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CONTRACT SOCIETIES: JAPAN AND THE UNITED STATES CONTRASTED¹

Written by Shinichirō Michida²

Translated by Veronica L. Taylor³

Abstract: This translation of an original Japanese language work by Michida Shinichirō contrasts the differences between the understanding of contractual obligations in the United States and in Japan. The translation cites specific differences between each country's statutes and case law, as well as distinct cultural factors that are important when considering respective understandings of contract in these societies.

Translator's Introductory Note: This translation is intended to give readers an introduction to Japanese contract law theory and its operation in that society. Professor Shinichirō Michida was writing for a general audience in Japan, not simply for those with legal training. One of his aims was to debunk the myth that the Japanese have no sense of contract—a theory that had been popularly accepted within Japan, as well as in the United States.

The value of this extract for foreign lawyers is that it demonstrates the interplay of codes, statutes, cases and scholarly writing in a civil law system like Japan's. As this extract shows, the major role of legal scholars in civil law countries is to synthesize reported cases and statutes by interpreting the underlying policy of code or statute provisions. Instead of criticizing and attacking court decisions and their underlying policy motives, however, Japanese commentators commonly affirm decisions and explain their reasoning in applying legal theory. The scholar's role in a civil law system is to generate legal theory, rather than to force its adoption by practitioners.

Veronica Taylor⁴

INTRODUCTION

In 1975-76, while teaching a course on U.S.-Japan transactions at Harvard Law School, I was invited to address the Japan Society in New York. Using Japanese law reports and statistics, I talked about differences

¹ Translated from Shinichirō Michida, *Keiyaku shakai: amerika to nihon no chigai o miru (Contract Societies)* (Yūhikaku, 1987). This translated extract covers Chapter 1, pages 1-4 and Chapter 2, pages 43-77. All yen amounts have been converted to US dollars at the rate of 360 yen to the dollar, which approximates the exchange rate at the time the cases discussed were decided.

² Professor Shinichirō Michida (1923-1988) was a former Dean of Kyoto Law School (1980-82), Chairman of Japan's Comparative Law Association and Japan's first representative to UNCITRAL (the United Nations Commission on International Trade Law).

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⁴ The translator wishes to thank Toshiko Takenaka for her assistance in the preparation of this translation.

between the Japanese and American legal systems. It was a non-controversial topic and, final applause aside, it was received in silence. Then, at the end of the presentation, an American attorney asked a question that made everyone gasp: "According to Professor Chie Nakane's *Japanese Society*,⁵ and another book by Professor Takeyoshi Kawashima,⁶ the Japanese have no concept of contract. You will no doubt agree, Professor Michida. Would you comment on this?"

I replied: "With the greatest respect, I do not agree."⁷ The audience stirred. I continued, suggesting that Americans may disregard contracts and promises to a greater degree than Japanese. According to Japanese contract theory, even an oral agreement becomes a contract, while in America, where contract theory differs markedly from Japan's, many kinds of oral agreements are not recognized by law. Leaving aside comparison with Americans, can we really say that the Japanese lack a concept of contract?

In 1986, Japanese businessmen in New York were still troubled by this resilient belief that Americans honor contracts, while the Japanese have no concept of them. Even Michiko Itō, a Japanese lawyer admitted to the New York bar writes in her book *Essential Legal Knowledge for a Posting to America*: "Americans honor their contracts . . . [I]n comparison with this, we Japanese do not have a clearly defined concept of contract."⁸ Thanks to theories propounded by Japanese academics and lawyers, energetic Japanese businessmen who did honor their contracts were angered by [the refrain] " . . . and so we doubt that your company is any different . . . "

CONSENSUAL CONTRACTS

The Marubeni Iida v. Aji no Moto Case

Professor Kawashima's *Legal Consciousness of the Japanese* uses the sale of soybeans by Marubeni Iida to Aji no Moto to illustrate that "among merchants there are many occasions when there is no way to clarify whether

⁵ Chie Nakane, *Japanese Society* (Pelican Books, revised ed 1973).

⁶ Takeyoshi Kawashima, ed. *Nihonjin no hoishiki (The Legal Consciousness of the Japanese)* (Iwanami Shinsho, 1967); Partial translation by Charles R. Stevens, *The Legal Consciousness of Contract in Japan*, 7 *Law in Japan* 1 (1974).

⁷ [Translator's note] Professor Kawashima was a University of Tokyo scholar and Professor Michida was from Kyoto University. These law schools rank first and second among Japan's prestigious national universities, and they have a long tradition of academic rivalry.

⁸ Michiko Ito, ed, *Amerika chūzaiin no tame no hōritsu jōshiki (Essential Legal Knowledge for a Posting to the United States)* at 4 (Yūhikaku Sensho. 1984).

or when a contract for a business transaction has been formed, [as in] the example of a lawsuit between two of the largest enterprises in Japan . . ."⁹

When prices in the international market for soybeans dropped, Aji no Moto repudiated the agreement, but Marubeni Iida argued that a contract had been formed because the parties had reached agreement. In response, Aji no Moto asserted that, in addition to the English language sales agreement existing between the parties, a written agreement in Japanese was required for a binding contract. The Tokyo District Court handed down a decision supporting Marubeni Iida's position.

However, if we broaden our inquiry and consider America and England at the time, a completely different view of the case is possible.

The seller was a trading company established in 1916 as Takashimaya Iida K.K. It commenced proceedings against Aji no Moto in March 1951, but was acquired by, and merged with, Marubeni before the date of judgment. It appears as Marubeni Iida in the court record. "Aji no Moto" is a well-known seasoning in which soybeans and wheat flour are the main ingredients. The purchaser, Aji no Moto K.K. was a major buyer of soy-beans.

With the outbreak of hostilities in Korea in June 1950 commodity prices escalated, but by the Spring of 1951, as the situation stabilized, prices dropped. Import prices, which had climbed to \$160 per ton were halved. The transaction between Marubeni Iida and Aji no Moto took place during this price fall. Soybeans and soybean curd (*tofu*) are an indispensable Japanese food product, but Japan depends on supplies from the United States. Takashimaya Iida was a trading company, but it had no grain silos of its own in the United States, nor did it purchase soybeans directly. Instead, it made its purchases from American grain trading companies and sold in turn to Aji no Moto.

In this case, Takashimaya Iida bought soybeans from one of the world's largest grain trading companies, Louis Dreyfus. The Dreyfus head office was located in Paris, but its New York office oversaw its Tokyo office. On March 2, the New York office, through Tokyo, called for offers [for soybeans] with deliveries scheduled for April, May and June. Takashimaya Iida received the inquiry and entered into a transaction with Aji no Moto on this basis, which culminated in litigation. In this case an English language contract existed between the parties, however it was accepted that the purpose of this was to forestall any inconsistencies with the content of the sales agreement between Takashimaya Iida and Louis Dreyfus.

