East Asian civil laws and legal systems (Sandra Hotz)*

1. East Asia and beyond

Japan, with its four main islands, is located to the very east of the Asian continent, with shorelines facing the Pacific Ocean. To the south, Japan faces Korea, more particularly South Korea, henceforth referred to as the Republic of Korea, located on the southern part of the Korean peninsula. China, henceforth referred to as the People's Republic of China (PRC), one of the world's largest countries, starts on the western side of the northern part of the peninsula. It additionally faces the Chinese Sea to the east and borders Vietnam, Myanmar, Bhutan, Nepal and India to the south, and Kazakhstan in the west. East Asia in this sense is clearly a geographical term. But it is no less a constructed entity.[1]

Any categorisation of the laws of an area as vast as Asia or even East Asia and of an East Asian legal culture, is bound to fail, eg because an East Asian legal culture based on Chinese law, meaning mostly a Confucian tradition of laws is too simplified[2] and because there are various different Buddhist legal traditions, which reach beyond East Asia as well.[3] Thus, writing about East Asian civil legal systems can and will henceforth be understood only as giving *three examples of civil law systems* with considerable significance in this region, resembling and differing from those in Western Europe, North America and the rest of Asia.

Beyond that, it can be fruitful to write about East Asian civil law models, as this could promote collaboration within the region and deepen the focus to these regions and make their legal models more

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1 Thus the financial crisis (1997) led to stronger regional cooperation in East Asia, promoting ASEAN +3, so that in terms of business and economics, East-Asia can refer to the ten ASEAN countries plus Japan, South Korea and China: *McCormack Gavan*, The Emptiness of Japanese Affluence, New York 1996, 161.

2 *Palmer*, JCL 1:1 2005, 165, 168.

3 *Huxley,* JCL 1:1 2005,160, classical European comparative law tends to divide legal cultures in Asia into 'Far-Eastern', 'Hindu' and 'Religious' families: Reimann/ Zimmermann (eds), Oxford Handbook of Comparative Law, 2006, *Kötz Hein, Zweigert Konrad*, Einführung in die Rechtsvergleichung, 3rd. ed, Tübingen 1996, and see *Glenn*, Legal Traditions of the World, 303, where ‚Asian legal tradition' is one out of six, next to chtonic, regilious and hidu legal traditions.

visible to the outside.[4] I would regard the following two examples of a meaningful practical use of the term East Asia: 1.) The drafting of Principles of Asian Contract/Civil Law (PACL) led by scholars and lawyers from Japan, South Korea and China (including Taiwan) since 2009.[5] 2.) A saying, that 'East-Asian arbitrations regulations follow the UNICITRAL Model Law of International Commercial' could secure foreign business partners.[6] There is also increasing interest in Chinese law, which could leave the other legal systems in East Asia somewhat neglected. However, it is important to point out the differences between the various legal models and practices.[7] Conventional wisdom suggests, for example, that the 'East Asian' legal culture has been non-litigious, but every country has distinct obstacles to legislation and its own preferences to ADR (Alternative Dispute Resolution).[8]

4 The use of western terminology should not obscure the fact that 'rights' in Japan, Korea and China cannot have exactly the same meaning as 'rights' in Europe or the United States. The assertion of rights in Japan, for instance, different from that in the West – after 200 years of feudal regimes, a strong bureaucracy, not easily accessible courts etc. – a Japanese person knows his/her rights but would not assert them on every occasion, indeed only when it is clear that a negotiated solution is out of reach.[9] And 'rights' in China have a different meaning again, because a Soviet-Marxist understanding of the law is based rather on ideas such as the right to work or eventually consumer protection than on the right of self-determination. Whereas today, after many centuries of ruling bureaucracy[10] and that of state ownership the law must somehow reconcile with the notion of private laws, especially private property.[11] And finally, where subordination and punishment are at

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4 *Miyazawa Setsuo*, Where are we now and where should we head for? A reflection on the place of East Asia on the Map of Socio-Legal Studies, Pac. Rim L. & Pol'y J. Vol. 22 No. 1 (2013), 113, 116, 121.

5 *Han Shiyuan*, Civil Law Codification in China: Its Characteristics, Social Functions and Future, 45, *Han Shiyuan*, European contract law, Chinese Contract law and East Asian Contract Law, East Asian Law Journal 1 (2010), 146.

6 For a further example see *Ginsburg*, Judicial Independence, 247, *Taylor, Pryles*,19.

7 *Taylor, Pryles*, 1.

8 *Barnes*, 63: eg for negotiations in Korea, consultations in the group/family are more important than in Japan.

9 *Feldmann*, The Ritual of Rights, 5, 13.

10 *Palmer*, JCL 1:1 2005, 165.

11 Among many others Lubman framed the questions, on how to study Chinese Law, as it so disparat from ‚Western' thinking: *Lubman*, 12.

the core of a long legal history, as is the case in South Korea, the understanding of 'rights' is a very different one again.

2. Circulating civil law models and the historical context

2.1 Japan

The first legal codes in Japan, namely the *Prince Shôtoku Code* from 640[12] and the *Ritsuryô Codes* (13th century),[13] were heavily influenced by Buddhism and by the Chinese imperial court system. However, they did not regulate private matters, but mainly contained constitutional (the former) or administrative and criminal provisions (the latter). Private or civil law matters were dealt on a local and familial basis.[14]

During the time of the *Tokugawa Shogunate* (1603-1868), a strict and centralised feudal system developed with a clear stratification of social classes, in which there was apparently no need for written civil laws. Nevertheless, some significant private arrangements, such as a rice market system with bills and agreements had developed.[15] After the fall of the feudal system, political power passed to the Emperor *Meiji* (1867-1912), who ruled the entire country within a hierarchical prefectural framework (eg a tax system reinstated the former feudal burdens). Emperor Meiji initiated the opening of the country to foreign trade and a century of innovation in education, technology and the military.[16] By the end of the Meiji period, Japan's power and imperial ambitions had become established.[17] In the mid-19th century, the Meiji government consulted many European and other laws in order to quickly

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12 Cf. 十七条憲法 (*Tshûshichi jô kempô*), meaning literally 'The Constitution in 17 articles'.

13 大宝律令 (*Taihô Ritsuryô*) *Code*, was heavily influenced by the *Tang Code* of 7th China (which had its influence in Korea and Vietnam, too).

