prevailing opinion in legal doctrine), or led to the adding of provisions

that now expressly acknowledge some general and basic principles and definitions in the field of the law of obligations, such as for instance "freedom of contract" (new Sections 521-522 CC), which however were clearly and undisputedly already acknowledged by the courts and legal doctrine before the reform.[22] It remains doubtful whether the reform was really necessary with regard to most of these items, because here the content of the law did not change much.

The other, more important objective of the reform was to modernise the Civil Code in reaction to changes in society and economy after the enactment of the Civil Code. In this regard, the law reform brought about only a few remarkable results. The abovementioned examples of a reform of the warranty liability of the seller and the liability for non-performance of the debtor can be also seen as examples for a modernisation of the Civil Code. A further, even more important example for a modernisation of the Civil Code is the new regulation of the use of standard terms of business (in the new Sections 548-2 to 548-4 CC). This is an important part of

22) Supreme Court, decision of 12 December 1973, Minshū 27, No. 11, 1536. Further examples: The rewriting of the rules on the formation of contracts (new Sections 523-532), on fraudulent misrepresentation (Section 96) and on the consequences of a default in acceptance of the performance (new Sections 413, 413-2(2) CC), the introduction of a provision expressly acknowledging the definition of the capability to form a will (Section 3-2 CC; already accepted since the decision of the Imperial Court of 11 May 1905, Minroku 11, 706), the amendment of the rules on agency (Sections 99-117 CC), the rearrangement of the various types of security papers, and the reform of the specific rights for creditors to ensure performance of the obligation (right to subrogate rights of the debtor and right to avoid acts towards third parties that harm the creditor), and the rewording of the provisions that govern the thirteen types of contracts expressly regulated by the Civil Code (e.g. sales contract, lease contract, contracts for work)

the reform, because there was no such general private law regulation of standard terms of business before the reform. This regulation, however, seems to be insufficient to address all concerning problems appropriately. Some commentators even go so far as to say that the new legal provisions seem to be "inspired by the aim of the legislator to prevent their actual application".[23)]

Other important examples for a modernisation of the Civil Code in the field of the law of obligations are the further reform of the surety law, of the law of assignment and of the provisions on prescription, as well as the introduction of a variable legal interest rate. Still, most other amendments do not extend (much) beyond a codification of the long-standing legal practice of the Supreme Court. This does no harm, of course, but at the same time, it is by no means a big step forward.

More important for evaluating the results of the law reform are the many initial reform proposals, which eventually could not be realised, and some items that unfortunately were not thought of at all. At the beginning of the reform process, many legal academics for instance recommended that existing special laws in the field of contract law should be integrated into the Civil Code. Thereby, the law would not only become more comprehendible and systematic, this could also be taken as an opportunity to do some fine tuning of the legal rules contained in those laws and to modernise them as well. This suggestion, however, was completely dropped. This is regrettable in particular with regard to the many special consumer protection laws that provide many special rights for ordinary persons, when they enter into a contract with an entrepreneur. Similarly, it would have been useful to integrate also the special laws that aim at protecting tenants and non-

23) J. Basedow, AGB-Kontrolle in Japan und Deutschland, ZJapanR/J.Japan.L. No. 49 (2020) 187, 200.

professional customers in financial transactions.[24] The Reform Committee however decided that such a move would make the Civil Code too difficult to understand and also admitted the claim that the integration of special rules for consumer protection and other purposes could lead to a dilution of the general rules in civil law. This argument, however, is not convincing at all. The integration of many special laws worked very well in Germany, when the law of obligations in the German Civil Code had been reformed in 2002. Why should this not be also possible in Japan?

The Reform Committee also dropped the proposals to expressly regulate, first, under which circumstances and to what extent a party would generally owe a duty to inform the other party and to explain about important details of the contract and related aspects prior to concluding a contract, and second, the content of a pre-contractual liability in such and other possible cases of a breach of a pre-contractual duty of care (pre-contractual liability). Similarly, the Reform Committee also did not endorse the proposal to specify the rules for interpreting a contract by specific legal provisions. All these proposals were very meaningful, because there is no common understanding among legal experts on how to handle these cases.