⁹ Kawashima, 7 Law in Japan at 7.

The soybeans totaled about 30,000 tons, were valued at about ¥1,800,000,000 (approximately \$5,000,000) and were delivered in three shipments. By July and August, all three ships had entered Japanese ports. Before the ships' arrival in port, Aji no Moto had begun negotiations with Takashimaya Iida, seeking a price reduction in light of falling prices in the soybean market. On June 2, Aji no Moto communicated its view that no contract had been formed. Takashimaya Iida then sold the soybeans to another buyer, but suffered a ¥666,000,000 (\$1,850,000) loss, and demanded this amount in compensation. Counsel for Aji no Moto asserted in response that:

Leaving aside sales of goods in small quantities, a commodity import agreement of this size should be concluded in writing . . . the English language contract covers only the outline of the agreement, whereas a Japanese language agreement would set out in detail provisions necessary for performance of the agreement. Because the agreement cannot be performed by reference only to the English language contract, it cannot be regarded as being formed at the time that the English language contract was written.

My view of this case is as follows. The case commenced in 1951. Looking comparatively at the rest of the world in the first half of this century, [we find] England playing a central role in commodity sales agreements of this type. In England, sales agreements for goods in excess of £10.00 were required to be in writing and signed by the obligor. Agreements in breach of this express provision in the Sale of Goods Act would be void. The provision requiring contracts to be in writing originated in a statute enacted in 1677, and was repealed in 1954.¹⁰

If we consider the sale of goods statutes in England and America at the time, it is not so surprising that Aji no Moto insisted on formation of the contract being conditioned on preparation of a writing in Japanese. [Even in] present day America, a vast amount of litigation arises from a bias against oral agreements, and requirements for contracts to be in writing.¹¹

Aji no Moto's view of contract in 1951 was consonant with the English and American theories of contract in vogue at the time. Its argument would

¹⁰ [Translator's Note] The American adoption of the English approach is discussed further in Chapter 3 of *Contract Societies*, which is not translated in this extract.

¹¹ [Translator's Note] Discussed further in Chapter 3. *Contract Societies*.

have been completely logical and legal in either England or America. Accordingly, I view *Marubeni Iida v. Aji no Moto* as a symptom of socio-economic "illness" occurring in any country, although I would avoid suggesting that it is an illness peculiar to large Japanese corporations.

My interest is in why the *Aji no Moto* claim rejected by the Tokyo District Court—that a sales contract requires writing—is regulated by legislation. Put another way, legal principles and trials are really prescriptions for social and economic "illnesses;" my interest is drawn to why these prescriptions differ in America and Japan, which is better, and whether either presents problems.

In the case of everyday medical illnesses, like a cold or the flu, my experience is that American and Japanese doctors' prescriptions are generally similar. However, when it comes to socio-economic "illness" like contractual disputes, American and Japanese prescriptions are exact opposites. Here I consider why this [difference] continues within different legal cultures.

An Experienced Doctor's Prescription : The Consensual Contract

The significance of the *Marubeni Iida Case* is that the Tokyo District Court decision represented an experienced doctor's prescription for the "illness:"

If [one views] a sales contract being formed by means of a contract in writing . . . it is easy to see that it would give rise to situations in which sales opportunities would be lost . . . if trust is presumed, this would remove any anxiety arising from the lack of [evidence in the form of] a contract in writing . . . *There are insufficient grounds for overturning the Civil Code principle of consensual contracts and requiring a writing as a contract formality . . .* in the case of a commodity import sales agreement, *where there is a mutual intent between the parties*, it is not appropriate to view the agreement in writing as a commercial custom, as the defendants argue, but it is appropriate to view the agreement in writing as something usually prepared for the purpose of confirming a contract already in existence.¹²

¹² 8 Kakyū Minshū 1366 at 1415-1416 (Tokyo Dist Ct, 31 July 1957); emphasis added.

Consensus (*dakusei*) is a slightly difficult word in Japanese. It does not appear in the *Iwanami Japanese Language Dictionary*.¹³ Those readers with legal training will know, however, that *dakusei* means formation by consensus; that the contract comes into being merely through agreement (*gōi*) of the parties. Just why the Tokyo District Court decision above was an "experienced doctor's" prescription will be apparent when we compare it later with the decision of the Illinois Supreme Court in *Ozier v. Haines*.¹⁴

Consensual Contracts and Exceptions: Real Contracts

In Japan sales agreements are consensual contracts, but not in America. Consensual contracts—contracts formed by mere oral agreement—are the paradigm in Japan. It is true, however, that not all contracts in Japan are consensual contracts. There are exceptions. Consensual contracts are those in which the contract gains its validity merely from the parties' expression of mutual intent; a real contract (*yōbutsu keiyaku*)¹⁵ is one which requires delivery of the subject matter of the contract, or some other kind of performance or payment before it becomes effective. Of the type contracts in the Civil Code,¹⁶ sales (*baibai*), leases (*chintaishaku*), employment contracts (*koyō*), contracts for work to be done (*ukeoi*), mandates (*i'nin*), partnerships (*kumiai*), life annuities (*shūshin teikikin*) and compromises (*wakai*) are all consensual contracts; gifts (*zoyō*)¹⁷ are treated in principle as consensual contracts. In contrast to this, loans for consumption (*shōhi taishaku*), loans for use (*shiyō taishaku*) and bailments (*kitaku*) are regarded as contracts requiring payment or performance. Outside the Civil Code, pledges (*shichi keiyaku*) and earnest money agreements (*tetsuke keiyaku*) are contracts requiring payment or performance.¹⁸

¹³ *Iwanami kokugo jiten*, (Iwanami, 4th ed 1986).

¹⁴ *Ozier v Haines*, 99 NE2d 395 (1951).

¹⁵ *Realvertrag*.

¹⁶ [Translator's Note] In addition to the principles of contract appearing in the general provisions of the Civil Code, the Code sets out provisions on thirteen specific "types" of contract, often called "named" contracts. Nine "type" contracts are also named in the Commercial Code. Contract rules relating to more recent kinds of contracts, e.g., franchises and distributorships, are often developed by applying by analogy the provisions relating to "type" contracts.

¹⁷ Civil Code, Art 550: A contract of gift which is not in writing may be revoked by either party; however this shall not apply in respect of any part as to which performance has been completed.