14 Although *Prince Shôtoku* is said to have established hospitals with charitable treatment for poor sick people and abandoned children, cf. *Röhl*, 571, and there has been found an old family record in the South-West of Japan, believed to be made in late 7th century, which could mean that the central government already directly controlled people over wide areas before the ritsuryô law: *Yomiuri Shinbun (Newspaper),* 13 June 2012.

15 The *Dojima* Rice Market and the Origins of Futures Trading, Harvard Business School (Issue 9-709-044), 10 November 2010, *West Mark*, Private Ordering at Words' First Futures Exchanges, Michigan L. Rev. 98 (2000), 25-74, *Henderson Dan Fenno*, Conciliation and Japanese Law – Tokugawa and the Modern, 2 vol., Seattle 1965, 106.

16 *Takayanagi Kenzô,* A Century of Innovation: The Development of Japanese Law, 1868-1961, in: von Mehren Arthur (ed), Law in Japan, The Legal Order in a Changing Society, Harvard 1963, 7.

17 *Jansen,* The Making of Modern Japan, 441.

set up a civil law code that suited the Western powers. Only with Western-style civil law would Japan find international acceptance and could handle the unequal international trade agreements which the Tokugawa Shogun had signed.[18]

The first relevant draft of the civil code from 1890 was also called *Boissonade's Draft*, since it was written by French Professor Gustave Emile Boissonade de Fontarabie, who had worked for the Japanese Ministry of Justice since 1879. Unsurprisingly, the draft was modelled on the French Civil Code of 1804, although it did not include the latter's provisions on family and inheritance laws. These culturally sensitive matters of private law were – obligingly – left to the Japanese jurists from the very beginning. Nevertheless, Boissonade's draft was never ratified because it was considered too remote from Japanese legal thinking (thus the concept of possessing personal rights was alien to Japanese thinking). But the most important critics of this first draft included professors trained in Great Britain or Germany, who preferred other legal systems to the French one. The result of this long, very broad (the legal system of approx. 20 countries were consulted) and controversial reception process was – mainly for political reasons – acceptance of the provisions and overall *pandectistic structure* of the German Civil Code, or to be precise, the structure of the first draft of the German Civil Code dating from 1888.[19]

The current *Japanese Civil Code (民法, Minpô,* henceforth: *Minpô*) dates from 27.4.1896 (No. 89) and from 21.6.1898 (No. 9). Its enactment was followed by an interesting period of adaptation of the *Minpô* and the other new Meiji laws to the prevailing social reality (1920s).[20]

The current parts of the *Minpô* covering the provisions on family and inheritance laws were ratified later on, after Japan's defeat in World War II, due to the influence of the American occupation, which lasted until 1951. One aim of the revised family law was to establish a certain degree of family property rights, which had not

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[18] *Hotz*, 6, further see *Jansen Marius B.* (ed), The Cambridge History of Japan, Vol. 5: The Nineteenth Century, Cambridge 1998, 432, 448, *Kitagawa Zentarô*, Die Rezeption und Fortbildung des europäischen Zivilrechts in Japan, Frankfurt, Berlin 1970, 30ff.

[19] *Hotz*, 9.

[20] *Rahn*,130, whether there was a clear cut and the former Chinese legal models were only history' (*Stickings Sia*n, Where Does Japan Belong?, JCL 1:1. 2005, 171-173), remains doubtful.

existed during the feudal system.[21] This revision also led to the evolution of the Japanese family courts. It is fair to say that the American legal influence became generally more important in Japanese legislation since the middle of the 20th century: thus the Japanese Constitution of 1947 was drafted in cooperation with the Allied Powers led by the United States. Although business laws, such as the anti-monopoly laws, rely strongly on American law, the civil law and especially the law of obligations have basically remained within the continental European tradition of civil law until now (see cf. 2.4).

2.2 South Korea

The links between the civil laws of Korea and Germany date back to the period around 1876, when Korea had a trade agreement with Japan and came into contact with U.S., French and German legal thinking. – This was towards the end of the *Chosŏn* Dynasty (1392-1910), an age of classical culture,[22] trade, technology and science and a period of strict and profound Confucian ideals.[23] – However, in the middle of this long period, the Japanese-Korean war (1592-1598) and the Manchu invasions brought heavy devastation to the country, and peace was restored mainly after Chinese influence was accepted. – During the *Chosŏn* Dynasty, there was a constant effort to codify the law: however, the *Great Code for Governing the Country* (經國大典, *Kyŏngguk taejŏn*) was the only effective one, and lasted from 1484 until the end of the dynasty. It was essentially a criminal code that favoured the centralized administration and the various kingdoms. It explicitly followed the structure and content

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21 *Noda*, 68: ‚avec plus de prudence, parce que les redacteurs devaient se garder de retomber dans la reproche de ne pas avoir dûment tenu compte des moeur traditionnelles', *Kawashima Takeyoshi*, Americanization of Japanese Law 1945-1975', Law in Japan (16) 1998, 57, 62 [...] 'one can pinpoint the American influence on some particular aspects of family law such as division of marriage property and the Family Court's supervision of children'.

22 The new Korean han'gul alphabet was established by 1443, but the Chinese characters (han'ya) remain important.

23 *Kwon*, 156, *Choi Dai-kwon*, 57: the Chinese Confucian model was adopted thoroughly, whether it concerned arts, education, family or the centralization of the administration, also acc. to *Kim*, Law and Custom, 27, Koreans were very ‚orthodox' about the interpretation of Confucian ideas and traditions: by the end of the 17th century the Korean family structure had adapted the patriarchal confucian order, whereas *before* it had reflected rather equality in gender (eg practice of living with the family of the wife', inheritance laws), see further *Kim Chan Jin*, Korean Attitudes Towards Law, Pac Rim L. & Pol'y J., Vol. 10, No. 1 (2000-2001) 1.

of the Chinese Ming Code.[24] In 1897, King *Gojong* promulgated a first constitution that granted sovereign authority to the emperor and was supposed to manifest Korea's independence from China.[25]

After the forced opening of the country by Japan,[26] and in the following process of legal codification, a major role was played by American, German and French law models, although the prevailing Chinese influence and the Korean-Japanese intellectual exchange were the most significant factors.[27] After the country's annexation by Japan (1910-1945),[28] an independent Korean civil law was no longer an option. Instead, the colonial governor issued *The Chosŏn Ordinance on Civil Matters* (朝鮮民事令, *Chôsen minji rei* henceforth: *Minji rei*) in 1913, which dictated a list of Japanese civil laws to Korea, and these underpinned the civil order during the colonial period.[29] The Japanese, who had learnt from their own experience during the codification process, made one exception: they let Korean customs overrule the law as long as they did not interfere with 'public order' (Art. 10 *Minji rei*). 'Capacity, family and succession matters' were declared to be customs (Art. 11 *Minji rei*), to which the *Minpô* did not apply, at least during the first period of the annexation.[30] During this period, Japanese law, and indirectly German law[31] became important, especially to the

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24 *Kim,* Law and Custom, 22.