It is also regrettable that the reform did not regulate some types of contracts that are not yet regulated by written law, but which generally have become very important and often used in daily business practice. As one example one could think of expressly regulating a contract concerning a bank account, as a special deposit contract. One could also think of adding specific rules for contracts concerning medical services, or detailed rules for general service contracts in return for payment. It would have been also useful to provide more detailed and general rules on contracts for all kinds

24) See the mentioned examples of special laws above (in supra notes 5 et seq.).

of commercial lending of money. Although maybe more a commercial law issue, one could have also used the opportunity to regulate certain types of Internet service agreements, franchise contracts or license agreements.

Another yet unresolved issue is the scope of tort law liability for pre-contractual and contractual problems. Over the years the courts in Japan have developed a tendency to apply tort law extensively also to issues that could be potentially resolved by contract law or legal instruments that regulate the conclusion of a contract ("tortious acts in business transactions (取引的不法行為 *torihiki-teki fuhō kōi*, 取引型不法行為 *torihiki-gata fuhō kōi*)").[25] Although Japanese law provides very general requirements for a tort law liability in Sections 709, 715, and 719 CC, the scope of the liability for tort, the scope of the liability for non-performance and the scope of the application of Section 95 (mistake) and Section 96 (fraudulent misrepresentation) clearly overlap and cause a conflict of application.

On the whole, the reform of the Japanese law of obligations and the corresponding parts in the Civil Code brings about some important changes, and the amount and volume of the text amendments in the Civil Code altogether look impressive. On the other hand, most of the changes represent a codification of the previous legal practice (or "case law") of the Supreme Court or higher courts in Japan, or of the prevailing view in legal doctrine. Whether the latter amendments were truly necessary remains at least doubtful. Some amendments, at least, that do not change anything in view of the practical handling of certain legal issues, appear completely unnecessary. On the other hand, one may lament a missed opportunity to truly modernise the Civil Code, to carry out some important further reforms on items that in fact remain mainly untouched by the reform and

25) For details see Dernauer (supra note 21) 73-76.

to stop halfway so that some reformed parts appear somehow irresolute and incomplete.

5. Conclusion: Much Ado About Something

Looking back at the many years of much ado in which the reform of the law of obligations was intensively discussed and prepared, one cannot help but to see some similarities with the plot in "Much Ado About Nothing", a comedy written by William Shakespeare at the end of the 16th century.

Prior to the law reform, there was a somehow wrongfully accused bride, called the "Civil Code", which had been fiercely criticised as outdated by many legal academics in Japan. In consequence, those legal scholars eventually established some study groups to prepare a written proposal to extensively amend and modernise the Civil Code, so that legal practice in Japan will be enabled to cope with the many legal problems that cannot be appropriately solved by the outdated Civil Code. The intense discussions and drafting took many years and the ambitious reform proposal was finally presented to the public with great fanfare, so that even the Ministry of Justice could be moved to establish an official reform committee to further investigate and prepare such a reform. As a result, not only legal academics, but all relevant stakeholders in Japan became actively engaged in the reform process.

Subsequently, however, the scope of the reform was gradually and largely cut down, in particular through the growing influence of bureaucrats, legal practitioners and lobby groups. Little by little, it turned out that many reform proposals were not as necessary as they originally appeared to be. Hence, many reform proposal were abandoned or reduced to small amendments of the Civil Code to reflect the current legal practice of the

Supreme Court and higher courts or the majority view in legal doctrine regarding the application of certain provisions in the Civil Code.

Eventually, the reform law displays a happy reunion of bureaucrats, legal practitioners, legal academics and lawmakers, bound by a common perception that a reform of a smaller scale than originally envisaged will do just fine.

Of course, the result of the reform is certainly not "nothing", it is "something" that will be useful for legal practice. However, in view of the much ado over the many years, it is a much smaller step forward than it originally appeared to be.

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