¹⁸ Saburo Kurusu. *Dakusei keiyaku - yōbutsu keiyaku (Consensual Contracts and Real Contracts)*, in Hiroshi Matsukawa, ed, *Minji Hōgaku Jiten, Jōmaki (Civil Law Dictionary, Vol 2)* (Yūhikaku, Supp 1964).

Naturally pledges require delivery of the thing pledged. The Civil Code covers this not in the Contracts section, but in the section dealing with Real Rights (*bukken*):¹⁹

Article 334. A pledge shall become effective upon the delivery to the obligee of the thing pledged.

Difficult legal questions emerge when contracts requiring payment or performance are viewed as exceptions to consensual contracts, but I will not consider these here.

Professor Kurusu's definition of consensual contracts, like those of Professors Kawashima and Wagatsuma,²⁰ belongs to the traditional approach, which emphasizes party agreement and a meeting of minds. However, Professor Hoshino's explanation is that a contract is formed not by party intention, but as a result of the application of law: "A contract . . . is a promise, the performance of which is protected by law." He defines consensual contracts as those, aside from contracts requiring payment or performance, which "become effective merely through the parties' promises."²¹

*The Origins of the American Bias Against Oral Agreements—The Ozier Case*²²

Aji no Moto repudiated its ¥1,800,000,000 contract with Marubeni Iida on June 2, 1951. Two days prior to this, the Supreme Court of Illinois handed down a decision concerning a contract for the sale of corn. White Heath, a grain company which operated Ozier as a partnership, filed a statement of claim for damages alleging the following facts. On February 11, 1947, Haines, a farmer, came to the company and sold 5,000 bushels of corn by oral agreement for \$1.24 a bushel. While Haines was in the office, Ozier telephoned a grain broker and rescinded the purchase of the 5,000 bushels.

¹⁹ The Japanese Civil Code, like those of other civil law jurisdictions, conceptualizes legal rights and obligations as deriving from: general provisions (*sōsoku*), real rights (*bukken*), claims (*saiken*), relatives (*shinzoku*) and succession (*sōzoku*). Most of the provisions dealing with contract are found in the Book of Claims; most of those dealing with property rights are found in the Book of Real Rights.

²⁰ Kawashima, 7 Law in Japan at 1: Sakae Wagatsuma, *Saiken Kakuron (Claims - Specific types)*, *Mimpō Kōgi V (Lectures on the Civil Code. Vol V)* at 43 (Iwanami Shoten, 1954).

²¹ Eiichi Hoshino, ed, *Mimpō Gairon IV (Keiyaku) (Outline of the Civil Law IV (Contract))* at 20 (Ryōshō Fukkyū Kai, 1986).

²² *Ozier v Haines*, 99 NE2d 395 (1951).

Haines knew of the subsequent sale, and that oral sales of grain were usual, and that it was well-known and customary practice for buyers with elevators to transact immediately with brokers. Nevertheless, when grain prices escalated, Haines sold his corn to another buyer and failed to deliver to Ozier. This forced the plaintiff to purchase corn at higher prices elsewhere to meet its obligation to the broker. The consequent loss was the basis of the claim for compensatory damages.

Defendant Haines moved for summary dismissal of the claim on the basis that the Statute of Frauds²³ required that contracts for the sale of goods over \$500.00 be signed by the obligor; since there was no evidence of a contract in writing signed by him, the court should dismiss the action.

If we compare the court to a doctor, what diagnosis did the American doctor make in this case? A Japanese doctor would have investigated or examined the evidence and tried to uncover the truth. The Illinois Circuit Court did not look at the evidence, but dismissed Ozier's claim immediately—somewhat like throwing the patient out of the hospital without an examination.

Ozier appealed to the Appellate Court of Illinois, arguing that because Haines knew that the plaintiff relied upon their oral agreement and had rescinded the purchase of the corn, Haines was estopped from raising the Statute of Frauds defense. The Appellate Court handed down its decision on May 31, 1951.²⁴ It upheld the lower court's refusal to consider the case, and interpreted Illinois precedents in this way. Action taken in reliance on such promises, as distinguished from action taken in reliance on a misrepresentation of existing facts, cannot raise an estoppel. While it is true that equity will not allow the Statute of Frauds to be a shield to shelter a fraud, the breach of a promise which the law does not regard as binding, is not a fraud. There does appear to be a moral wrong, but if we attempted to right this moral wrong under these conditions the statute would be rendered nugatory.²⁵

Ozier appealed to the Supreme Court of Illinois. However the Supreme Court found that six elements were necessary for equitable estoppel to operate in relation to the Statute of Frauds and that these had not been established here. It upheld the Appellate Court decision:²⁶

²³ Illinois Code 123, Chapter 5, Art 4.

²⁴ *Ozier v Haines*, 99 NE2d 395 (1951).

²⁵ 99 NE2d 395 at 396.

²⁶ *Ozier v Haines*, 103 NE2d 485 (1952).

To adopt such a view would render the Statute of Frauds useless and unmeaning (sic). It is true that harsh results, or moral fraud as plaintiffs choose to term it, may occur where one has changed his position in reliance on the oral promise of another, but it is a result which is invited and risked when the agreement is not reduced to writing in the manner prescribed by law. The present case is a patent example, for although the parties were in each other's presence and in a business office, no attempt was made to reduce their agreement to the simplest writing.²⁷

[Thus] an oral sales agreement was completely barred from the court, while "moral wrong" and "moral fraud" marched through majestically. The decision in this case illustrates the systemic bias against oral agreements in American legal principles.

If we take into account the Aji no Moto claim raised two days prior to the Court of Appeals decision, we need to broaden our view of both the *Marubeni Iida Case* and American concepts of contract.

The Reconciliation of Law and Morals

The reason why the Tokyo District Court decision is an experienced doctor's prescription is because it is morally sound, creates no damaging influence or side-effects for the Japanese, and it reconciles law with morality. "Honor your promises" is a fundamental basis of human beings' social morality. Although I have previously referred to a Biblical passage,²⁸ the Bible did not exert much influence over Japanese morals until after the Meiji period (1868-1912). Here I will draw on part of the Analects, which did have a great impact on Japanese morals. The extract explains the importance of keeping promises:

Sincerity, faith or credit (*shin*)—being able to trust the word itself, is the foundation of a human being's character. A person without sincerity—whose words cannot be trusted—cannot fulfill his potential as a human being. Because he has no sincerity, the foundation¹ for character, his ability matters not—his character must inevitably crumble. How can an ox cart without a yoke, or a horse-drawn cart

²⁷ 103 NE2d 485 at 488.