25 *Choi*, 156.

26 *Choi Dai-kwon*, 73, *Hyunmo Park*, How and when did the Geonguuk daejeon System dismantle? A Study on political meaning of Daeham Empire, The Review of Korean Studies Volume 12 Number 3 (2009), 197-221, 199, *Jansen*, Making of Modern Japan, 441ff.

27 For example, *Ume Kenjirô*, who was one of the three drafters of the Japanese Civil code, was coworking in Korea on a 'modern' legal system: *Kim Marie Seong-Hak*, Ume Kenjirō and the Making of Korean Civil Law, 1906-1910, The Journal of Japanese Studies, 2008 Vol. 34:1. And the first western work in Korea with great influence was that of Swiss scholar and politician *Johan Caspar Bluntschli* (1808-1881) ‚Modernes Volkerrecht der Civilisierten Staaten als Rechtsbuch dargestellt' of 1868, which was introduced to Korea *from China* (The Korean Ministry of Education printed the volume following the Chinese text and distributed it among the ruling elite): see *Choi*, 137.

28 *Kwon*, 154.

29 *Seirei* No. 7 (meaning ‚cabinet orders', but the effect was that of a Japanese law: *hôristu*), March 1912, English transl. see *Kim*, Law and Custom, 306, further 173.

30 Eg. Judgement of 8 March 1912 by the *Chonson High Court (Minaj* 13) regarding the '*Chonse'* (cf. note 31), *Kim*, Law and Custom, 192.

31 Sang Jong *Kim*, who is a member of the revision committee, Amendment Works of the Korean Civil Code (Property Law), 14, stresses the fact, that the German civil code was *not* studied directly, *Kwon Youngjoon, Lee Yong-Shik*, Legal Analysis of Traditional Leasehold (Chonsegwhon) from a Comparative Perspective, AJKL 29 (2012) No. 2, 263: '*Chonse'* is a unique form of Korean lease contract, that consists of a one-time deposit of the large leasing-sum for the duration of the lease (normally 1 year) by the tenant with the landlord,

Korean civil law. – The *Minpô* (without the books on family and succession laws) remained in force until 1960.[32] In postwar period the Japanese influence on Korean law continued to be profound, also with regard to legal institutions.

The Korean Civil Code (민법/民法, *Minpŏp* henceforth*: Minpŏp*) was promulgated on February 22, 1958 and became effective in 1960.[33] The post-colonial period saw attempts to break away from the Japanese legal model, particularly its 'excessively individualistic parts', which were considered inappropriate, and to explicitly keep or restore the country's own customs.[34] In contrast, the previously imposed Japanese household system (*Ie-system*, cf. 4.1.3) and the family registration system were kept, with specific reference to Korean customs.[35] However, the latter have now been abolished, since the amendments to the *Minpŏp* in 2005 and the establishment of a completely new family registration system in 2007. – While the German legal influence has prevailed until today, the American occupation in particular (1945-1948) brought the additional influence of the common law to Korea.[36] When doctrine writes of a 'shift' to common law, it remains to be noted, that for the constitutional law the common law influence was – not surprisingly – stonger then for civil law.

2.3 China

When the feudal regime was about to fall in the early 5th and 6th centuries BC, people felt that the time had come to have formal

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and then the tenant does not have play for a monthly or weekly rent. The landlord may keep the interest as part of the rent. This legal institute not only influenced the housing culture, but led the people to save their money and often made parents pay the lumpsum as wedding gift. It became a financing device using a house as collatera (*'Chonsewon'* refers to the registered '*Chonse'*).

32 *Kwon*, 156, *Kim,* Law and Custom, 274.

33 1 January 1960, Act. No. 471 in: Statutes of the Republic of Korea III, 1, available in English http://www.moleg.go.kr/english (accessed 26 June 2013), *Kwon*, 156.

34 *Kim* Sang Jong, 3, again the ‚*Chonsegwon*' as example.

35 *Kim*, Law and Custom, 287.

36 *Kim* Sang Jong, 15.

laws. *Confucius* managed to reform and preserve the existing laws at one and the same time:[37] He was the philosopher of 'Li' – 'Ye' in Korea and 'Giri' in Japan – covering concepts such as responsibility or denying formal norms and relying more on morals and traditional customs. Nevertheless, despite its suspicion of external control, formal law and court justice, the Confucian School was realistic enough to know that society cannot dispense with laws and courts. They were consequently ready to compromise with a second – completely different – significant traditional school of philosophy, namely *Legalism*, which relied on positive law.[38] The *fusion of Confucian and Legalist ideas* furthered legislation in ancient China: [39] This led to an early sophisticated formal Chinese legal system including a series of old legal codes,[40] such as *'The Great Ming Code'* (大明律, *Da Ming lü,* acquiring its final form in 1397)[41] or '*The Great Qing Code'* (大清律例, *Da Qing lüli*, 1740)[42]. The *Ming Code* regulated major aspects of social affairs, aiming at maintaining order and harmony in the empire. The impact of the Ming Code was considerable: firstly, the Manchus, who conquered China and established the Qing dynasty (1644-1911), chose to maintain it with minor changes. Secondly, it had great influence on the legal culture of Korea (as already mentioned), and to the late Tokugawa regime and early Meiji

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37 Sources of Chinese Tradition, compiled by *de Bary Wm. Theodore* and *Bloom Irene*, Vol. 1, 2nd ed, New York 1999, 44-63 reg. *Confucius,* Analects, 2:3, ‚Lead the people with government regulations and organize them with penal law, and they will avoid with government regulations and organize them with penal law, and they will avoid punishment but will be without shame. Lead them through moral force (de) and keep order among them through (li), and the people will have a good character', *Chen Juanfu*, 8, 39, *Lubman*, 12, *Glenn*, Legal Traditions, 306, 319, 336*, Muehlemann Guido,* Understanding Chinese Law, Why a cultural approach is essential, in: Hotz, Zelger (eds) Kunstund Kultur, Zürich, St.Gallen 2011, 345-368.