²⁸ [Translator's Note] Michida, *Contract Societies*, at 24, which is not translated in this extract.

without a harness, go forward? Neither can the life of a person without sincerity advance.²⁹

The importance of a principle which recognizes oral agreements as consensual contracts is that, in the words of the Analects, it supports the trustworthiness of human words, and makes possible the progress of human society. The Tokyo District Court decision exposes this fundamental principle and reconciles it with law, without creating any ill-effects.

The Need for a Writing

The difference between *Marubeni Iida v. Aji no Moto*, and *Ozier v. Haines*, was whether or not a writing was required for a grain sale, and whether or not these were consensual contracts.

In America, the current position is still that sales of goods or movables are not generally consensual contracts, but [require] written agreement, and that contracts for the sale of land must be in writing. We have looked already at the sale of goods and movables in Japan, but what about contracts for the sale of land?

The general provisions of the Civil Code dealing with ownership and hypothecs³⁰ state that:

Article 176. The creation and transfer of real rights take effect by a mere declaration of intention by the parties.

In the *Seisho Gakuen (Bible College) Case* discussed below, the view taken by scholars in textbooks and legal references is that a contract can be formed by an oral promise. Japanese and American contractual principles also differ, then, in relation to the sale of land.

²⁹ "Hito ni shite shun nakuba, sono kanaru koto o shirazarunari. Taishagei naku, shōshagetsu nakunba, sore nani o motte kore o yaranya." Kojiro Yoshikawa, Rongo (The Analects) Vol 1 at 52 (Chūgoku koten sen, Asahi Shimbunsha, revised ed 1965).

³⁰ [Translator's Note] A hypothec is a civil law real security right, created by contract and registration. The lender does not take possession of the property, and ownership in the property is not transferred. Other real rights over immovables, like superficies (e.g., the lease of a building on the land of another owner) may also be hypothecated. Hypothecs and superficies are regulated by the Civil Code.

New Formalism

Although in principle consensual contracts do not require writing, in practice, even in Japan, the use of various kinds of written contracts has spread. In the new edition of the *Systematic Civil Law Dictionary*, Professor Toshio Hironaka calls this the "new formalism;"

The use of preprinted forms is increasing . . . [and] this trend is particularly apparent in transport and insurance industry transactions. To preserve their fairness, the state subjects these standard form agreements to some supervision. We must also consider, from another viewpoint, the existence of formalism. These are situations in which the law requires a contract to be reduced to writing in order to ensure that the contents are rational and equitable. For example Article 25 of the Agricultural Land Law³¹ requires a writing for a tenancy agreement (although this provision is interpreted to mean that *a writing is not a prerequisite for the validity of the contract*).³²

Here we will not go into issues raised by standard form contracts. I will simply note that when contracts required by law to be in writing are interpreted as meaning that a writing is not prerequisite for their validity, this supports the principle of consensual contract. We will consider examples besides the Agricultural Land Law and the Building Law, but here I want to explore the characteristics of the former. In particular, I want to contrast this requirement of writing with the contract-in-writing systems of England and America, and the "social reliance on lawyers" that has resulted.³³

Agricultural Land Law and Itō v. Kyoto

The Agricultural Land Law was enacted in 1952. Article 25(1) provides:

³¹ Nōchihō (Agricultural Land Law) (Law No 229, 1952).

³² Zennosuke Nakagawa, Hiroshi Endo, Hisao Isumi, *Taikei Minpō Jiten - Fudōsantōkihō, Shakuchihō, Shakkahō* (*Systematic Civil Law Dictionary - Real Property Registration, Land Lease and House Lease Law*) at 33 (Seirinshōinshinsha, 1976); Emphasis added.

[Translator's Note] Japanese Code and legislative provisions may appear to be clearly worded and are often rather broad. However, as this example illustrates, they need to be read in light of court interpretation, and influential scholarly theory.

³³ [Translator's Note] Described in Michida, *Contract Societies*, at 33-34, which is not translated in this extract.

In a lease agreement regarding agricultural land or pasture the parties must set out clearly in writing the duration, the amount of rent, and conditions for payment etc., and any other supplementary contractual details.

I noted earlier that the Civil Code regards leases as consensual agreements which do not require writing. All that Article 601 states is that: "A lease becomes effective when one of the parties has agreed to allow the other party to use a thing and take profits therefrom and the latter has agreed to pay rent therefor."

In contrast to the general law of consensual contracts established by the Civil Code, Article 25(1) of the Agricultural Land Law creates a special writing requirement for contracts concerning "agricultural land and pasture."

Yet although Articles 92 through 95 of the Agricultural Land Law establish penalties, none apply to a violation of Article 25(1)—not creating a contract in writing. Fines or imprisonment are the usual criminal penalties, but do any civil penalties attach to a violation of Article 25(1)? Let us consider some cases.

The transformation of agricultural leases into written documents did not date from the 1952 Agricultural Land Law, but from Article 9-10 of the 1946 Agricultural Land Conciliation Law³⁴ which revised the 1938 law of the same name.

In 1951 a case was filed in Kyoto concerning this Agricultural Land Conciliation Law.³⁵ The plaintiff, Itō, brought suit against the Kyoto Central Ward Agricultural Committee and the Kyoto City Agricultural Committee. The defendant argued that plaintiff Itō's ascendant had concluded an oral contract for the lease of agricultural land with two other parties, Imai and Nakagawa. Plaintiff alleged that an oral contract was in contravention of Article 9-10 of the Agricultural Conciliation Law and was thus void. The Kyoto District Court gave judgment on May 21, 1955, holding that:

The plaintiff argues that a lease for agricultural land not made in writing contravenes Article 9(1) of the Agricultural Land Conciliation

³⁴ Nōchi Chōteihō (Agricultural Land Conciliation Law) (Law No 42, 1946).

³⁵ *Kyoto v Itō*, 6 (No 5) Gyōsai reishū 1145 at 1152 (Kyoto Dist Ct, 30 June 1955).

Law and is thus void; however this provision should be construed as a mere directive provision (*kunji kitei*).³⁶

That is, the special law provision requiring agricultural leases to be in writing is not viewed as displacing the Civil Code principles of consensual contracts, but simply as an informational, optional provision.³⁷ This can be contrasted with the 1873 English case, *Adeane*,³⁸ discussed below, in which the owner of the land, Adeane, and the tenant, Bennett, travel all the way to a London solicitor's office to draw up an eight-year lease. The English principle of requiring contracts "not performed within one year of agreement" to be made in writing—which is still followed today in America—is quite different from the Japanese principle. The case also shows that, in comparison with England and America, neither contract principles nor the act of concluding a contract in Japan required a lawyer.

Building Sites and Building Transactions Law

The purpose of the Building Sites and Building Transactions Law³⁹ is both to regulate the broker and to try to protect the buyer. The statute stipulates that before the contract is formed, the broker must record important provisions in writing, to deliver this to the buyer and explain its contents (Art. 35). Once the contract is formed, a contract document must be delivered to the buyer (Art. 37). If the broker fails to deliver a contract in writing, will the sale of the residential land or building be invalid? All that the statute prescribes in this case is that a broker who fails to deliver a contract in writing "is subject to a fine of no more than ¥100,000" (currently \$769.00). (Art. 83(1)(3)). So the presumption is that, according to Civil Code principles, the validity of the sale flows from the parties' intentions, manifested in their oral agreement.

³⁶ [Translator's note] A *kunji kitei* is a non-mandatory, procedural statutory provision which is directed to a court or administrative agency. Contrast this with the different terms used for optional and mandatory provisions of the Civil Code. An optional provision within the Civil Code is classified as a *nin'i kitei*. Mandatory provisions in the Civil Code (e.g., conformity with the public policy and good morals requirement of Article 90) are classified as *kyōkō kitei*.

³⁷ [Translator's note] A "special law" is legislation which supplements the Codes, either by providing more detail on areas of law covered broadly by the Codes, or regulating new, non-Code subjects. Where special law provisions apply, and conflict with more general Code provisions, the special law takes precedence.

³⁸ *Erskine v Adeane*, 8 Ch App 756 (1837).

³⁹ Takuchi tatemono torihikigyōhō (Building Site and Building Transaction Law) (Law No 176, 1953).

The statute is applicable to situations where a consensual contract is formed, but the issue is whether it binds the parties. For the purpose of consumer protection, where a contract is concluded through offer and acceptance made *outside the broker's office* (as in the case of door-to-door sales), the statute will apply: (i) where the buyer is given notice by the broker of the revocation of an offer, or the means of rescinding the contract are provided for in a Ministry of Construction Order, and the offer is revoked or the contract is rescinded within 5 days of the agreement, and (ii) where residential property or a building is transferred, but the full price has not yet been paid. In this case revocation of the offer or rescission, made in writing, will be effective if accepted by the buyer (Art. 37(2)).

Installment Sales Law

In 1961 the Installment Sales Law⁴⁰ was enacted with consumer protection as one of its objects. This statute also obligates brokers to prepare and deliver contracts in writing, but a writing is not a condition of contractual validity: "[a]ny person contravening Article 4 by not delivering a contract . . . is subject to a fine of no more than ¥100,000." (Art. 53(3)). So the principle of consensual contracts—validity stemming from oral agreement—is adopted here, and the regulations regarding installment sales are arranged around it. A special consumer protection provision allows revocation of offers and rescission where a purchaser makes an offer and concludes a contract *outside the broker's place of business* (Art. 4-3).

Laws Regarding Door-to-Door Sales

The Door-to-Door Sales Law⁴¹ was enacted in June 1976, one year after the *Suehiro v. Seisho Gakuen Case* discussed below. The statute requires a contract in writing to be delivered (Arts. 4 and 5), but this is not a condition of contractual validity. The sanction for not preparing a contract in writing is merely "a fine of no more than ¥100,000." (Art. 23(1)). As with the Installment Sales Law, a special consumer protection provision allows revocation of offers and rescission where a purchaser makes an offer and concludes a contract *outside the broker's place of business* (Art. 6).

⁴⁰ Kappu hanbaihō (Installment Sales Law) (Law No 159, 1961).

⁴¹ Hōmon hanbai tō ni kansuru hōritsu (Law Concerning Door-to-Door Sales)(Law No 57, 1976).

Sale of Land and the Seisho Gakuen Case Warning

The principle of consensual contracts applied in Japan to sales of land as well as to sales of goods, but on June 30, 1976, the Tokyo High Court rendered a significant decision in which it found no contract for the sale of land where the agreement had not been made in writing.

It was April 1972, and Suehiro Shōji, a real estate brokerage, received a commission from Nitta Mokuzai K.K., which required land for residential development. Negotiations commenced with Seisho Gakuen, an educational institution seeking to sell some vacant land.

Seisho Gakuen had loans from the Chiba Mutual Bank and others totaling some ¥3,000,000,000 (\$8,333,000) and was under pressure to sell the land in order to reduce the debt. Negotiations stalled initially as Seisho Gakuen set its selling price at around ¥4,000,000,000 (\$11,110,000) and Nitta offered a purchase price of ¥3,500,000,000 (\$10,270,000). Seisho Gakuen then attempted to sell the site to Tokyo Tatemono K.K. and Tokyo Fudōsan K.K., but [these discussions] ended without a contract being concluded. Seisho Gakuen then reconsidered Nitta Mokuzai. Its director approached Suehiro Shōji and requested it to finalize the transaction for ¥3,700,000,000 with the brokerage fee to be paid separately.

In a different transaction, Nitta Mokuzai had gained approval from Chiba Mutual Bank for financing its property acquisition. Because the buyer was financed by Chiba Mutual and the seller would extinguish its debt to the same bank in this transaction, the meetings were scheduled to take place at Chiba Mutual's head office. The first meeting took place on May 15. However, the buyer offered ¥3,500,000,000 and the seller ¥3,700,000,000, with no consensus reached. The manager of the bank's head office took the median price and proposed ¥3,600,000,000. Buyer and seller undertook to consider this price and the meeting concluded. Four days later, Seisho Gakuen held a directors' meeting and resolved to accept ¥3,600,000,000 and to pay the brokerage fee.

On the 20th of that month, the director of Seisho Gakuen met with the managing director of Suehiro Shōji in a coffee shop under the JR Chiba Railway Station. He requested that the Suehiro representative finalize the sale at ¥3,600,000,000, with a brokerage fee of ¥4,000,000 (\$11,000). Nitta Mokuzai agreed to the deal.

To confirm the parties' intentions, a second meeting was held at the Chiba Mutual Bank office on the 23rd of the month. Nitta Mokuzai was represented by its president, and Seisho Gakuen by its director responsible

for the negotiations. All parties agreed that the sale price would be ¥3,600,000,000, with brokerage fees of ¥4,000,000 yen per side (¥8,000,000 in total) being paid to Suehiro Shōji. The purchase agreement was drawn up in the early part of the next month, and provided for the immediate payment of 30% of the purchase price and the brokerage fees, with the balance payable once there was a clear prospect of the hypothec right of the Chiba Mutual and six other banks being removed from the register. After agreement had been reached, the parties, at the direction of the Chiba Mutual Bank Head Office Manager, made a courtesy call on the bank's managing director and the head of the Examination Division, to report the content of the agreement.