38 Legism is the leading philosophy during the Qin dynasty 221-206 BC, see in general *Wang*, 27, *Peerenboom*, 34, *von Senger*, 12ff., see further on Legism: *Helmut Vittinghof*, Legalism/Legism (*fajija*) and legalist/legist teaching, Journal of Chinese Philosophy Vol. 28 151-159, *Peerenboom Randall*, Law and Morality in Acient China: the Silk Manuscripts of Huang-Lao, State University Press New York, 1993, introducing the Hunag-lao thought, which is a third Chinese philosophy, that combines Legism and Daoism, 167.

39 *Palmer*, JCL 1:1 2005, 166, see note 13 for the Tang Code.

40 Fof further see *Heuser Robert*, Einführung in die Chinesische Rechtskultur, 2. A., 2002, 110ff.

41 *Yonglin Jiang*, The Great Ming Code, *Da Ming lü*, translated and introduced, Asian law series no. 17, Seattle 2005.

42 *Jones William*, The Great Qing Code, Oxford University Press 1994, lit. transl.: 'Great Qing Code with Examples'.

government in Japan.[43] Although the Qing dynasty was rich in people and commerce, the 'Great Code of the Qing' also remained a feudal and criminal code.[44] – But then, also Chinese *customary norms* eg in form of adoption or inheritance rules, were important as well. And these are also part of civil law.[45]

During the last decade of the Qing dynasty, the state of the country and the economy had declined and trade with foreign countries called for more security.[46] Legal reforms became necessary and foreign civil legal systems began to be studied.[47] The first separate private law code, a *Draft Civil Code of the Qing Dynasty* (大清民律草案, *Da Qing milü cao'an*) was written by 1911 and to a large extent followed the Japanese and German models of civil law.[48] However, the revolution put an end to the Qing dynasty in October 1911 and the draft was never adopted.[49] And yet its influence prevailed,[50] and after further revisions the government of the Kuomintang promulgated the *Civil Law* of China (民法, *minfa*) in five books (approx. 1200 articles) within the years 1929-1931. This was also largely Western-inspired and modelled after the German

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43 *Jansen* Marius B., China in the Tokugawa World, Harvard University Press 1992, 65 *sub seq*.

44 However it provides in Part III: Laws relating to households, families, marriage, taxes (grains, salt) eg Art. 101 ‚Marriage' with comprehensive outlines of the *marriage contract* and regulations on disclosure, marriage brokering and plural marriage, whereas any kind of misbehavior led to a certain amount of ‚strokes of heavy bamboo', Art. 112 any kind of taking/arranging in marriage' by power or force, was ‚punished with 60 strokes', see however *Henderson Dan F.*, *Torbert P.M.*, Contract in the Far East – China and Japan, in: International Encyclopedia of Comparative Law, Vol. VII, Arthur von Mehren (ed), Tübingen 1992, 19.

45 *Palmer,* JCL 1:1, 167.

46 *Pissler*, 7.

47 *Chen* Janfui, 23.

48 *Wang Qian,* 111, *Pissler,* 7 ff, *Xian Li*, The Impact of Japanese Law on the Kinsfollk and Inhertance Rules in Draft Civil Law of the Qing Dynasty and its modern Signification, *Hikakuhô rônshu (Japanese Journal of Comparative Law)* Vol 43 No. 3 (2009) 307-355, 310 ff. – Depending a bit on the background of the scholar, some stress the direct, the others the indirect influence, undoubtedly – only because of the language – the *Minpô* had its impact as well.

49 *Chen, von Rhee*, 2, *Lei Chen,* The Historical Development of the Civil Law Tradition in China: A Private Law Perspective (September 28, 2009), available at SSRN: http://ssrn.com/abstract=1479442 or http://dx.doi.org/10.2139/ssrn.1479442 (accessed 3 July 2013), 12, according to *Chen* there was a further attempt to legislate an interim Republican Civil Code between 1912 and 1927, which was published in 1925 and relied on the Qing Civil Code Draft.

50 *Wang Qian,* 111, also in jurisdiction cf. *Pissler*, 10f.

Civil Code as well as after the Swiss Civil Code.[51] –The founding of the *People's Republic of China (1949*) brought along laws linked to the socialist system: thus more standardized purchases (eg of cotton) developed, and by 1956 private enterprises had ceased to exist. They were replaced by a 'state-run supply system', which obviated any need for any agreements or contracts between private persons.[52] And marriage law again was treated as something different from civil law.[53] Nevertheless, attempts were made to introduce a comprehensive civil code in the 1950s and 1960s, but they failed for political reasons. Instead, Chinese lawmakers passed single regulations on civil law issues. Due to this development, the concept was later changed to the '*General Provisions of Civil Law'*,[54] which became effective in 1987[55] and are still in force today (cf. 4.3). – The law is certainly a milestone in Chinese civil lawmaking. It relies strongly on the United Nations Convention on Contract for the International Sale of Goods (CISG), that was ratified by China a little earlier (1981), and other foreign laws such as the Swiss Code on Obligations (1911).[56] The ongoing reform of the civil legal system led to the enactment of the Contract Law Act in 1999.[57]

In addition, the Standing Committee of the National People's Congress passed China's first Tort Liability Law in 2009, which took effect on July 1, 2010 and deals with important issues for the domestic and foreign businesses operating in the Chinese retail sector. Moreover, there exist a fairly recent Property Law Act (2007)[58], a

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51 Promulgated May 23, 1929, effective October 10, 1929 until 1949, however *in Taiwan it is still in force*, see for englisch translation of ‚The Civil Code of the Republic of China', Books I-III is by *Hsia, Cho, Chang*, Shanghai, Hongkong, Singapore 1930 and a German translation by Karl Bünger, Zivil- und Handelsgesetzbuch sowie Wechsel- and Scheckgesetz in China, Marburg 1934,101, *Lei Chen*, The Historical Development of the Civil Law Tradition in China: A Private Law Perspective, 13, 18, *von Senger*, 12ff.