The issue here is whether a contract for the sale of land had been formed.

Triangular Relationships and Prescriptions

It was early June, time for the preparation of the written agreement. But Seisho Gakuen made no communication to Nitta Mokuzai or Suehiro Shōji, and on June 7, sold the property to Iwabuchi Sangyō K.K. The written agreement with Nitta Mokuzai was never drafted. When the prospect of being able to sell for a higher price presented itself, Seisho Gakuen chose Iwabuchi as its transaction partner, and failed to pay the brokerage fee to Suehiro.

The *Shinchō Kokugo Dictionary* defines a "triangular relationship" as a complex relationship involving three parties. The Seisho Gakuen/Nitta Mokuzai-Suehiro Shōji-Iwabuchi relationship was certainly of this kind. What propelled Seisho Gakuen towards a triangular relationship was no doubt the pressing need to dispose of accumulated debts. But on the other hand, they almost certainly consoled themselves with the thought that Japan is a land of free competition, and that the right to conclude contracts should also be free. Suehiro Shōji brought suit in the Chiba District Court on August 10 for the brokerage fee it would have received from Seisho Gakuen.

Looking at this case, there will be some readers who will want to conclude that the Japanese have no consciousness of contract. But, as I have previously indicated, I see this more as a social (or interpersonal) "illness." Not only Japan, but also America suffers from "triangular relationship illness." What kind of diagnosis and prescriptions will the "doctors" (or the courts) make?

Real Estate Brokerage Fees and Compensation

In *Suehiro Shōji v. Seisho Gakuen*, the Chiba District Court rejected Suehiro's claim for damages on July 15, 1974. Suehiro then filed a *kōso* appeal⁴² with the Tokyo High Court, seeking ¥4,000,000 and disaffirmation of the District Court judgment. The fifteenth civil division of the Tokyo High Court handed down its decision on June 30, 1975.⁴³ The Tokyo High Court found that, since there was no contract formed between Nitta Mokuzai and Seisho Gakuen (for reasons discussed below), Suehiro's claim for compensation based on the contract could not be sustained. But the Tokyo High Court did in fact assist Suehiro: it found against Seisho Gakuen in the amount of ¥3,200,000 (\$8,888) plus 20% per annum interest between the date of judgment and the date of final payment. The court "prescription" contained a vital ingredient, strengthening societal health and interpersonal relations. Before turning to the nature of the "vital ingredient," we should consider the court's view of real estate transactions and brokerage fees.

The judgment broadly divides contracts for real estate brokerage fees into two kinds. The first is "exclusive brokerage" (*senzokuteki nakagai*), where (i) the broker provides an introduction and the mandator is obligated to accept this,⁴⁴ or (ii) the client may not give the business to another broker simultaneously without consent of the first, or (iii) the mandator may not enter negotiations directly with the other party, or (iv) termination or withdrawal during the transaction is not permitted, or (v) a special agreement has been entered into to this effect. The court found that no such special agreement existed between Suehiro and Seisho Gakuen, so their relationship was not of this kind.

The second model is "simple brokerage" (*tanjun nakagai*), of which there are two types: (i) where the broker is given agency powers by the mandator, and (ii) where no agency powers attach to the broker. The court found that the Suehiro-Seisho Gakuen relationship was of the latter kind, a simple brokerage, with no power of agency. Leaving aside the ordinary situation where negotiations proceed to sale, the court said:

⁴² [Translator's note] Two opportunities to appeal exist in Japanese civil procedure. The *kōso* appeal is review to which the appellant is automatically entitled, in which the merits of the case as well as questions of law are reexamined. A further *jōkoku* appeal may then be made for reexamination on points of law.

⁴³ *Suehiro Shōji v. Seisho Gakuen*, Hanrei Jihō (No 790) 63 (Tokyo High Ct, 30 June 1975) (Hereafter *kōso* appeal).

⁴⁴ [Translator's note] "Mandate" is the civil law concept which approximates to "agency" in the common law.

The mandator is not obliged to accept the introduction . . . he or she has the freedom to reject it, and where he or she entrusts the same property of the same description to two or more brokers simultaneously, the mandator is free to select the introduction of his or her preference . . . he or she may also rescind the brokerage contract at any time without requiring a special reason to do so.⁴⁵

Having focused on this "freedom", the court went on to find that Seisho Gakuen had entrusted Suehiro with something to sell; where there is such a mandate and the parties agree, this becomes a contract of mandate under the provisions of the Civil Code:

Article 643. A mandate becomes effective when one of the parties has commissioned the other party to do a juristic act, and the latter has consented thereto.

In this kind of contract of mandate, the effect of the Civil Code provisions is that a right to claim compensation will only arise where there is a special agreement. Mandate is essentially a gratuitous act:

Article 648. In the absence of special agreement a mandatee cannot demand remuneration from the mandator.

However, paragraph 3 of the same provision qualifies this:

Article 648(3). If a mandate terminates in the course of performance owing to any cause for which the mandatee is not responsible, *he is entitled to remuneration in proportion to the performance already effected.* (Emphasis added)

This provision opens up the possibility of compensation when part of "the performance is already effected." In this case, it could not be said that Suehiro had already performed its mandate to sell the property. If unable to claim compensation, could Suehiro claim expenses? The court said this:

⁴⁵ Kōso appeal, 66.

In a simple brokerage for real estate the broker does not bear an obligation to make the sale . . . when a sale takes place as a result of the broker's introduction, this merely gives rise to the right to claim compensation (or the mandator's obligation to pay compensation)—there is no other right to claim expenses.⁴⁶

Any attempt to aid Suehiro on the basis of these Civil Code provisions alone would fail. The court made a further finding about real estate brokerage contracts:

Real estate brokerage contracts do not belong to any of the classical contract "types" [under the Civil Code]. They are "non-type" contracts, and thus, *depending on the actual circumstances of the case*, will be subject to the *application by analogy* of [Civil Code] provisions on mandate, sub-contracting, commercial agency (*shōji nakadachi*),⁴⁷ employment and the like, as well as administrative provisions of the Building Site and Building Transaction Law.⁴⁸

In other words, the court gave judgment applying provisions by analogy to the actual circumstances of the mandate. Application by analogy, however, is not something that should be allowed to escalate to an unlimited extent. Here, the issue was in what circumstances will compensation "in proportion to the performance already effected" be permitted?

Good Faith: the Principles of Trust and Breach

In order for the right to compensation under Article 648(3) to apply by analogy, the court required two elements. The first was that "the broker has expended considerable effort to establish the sale, which, in the normal course of [a transaction], would have been viewed objectively as [sufficient] to bring the sale to a conclusion." The second requirement was "special circumstances in which the mandator has breached his duty of good faith and has abused his freedom." "Good faith" is the principle of good faith and trust

⁴⁶ Kōso appeal, 66.

⁴⁷ [Translator's note] *Shōji nakadachi* (Commercial Agency) is not a type-contract under the Civil Code, but it is regulated by provisions including Civil Code Art 656, dealing with quasi-mandate (*jun i'nin*); Commercial Code Art 502 dealing with commercial agency, and by analogous application of the Civil Code provisions on contracts for work (*ukeoi*).

⁴⁸ Kōso appeal, 66.

found in Article 1(2) of the Civil Code: "[t]he exercise of rights and performance of duties shall be done in [good] faith and in accordance with the principles of trust." The court pointed to Seisho Gakuen's breach of faith and failure of trust in the following passage:

The kōso appellant and mandator (Seisho Gakuen) . . . despite reaching *actual agreement* with the buyer and having decided to take steps to prepare a contract in writing . . . without contacting the buyer—and certainly without his consent—sold the property to Iwabuchi Sangyō for the purpose of gaining a higher price . . . The above actions by the appellant must be viewed as *contravening the principle of good faith* . . . ⁴⁹

The judgment went on to apply Civil Code Article 648(3) by analogy; here oral agreement had been reached and the only performance outstanding was the preparation of the contract in writing and payment. Taking this into consideration, the court reduced the agreed fee by one-fifth, and ordered Seisho Gakuen to pay ¥3,200,000 and interest.

The court found that a contract on the verge of formation is not a contract, but it was prepared to recognize the efficacy of "actual agreement" in order to deal with the case as an application of the principle of good faith.

"Good faith" (*shingi*) is defined in everyday Japanese as "to make efforts to honor a promise," and "sincerity" (*seijitsu*) is defined as "seriousness [of purpose]; honesty" (*Iwanami Kokugo Dictionary*). When the court uses the words "principle of good faith," the meaning derives from this definition of "good faith." The core of the concept of "good faith" is that promises must be honored. "Promises" are "what one agrees to do for another, or do mutually; the content of such agreement" (*Iwanami Kokugo Dictionary*). People's promises range in strength and form, from the most casual to an agreement regarding immovables.

One of the features of Japanese law, in contrast with the American situation, is the willingness to impute liability in some circumstances to pre-contractual promises. No doubt it pained Seisho Gakuen to hear in a public courtroom that it had not acted in good faith, but, just as the expression "good medicine tastes bad" indicates, I regard the court's prescription as widely applicable "good medicine."

⁴⁹ Kōso appeal, 67.

Suehiro Shōji was assisted by the decision, but what of Nitta Mokuzai, who thought that they had an agreement which merely required transcription? Why was this viewed as not constituting a contract?

The Writing Requirement: Custom and Intent

Why, if an oral agreement was reached at the Chiba Mutual Bank headquarters on May 23, did the Tokyo High Court not recognize this as a contract? Let us look at the connection between the court's reasoning and the principle of consensual contracts. The emphases and numbering in the extract are mine.

(1) In a sale of property for a considerably high price, it is clear that in reality the well-settled practice is to prepare a contract in writing which incorporates standard form conditions, including penalty provisions, and the details of the transaction, and make a payment of earnest money or part of the sale price . . . ⁵⁰

If a "well-settled practice" is "clear . . . in reality," then a general provision of the Civil Code regulating juristic acts will apply:

Article 92. If, in cases where there exists a custom which differs from any provisions of laws or ordinances which are not concerned with public policy, it is to be considered that the parties to a juristic act have intended to conform to such custom, and that custom shall prevail.

Accordingly, the decision establishes that where there is a "well-settled practice" of preparing a written contract, the "parties intention to follow this practice should be presumed."⁵¹

(2) This practice must be given due weight; if one adopts this position and parties in a real estate sale transaction are regarded as following the practice, then it is appropriate to view preparation of a contract in

⁵⁰ Kōso appeal, 65.

⁵¹ [Translator's note] The EHS (*Eibun hōreisha*) translation of the Civil Code renders the Japanese term *kanshū* as "custom." Different jurisdictions use different terms for this concept; here I have used "practice" in the sense of "trade practice."

writing and payment of part of the sale price as essential elements in the formation of the sale.⁵²

(3) In this case, there is no clear manifestation of an intent not to follow the practice outlined above. Because the parties agreed, in line with usual practice, to prepare a contract in writing and pay part of the sale price, failure to do so must result in failure to form a contract of sale.⁵³

The judgment rejects the view that a contract of sale was formed. Dissatisfied with the Tokyo High Court decision, the parties made a *jōkoku* appeal to the Supreme Court. My research failed to discover a Supreme Court report for *Suehiro Shōji v. Seisho Gakuen*; inquiries to the lawyers for both sides revealed that the parties settled before a final decision was rendered. Settlement meant that the Supreme Court lost the opportunity to comment on this 1975 Tokyo High Court decision, but it remains worthy of careful attention, nonetheless.

One reason for studying the decision is that numerous real property textbooks and legal guides state that the sale of real property can be effected by oral agreement:

(1) An oral agreement is effective as a contract but . . . preparing a contract in writing is advisable to avoid problems further down the track.⁵⁴

(2) Oral [agreements] are not uncommon . . . Writing is not a requirement. This is what is meant by freedom of form being one of the elements of freedom of contract. Thus a so-called "oral promise" has binding force . . . but to avoid the unnecessary danger of inviting disputes, in a high-value contract like a real estate transaction, preparation of a contract in writing is almost essential.⁵⁵

⁵² Kōso appeal, 65.

⁵³ Kōso appeal, 65.

⁵⁴ Shōji Shinozuka, ed, *Fudōsanhō no jōshiki jōmaki (Real Estate Law General Knowledge, Vol 1)*, at 188 (Nihonhyōronsha, 1972).

⁵⁵ Kikuo Ishida & Masao Osawa, eds, *Fudōsanhō Nyūmon (Hōgaku Nyūmon Kōza) (Introduction to Real Estate Law (Lectures in Introduction to Law))*, at 80-81 (Seirinshōin Shinsha, 1978).