52 *Xie,* 35.

53 *Han*, 49.

54 中华人民共和国民法通则 (Zhonghua renmin gongheguo mínfa tongze) heceforth: *Minfa tongzhe*, promulgated by the Sixth National People's Congress, 1 January 1987, in: *Zhonghua Renmin Gongheguo Fagui Haibian* (Official Decree of the PRC), No. 37, 1 (1987).

55 *Henry R. Zheng,* China's Civil and Commercial Law, Singapore 1988, 19.

56 *Jian*, ZChinR 2/2007, 132-140, 136.

57 Prior three specific contract laws existed: 'The Economic Contract Law' (1981), 'The Economic Contract Law Involving Foreign Interests' (1985) and the 'Technological Contract Law' (1987) were in force.

58 This act passed in 2007 after a period of debate, it follows the Japanese and German civil law system in its systematics and content: *Lei Chen*, 87.

revised Marriage Law Act (2001) and a revised Adoption Act (1998). China is once again working towards a comprehensive Chinese Civil Code' (cf. 2.4).

2.4 Recent Trends

It is fair to say that there is a *second wave* of circulating civil law models today. Time, technical developments and social changes have led to many substantial reforms - anticipated, ongoing or accomplished - of existing civil codes and civil legal systems (mainly the laws of obligations) going on in Europe, East Asia and elsewhere. Some of these provisions are outdated and some parts of the civil codes or acts no longer correspond to the current law. In Japan, for example, a consolidation of the *Minpô* with over a century of civil law adjudication and legal doctrine is necessary, because it is the first substantial revision of the laws of obligations and the general provisions since enactment. Over time, there has also been a large amount of special legislation in several fields of civil law, which needs to be integrated and/or harmonized. These general reasons have so far led to an official '*Interim Draft'* of the *Minpô* upon the revision of the larger part of the Japanese law of obligations and the general provisions on February 26, 2013.[59] A *Shingikai* (advisory committee) to the Justice Minister has compiled a report on revising the *Minpô* with many possible updates. The amendment of the *Minpŏp* from 1958 in South Korea has a similar origin.[60] And these are also the main reasons why the

[59] 民法債権関係の改正に関するする中間試案中間試案 (*Minpô saiken kankei no kaisei ni kansuru shûkan shian*) see http://www.moj.go.jp/shingi1/shingi04900184.html (accessed 16 July 2013). To be precise the revision touchs book 3 'Claims' and parts of book 1 'General Provision' (eg juristic acts, prescriptions rules), while of tort law and the obligations based on illegal enrichments are only to be amended in relation to contract law. The drafts follow the 'Draft Proposal' of the *Shingika*i, which was published in April 2009 – and are available in English on their own homepage: The official working group was named after that by the Ministry of Justice, and met first in November 2009, see for further information on reasons and content of reform: 見直しの対象 (*Minaoshi no taishô*) http://www.moj.go.jp/content/000103338.pdf (accessed 18 July 2013). The Japanese Ministry of Justice intends to submit the bill to revise the *Minpô* in 2015.

[60] The Amendment of the *Minpŏp* began in February 1999, when a special committee with an overwhelming majority of scholars with a German law background was established as a subcommittee of the Legal Advisory Commission within the Ministry of Justice. A first Draft was accomplished in 2001, and after holding public hearings and reviewing opinions a 'Preliminary Announcement of Legislation' on 14 June 2004 was made: see *Yang,* Journal for Korean Law Vol. 4 No. 1, (2004), 99 ff., *Tae-Ung Baik, Jewan Kim, Kyung-Il Paek*, A Discussion for the Amendment of the Korean Civil Code: Statutory Limitation Provisions and Related Issues, 50 Minsabeophak 1 (2010), see revised 'General Provi-

PRC is discussing the introduction of a Chinese Civil Code.[61] In the case of China, however, the new codification would extend beyond the integration or harmonization of the existing (and not that old) civil laws, because it is viewed as a symbol of the country's ongoing transformation and as a way to secure its social structure.[62] But the overall aim is to rationalize and improve China's civil legislation, especially as regards the specific part of contract law.[63] Binational conferences[64] and ongoing discussions on the structure and style of the future codification[65] confirm this intention.

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sions': 2013년 7월 시행되는 민법개정안 살펴보기|작성자 양소영변호사시행 2013.7.1.] [법률 제11300호, 2012.2.10., 일부개정 (Civil Act as of July 2013, law No. 11300, 02.10.2012, Department of Justice, Bureau of Justice hearing) cf. http://www.law.go.kr/lsInfoP.do?lsiSeq=122983#0000 (accessed 20 July 2013), cf. actual legal information available in Korean: http://www.legaltimes.co.kr (accessed 20 July 2013).

61 An academic '*Draft Civil Code'* was prepared in 2002, which was the first one to be submitted to NCP since the founding of the Peoples Republic of China, but it was too early, instead in 2007 the new property law resulted as single act. Another academic '*Draft Civil Code'* was prepared by the *Chinese Academy of Social Sciences* in 2010 see Introduction, see *Lei Chen, van Rhee.*

62 These are the lines of *Meng Qiang*, who writes as editor on the topic of the ‚Civil law Codification' on the Chinese site http./www.civillaw.com.ch.cn, run by the Institute of Civil and Commercial Law of the Law School of the People's University of China: 孟强, 民法法典化专题研究编辑手记 (*Qiang*, Notes from editor on the research and study the Civil Code) cf. http://www.civillaw.com.cn/special.asp?id=298 (accessed 19 July 2013).
The future ‚Chinese Civil Code' gets directly linked to the 21st century, which should be one of 'respecting human values' by Professor Jiafu *Wang's* opening statement on Chinese legislation and codification at the French-Chinese Conference on Civil Codes (2006): cf. http://www.civillaw.com.cn/special.asp?id=298 (accessed 19 July 2013).

63 *Han*, Shapshot of Chinese Contract Law, p 253.

64 Eg on the French and the Chinese Civil Codes in 2006 or on the Swiss and the Chinese Civil Code in 2012, but also on whether to adopt foreign laws or not at all, cf. *Jian*, ZChinR 2/2007,136.

65 见苏永钦：民法典的时代意义－对中国内地民法典草案的大方向提几点看法，载氏、民事立法与公私法的接轨，北京大学出版社2005年版48-59页 (*Su Yongqin*, The significance of the Civil Code era and a Draft Civil Code on the mainland of China, in: Zhu, Civil legislation and public and private law standards', Peking 2005, 48-59), cf. 生导师 民法法典化：中国与法国的对话 研讨会上的致辞王利明 (*Zhōngguo yu faguo de duihua yántǎo huì shàng de zhìcí wánglìmíng*, The Civil Code: a dialogue between China and

But there are also specific differences: thus according to Japanese legal doctrine, the law of obligations lacked a systematic contract liability system, which led to jurisdiction having to rely heavily on the general provisions of tort law (Art. 709ff. *Minpô*).[66] This has to be changed taking into account eg the updated German law of obligations (*Schuldrechtsmodernisierung*, in effect 2002) and the provisions of the CISG, which Japan enacted in 2009.[67] Another example is: the amendment of the general provisions on juristic acts against public order or good morals (art. 90-91 *Minpô*). As there is no separate provision on the illegality of contracts, it remains somewhat unclear what kind of illegal acts are embraced by these provisions and whether, for example, a contract against public administrative regulations rends the juristic act void.[68] Japanese legal doctrin is of the opinion, that despite the principle of freedom of contract a violation of mandatory public law should be treated as such in private law and therefore lead to the invalidity of a contract.[69]

In turn, the revision of the *Minpŏp* aims eg to clearly enunciate the principle of private autonomy, ahead of the principle of good faith, which had filled the gaps to a large degree until the present. Apart from Art. 751 *Minpŏp*, the general provision on torts, the *Minpŏp* does not mention any individual rights.[70] The provisions on

France) transcript of speech by Wang Liming, uploaded July 3, 2006), cf. http://www.civillaw.com.cn/Article/default.asp?id=27324 (accessed 19 July 2013).

66 *Hotz*, 71.

67 *Uchida,* Uniform Law Review 2011, 707 (Professor Uchida was a leading member of the *Shingikai*), *Tarô Suizu*, Die Japanische Schuldrechtsreform, aus dem Blickwinkel der Kodifikationsidee, ZJapanR /J. of Japanese L. Nr./No. 32 (2011), 249.

68 *Saikôsai* (Supreme Court) 4 September 1997, Minshû 51-8-3619, commets by *Yamamoto Keizô* in: *Bälz et al.* (eds), Business Law in Japan - Cases and Comments. Intellectual Property, Civil, Commercial and International Private Law, Leiden, Bosten 2012.

69 *Yamamoto Keizô*, *Minpô Kôgi* I – *Sôsoku* (Lectures of Civil Law I, General Provisions), 3rd. ed, Tokyo 2011, 290ff., *idem.*, *Kôjô ryôzoku ron no saikôsei* (Rethinking the concept of public policy), Tokyo 2000, 246 ff.

70 A fact, that it shares with § 823 German CC (though the the right of the person is garantued by § 2 of the Constitution (Grundgesetz) and noteworthy is as well, that this article corresponds in large parts with the above mentioned Art. 709 *Minpô*.

contracts or property from the 'General Provisions Section' is also to be placed in special books and a new provision is to be created for the declaration of intention by electronic means.[71] The most recent amendment was on another current 'hot' topic in civil law, namely the amendment of the provisions on the ability to act, the guardianship and protection of the elderly as well as the general constitution and ability to act of legal persons.

2.5 Plural legal systems & hybrids

These distinctive legal histories represent three processes of circulating civil law models in Japan, South Korea and China, whereas the *circulation within the East Asian region* has been at least as important as that between Europe and East Asia. The Japanese and Korean legal systems have had great historical influence from China, and in all three countries the influence of the Western civil law influence started when the *Qing* dynasty declined, the *Meiji* era began and when Korea became a Japanese colony. The influence on eachothers civil legal systems continues until today, which is after knowing about these circulations processes and having (had) a common writing language (Chinese characters), not at all surprisingly. [72] Especially in the post-colonial period Japanese influence on Korea continued to be strong, in regard to institutions and material law. Since the late 80s and 90s call for legal reforms from within these three civil legal systems are likewise on the ageda.

The *dynamics* of these circulations[73] might explain to some extent why the civil law of one country adopts one ore rather many existing models of civil law, but then there was always need to fuse the 'old' with the 'new' models and the products are those of their time and local context:[74] Legislators, scholars and judges follow their traditional an local models.[75] To recognise this *pluralism*

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71 See *Yang*, Journal of Korean Law 99 (2004), 108 for example, as to the circumstances under which a revocation should be allowed in case of a mistake, the majority adopted a position, which was admittedly influenced by § 119 II of the German CC and Art. 24 of the Swiss CO.

72 For this reason, I use the transcripts, see devol JCL 1:1, 163, see a further example (takings lessons): *Ginsburg*, Judicial Independence, 247, *Taylor, Pryles*, 19.

73 Whereas I write about circulating legal models (*la circolazione dei modelli*), a common law scholar might use the term 'legal transplants'.

74 *Milhaupt Curtis J.*, A Relational Theory of Japanese Corporate Governance, Contract, Culture, and the Rule of Law, Harvard Int'l L. J. 37 (1996) 3.

75 *Graziadei Michele*, The Functional Heritage, in: Legrand, Munday (eds), Comparative Legal Studies: Traditions and Transitions, Cambridge 2003, 100-127, 117.

within the legal system is the first step to making a comparison[76] – at least from a Western point of view.[77]

The *outcomes* of these processes are doubtless individual. It is neither possible to trace these three civil legal systems (or any code) back to a single specific cultural or legal origin or to a single specific legal family or legal tradition, nor to present them simply as variants of each other.[78] Instead, different layers of normative systems (jurisdiction) and laws were added (while some were changed) over many centuries until something *new* emerged. The Japanese and Korean civil codes are consequently classical legal *hybrids*[79]. The Japanese Civil Law of today is a fusion of European legal thinking dating back to the end of the 19th century, American legal thinking prevailing since the time after WW II (eg political equality, reform of family law) and traditional Japanese thinking and conventions. And a certain acceptance of contemporary global laws (eg 'Committee on the Elimination of Discrimination against Women') must also be taken into account.[80] South Korea has its own distinctive legal history: it is a fusion of traditional Confucian ideas and laws and of Western legal thinking filtered through a colonial system. The Chinese civil legal system can equally be qualified as a hybrid legal system because it is based on a civil law system derived from Soviet and continental legal principles as well as on Chinese customary values[81] and one which, is challenged by the current demand for legislation to regulate relationships between different market players.