(3) Preparation of a contract in writing is not a legal condition of contract formation . . . a contract for the sale of real property in principle derives its efficacy from the expression of the parties' intent (Civil Code Art. 176), but . . . there is no harm in preparing a carefully drafted contract.⁵⁶

(4) Question 1: You have arranged to buy land and a building from an acquaintance. Details have been settled, but when you suggest drawing up a contract, the other party says, "we don't need to set this out again in a contract." Is it correct to assume that a contract has been formed at this point? Or, will there be disadvantages in future if there is no contract in writing?

Answer: A writing is not usually required to form an effective contract. In Question 1 the details have been settled, so there is a contract. Preparation of a contract in writing has no bearing on this.⁵⁷

Well, this is probably what Nitta Mokuzai and Suehiro Shōji thought when they entered their real estate transaction negotiations in 1972. The buyers, Nitta, did not initiate the litigation, but assuming that they had, what kind of result could they have expected from the Tokyo High Court in 1975? We cannot be certain, but it is possible that no contract would have been found between Nitta Mokuzai and Seisho Gakuen. Of course, all kinds of criticism of the judgment can be made after the event, but the failure of Suehiro's argument based on consensual contract should not be ignored. "Sales of property for a considerable price" will continue to occur in the future. To ensure that the sale goes through, the buyer will need to fulfill the requirements set out by the Tokyo High Court. It is worth examining these in more detail.

"Intent" and Presumption

The Tokyo High Court decision refers to "sales of property for a considerably high price" and regards the "practice" of preparing a contract in writing and payment of earnest money or part of the sale price as "well-

⁵⁶ Fudōsan Kenkyūkai (Real Estate Research Group), ed, *Fudōsan torihiki dai-nana ban*, (Real Estate Transactions, 7th ed) at 141-2 (Yūhikaku Sensho, 1986).

⁵⁷ Tōru Ikushiro & Shinichi Yamamoto, eds, *Fudōsan baibai no hōritsu sōdan (dai-go ban); Hōritsu sōdan shiriizu 7*, (Legal Advice on Real Estate Sales (5th Edition); Legal Advice Series 7) at 190 (Yūhikaku, 5th ed 1981).

established" and "clear in reality." The court says nothing more about this "practice."

If there was a well-established "practice," then Suehiro, as an industry broker, was in a position where it must have known this, and should have ascertained with more clarity the parties' "intention" to follow the "practice," or to disregard it. However, the *Annotated Compilation of Laws*,⁵⁸ cites two Taishō Period (1912-1926) Great Court of Judicature decisions in relation to Article 92:

In relation to the practice of raising land rents (*chidai neage*) in metropolitan Tokyo, a person in the position of expressing an intention to transact in this way must be taken to have such an intention unless they make a particular objection . . . The party asserting the existence of an intention to follow [such] practice is not required to show special proof of this.⁵⁹

If we apply these approaches, then defendant Seisho Gakuen would not have been required to prove anything with regard to the practice of drawing up a contract in writing. The Tokyo High Court decision that presumed Suehiro to have followed the practice should not be criticized.

The Tokyo High Court finding that there was no contract must have come as a surprise to Nitta and Suehiro, who probably had a simple belief in consensual contracts. The decision stands as a warning signal to parties conducting real estate transactions in Japan.

In reality, where the value of the transaction is considerable, there will usually be a contract in writing, and payment of earnest money or part of the price, so this decision will not apply. But there may be situations, where the transaction is concluded after working hours at a bank, in which the purchaser's loan for the earnest money or the sale price cannot be concluded. Parties need to do thorough preparation, including preparation of a draft agreement, and then convert their oral agreement into a contractual agreement in the shortest possible time. To do so will require the services of a lawyer, and indeed this is really a lawyer's role. However, where this is not possible, parties need to be aware of the Tokyo High Court decision which demands a

⁵⁸ Dr. Kenichiro Osumi, ed, *Mōhan Roppo* (Sanseidō, 1982). [Translator's Note] A compilation of the Codes and statute law which is annotated with leading cases.

⁵⁹ *Mōhan Roppo*.

clear manifestation of the intention not to follow the usual practice as a prerequisite to relying on the consensual contract principle.

Important Transactions and the Concept of Contracts in Writing

The Seisho Gakuen decision dealt with "land of a considerably high value." The premise underlying the reasoning is that sales can be subdivided into those concerning important property and those concerning less important property. It also points out that Article 12 of the Civil Code makes this distinction when it requires the consent of a guardian where an incompetent is performing a juridical act in relation to "real property or other important movables."

Article 12 (1). A person adjudged quasi-incompetent shall obtain the consent of his curator for doing any of the acts mentioned below:

- (1) To receive or make use of capital;
- (2) To borrow money or become a surety;
- (3) To do acts which have for their object the acquisition or the loss of rights relating to immovables or to movables of importance;
- (4) To take legal proceedings;
- (5) To make a contract, compromise or enter into agreement for arbitration;
- (6) To accept or renounce an inheritance;
- (7) To refuse a gift or bequest or to accept a gift or bequest which is subject to encumbrance;
- (8) To undertake building, re-building, extension of building or to effect extensive repairs;
- (9) To let or rent property for periods longer than those specified in Article 602.

The court found that "this practice must be given due weight," but this proceeds from the idea that important property and expensive real estate should be subject to the contract-in-writing system. England adopted this principle as part of its positive law in the seventeenth century. The important transactions requiring writing were sales of goods with value in excess of £10.00; sales of land; contracts for a period longer than one year; contracts for marriage; and guarantees and promises by executors. In 1954 the writing requirement was abolished for all but the contracts for the sale of land and the

guarantees. America copied this seventeenth-century English model, and it continues to this day. The contract-in-writing system thus has both old and contemporary aspects, but much of it is a product of historical accident.

Land is never inexpensive; on occasion it can be very expensive indeed. America applies the contract-in-writing principle. But on the other hand, high-value sales also include the sale of corporations. The Bank of California was acquired by Mitsubishi Bank, and Miller Beer; Elizabeth Arden and Getty Oil have all been sold for huge amounts. But as we will see in subsequent chapters, the 17th century English principle adopted in the U.S. has not been extended to cover these kinds of transactions; instead the courts have emphasized party "intent."

The Tokyo High Court *Seisho Gakuen* decision contains some elements in common with American decisions. An interesting case to compare in this regard is *Reprosystem B.V. v. SCM Corporation*, which also deals with the issue of writing and large-scale transactions.⁶⁰ American approaches to the sale of corporations are examined later in the book, not only as comparisons with the *Seisho Gakuen* decision, but also to illustrate how American contract law has moved away from seventeenth-century principles and developed in new directions.

⁶⁰ *Reprosystem B.V. v. SCM Corporation*, 522 F Supp 1257 (1980); 565 F Supp 4 (1982); 727 F. 2d 257 (1984).