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76 *Hotz Sandra,* Rechtsvergleichung und Rechtspluralismus, am Beispiel des japanischen Arbeitsverhältnisses, Zeitschrift für Europarecht, Int. Recht und Rechtsvergleichung Heft 3 2012, 132.

77 *Howson Nicols Calcina*, What can the West learn from the Rest?: The Chinese Legal Ordner's Hybrid Modernity, Hastings Int'l & Comp. L. Rev. Vol. 32 No 2, 2009 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1430559 (accessed 4 August 2013).

78 *Graziadei Michele*, Comparative Law as Study of Transplants and Formants, in: Oxford Handbook of Comparative Law, 441, 443, but then again *Watson Alan* was against the inclusion of the sociological and cultural context (Legal Tranplants, An Approach to Comparative Law, 2nd ed, 1993 Athens).

79 *Castellucci Ignazio*, Chinese Law a Hybrid, in: Cashin Ritaine, Donlan, Sychold (eds), Comparative Law and Hybrid Legal Traditions, Lausanne, 10-11 September 2009, Zurich 2010, 75-96, see generally *Black, Bell*, Introduction, 22, for the Japanese legal thinking: *Rahn*, 14, 389, see for hybrids also N XX.

80 *Hasegawa Kô*, The Structuration of Law and its working in the Japanese Legal System: in Moreteau, Vanderlinde (eds) 16. Congrès de l'Académie du droit international à Brisbane, Bruxelles 2002, 319.

81 See only Stratagemes: *Von Senger Harro*, Strategeme Band I 14. Auflage, Frankfurt a.M. 2008 and Stratageme Band II, Bern, München, Wien, 2004.

This *hybrid character* is a common capital of these three legal systems.[82] Each of them is based on a long-acquired ability to innovate (incl. to legislate) and adapt and at the same time preserve strong normative traditions such as eg the Confucian understanding of 'Li' ('Giri', 'Ye'). Today this ability has become – at least in my opinion – one of the strongest and most outstanding traditions of East Asian legal culture itself. Recent trends merely confirm this fact (cf. 2.4), although these processes tend to be more sophisticated and critical) today and include the consultation of international *soft laws* such as the principles of DCFR, PICL, PECL or UNIDROIT.[83] *Vice versa*, at least in the context of recent provisional legislation, Japanese law is also being consulted in Germany and Switzerland.[84] Once the PACL has been published, it will also be taken up at EC or UN level.[85]

3. The institutional context

3.1 Japan

3.1.1 Primary sources of law and legislative bodies

The primary source of the law is a large body of Japanese statutes, codes and acts. The most important codes are compiled in the *Roppô (*六法), literally meaning 'the six law books':[86] the Constitution, Criminal Code, Code of Criminal Procedure, Civil Code, Commercial Code and the Code of Civil Procedure.[87]

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82 *Miyazawa* Setsuo, Pac. Rim L. & Pol'y J. Vol. 22 No 1 2013, 132, for an example of fieldwork in many Asian countries.

83 *Basedow Jürgen*, The Europeanisation of Contract Law and its Significance to Asia, Asia Pacific Law Review 19.1 (2011), 53-71.

84 *Hopt, Steffek* (eds), Mediation – Rechtstatsachen, Rechtsvergleich, Regelungen, Tübingen 2008.

85 The PACL have in fact already been noticed as ‚regional activity', see CISG-AC Declaration No. 1, The CISG and Regional Harmonization, Rapporteur: Professor Michael Bridge, London School of Economics, London, United Kingdom. Adopted by the CISG-AC following its 16th meeting, in Wellington, New Zealand, on 3 August 2012.

86 *Oda*, 51 see for a comprehensive introduction to Japanese Law: *Milhaupt* Curtis J., *Ramseyer* J. M., *West* Mark: The Japanese Legal System: Cases, Codes, and Commentary, University Casebook Series, 2nd ed, New York 2012, see for commented cases in: Business Law in Japan - Cases and Comments. Intellectual Property, Civil, Commercial and International Private Law, *Bälz et al.* (eds), Leiden, Bosten 2012.

87 For English translations of the constitution, the codes and many laws the *‚Japanese Law Translation Database System'* of the Japanese Ministry of Justice http://www.japaneselawtranslation.go.jp/ (accessed 10 August 2013), all laws are found in the Japanese governmental data base is: http://law.e-gov.go.jp/cgi-bin/strsearch.cgi (accessed 10 July 2013).

In 1881 Emperor Meiji called for the drafting of a constitution, which passed into law in 1889.[88] After the country's defeat in WWII, the current fundamentally amended *Japanese Constitution* (憲法, *Kempô;* henceforth: *Kempô*) emerged in November 3, 1946, and has been in effect since 1947. Article 98 reads as follows: '*The Constitution shall be the supreme law of the nation and no law, ordinance, imperial rescript or other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity.'* Today, the Japanese Emperor is the sole 'symbol of the State and of the unity of the people' (Art. 1 *Kempô*), but without any powers relating to government.

The supreme organ and sole legislative body of Japan is the Diet, comprising two legislative chambers (Art. 41 *Kempô*). In practice, before a bill reaches the Diet, the ministries in charge will prepare new legislation or a revision together with an advisory committee composed mainly of legal scholars and officials (cf. 2.4). When a bill passes both chambers, it becomes law (Art. 59). Very recently, there have been discussions on whether to amend Art. 57 (2) of the Constitution and to relax the *two-thirds quota* for the House of Representatives so that a bill could be passed more easily despite opposition by the other chamber.[89]

A further important source of law is the large body of *administrative laws and regulations* (Art. 74 *Kempô*), and going hand in hand with that is a meaningful informal system of *ex ante* administrative regulations (*gyôsei shidô*).[90]

Case law is also of great importance in Japan. Although there is no formal principle of *stare decisis*, decisions of the Supreme Court should be and are followed by the lower courts.[91] Legal doctrine is officially not regarded as a source of law, but it tends to be highly and widely regarded by the practice of jurisdiction.[92]

As already mentioned, the Japanese Civil Code, the *Minpô*, is the comprehensive civil law that regulates most cases of civil law. In addition, there are many substantial laws on specific civil legal issues, such as the Consumer Contract Law (No. 61/2000) and the International Private Law (No./2006).

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88 *Röhl*, 2.
89 *Yomiuri Shinbun* 26 July 2013.
90 *Baum, Bälz*, 52.
91 *Haley,* Judiciary, 99, *Oda*, 43f.
92 Legal doctrine is of greater importance in Japan than it is eg in Switzerland or Germany.

3.1.2 The judicial system

Before the *Meiji* era, there was no legal profession or judiciary apart from the administration agencies. In 1872, the judiciary took a first step as a branch of government, followed by the establishment of the *Daishin'in (The Great Court of Cassation)* in 1875.[93] Although the implementation of the separation of powers was of concern to the *Meiji* Government, the realization of these changes after 200 years of a feudal administrative system was a difficult task. One way of overcoming these obstacles to adjudication was to invite foreign law professors to complete the official training of Japanese judges. Within a couple of years (1890), an independent judiciary was established.[94] However, the courts dealt only with cases of civil and criminal law. So, that the decisions of the administration and its agencies remained outside the scope of the judiciary.[95] This changed with the amendment of the Constitution after WWII. Today, the Japanese court system decides on administrative, civil and criminal matters, whereas the judges are highly educated[96], politically independent and widely trusted.[97] The court system consists of the *Saikô Saibansho* (Supreme Court, henceforth: *Saikôsai*), the high courts, district courts, family courts and summary courts for cases of civil litigation, which do not exceed 1.4 million Yen (approx. €20,000). In addition, the Intellectual Property High Court was established in 2005 as a special separate branch of the Tokyo High Court. Court rulings

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93 *Ginsburg*, Judicial Independence in East Asia, 251.

94 *Ginsburg*, *ibid*., 253.

95 *Dan Fenno Henderson*, The Japanese Law in English: Some Thoughts on Scope and Method, 16 Vanderbilt J. of Transnat'l L. 601 (1983) 607.

96 See for age (currently all are over 60 years) and education, homepage of the *Saikosai*, http://www.courts.go.jp/english (accessed 7 August 2013).

97 Cf. the fairly recent survey of *Ôbuchi Kenichi, Sugawara Ikuo, Teshigawara Kazuhiko, Imazai Keiichiro,* Procedural Justice and the Assessment of Civil Justice in Japan, Law & Society Review, Volume 39, Number 4 (2005), 875, rather positive also *Ramseyer Mark J.,* Do School Cliques Dominate Japanese Bureaucracies? Evidence from Supreme Court Appointments? 88 Washington University Law Review 1681 (2011), 1687, where he draws the conclusion, that Supreme Court judges, who graduated from one one of ‚top Universities', simply write more opinions then others, see generally: *Haley*, The Japanese Judiciary, 99, *more critical* eg: *Foote Daniel H.*, The Supreme Court and the Push for Transparency in Lower Court Appointments in Japan, 88 Washington University Law Review 1745 (2011), who misses ameliorations in the transparancy of the judiciary, *Abe, Nottage*, 2ed ! , who (among others) report, that individual judges, who ‚disobied' their precedents of the Supreme Court, had suffered some sanctions as eg being tranferred to another court or not promoted.

have binding power towards lower instances.[98] The *Saikôsai* is the highest appellate court and its decisions are final. It is also the supreme authority regarding judicial administrational questions and has some legislative power in this field (Art. 77 *Kempô*). The general provisions of competence of the Japanese courts are enacted in the Code of Civil Procedure.[99]

The bursting of Japan's economic bubble in the beginning of the 1990s called the for more practical importance of laws and legal institutions. In 1999, the Japanese government established the (*Justice System Reform Council*).[100] In 2001 it recommended reforms of the legal system in order to realize the 'rule of law', to further *ex post facto* litigation, facilitate access to courts, expedite civil law trials and increase the transparency of the decision-making process and the capacity of the courts, and finally to remodel the legal education system and counter the scarcity of lawyers. One measure aiming to strengthen people's confidence in the system of justice was the introduction of the *Saiban-in seidô* (裁判裁員制動) in May 2009: a system of quasi-lay judges. Thus, in examining certain crimes at district court level, six lay judges serve together with three professional judges, the former being chosen from the citizens by lot.[101] – The *Saiba-in seido* has been, and still is, criticized from within Japan as well as from outside.[102] Thus *Furukai* and *Hans* report that since the introduction of the *Saiban-in seidô* the conviction rate has remained unchanged at the high level of 99.9%.[103] On the other hand, the acquittal rate for

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98 Art. 4 Court Act (裁判所法, *Saibansho hô*) Law No. 59/1957, amended as Law No. 36/2006) provides for the regulations on the courts functions.

99 民事訴訟法及び民事保全法 (*Minji soshō-hō oyobi minji hozen-hō)* Law No. 109/1996, last amendment as Law No. 36/2011.

100 Cf. Homepage of the Justice Reform Council and The Recommendations of Justice Reform Council – For a Justice System to Support Japan in the 21st Century, 12 June 2001, http://www.kantei.go.jp/foreign/policy/sihou/singikai/index_e.html (accessed 23 July 2013) see generally *Foote*, XXI, *Miyazawa Setsuo*, Law Reform, Lawyers, and Access to Justice, 39-89 in: Gerald Paul McAlinn (ed), Japanese Business Law, Kluwer Law International, 2007.

101 *Anderson, Ryan,* 145, during 1918-1943 Japan had made the experince of a ‚full' jury in a limited range of criminal cases (陪審法*, Baishin hô*, Law No. 50/1923).

102 *Setsuo Miyazawa*, The Politics of Judicial Reform in Japan: The Rule of Law at Last?, Asian Pacific Law and Policy Journal Vol 1. Issue 2 (2001) 89-121, *Ibusuki, Makoto*, Quo Vadis?' First Year Inspection to Japanese Mixed Jury Trial, 12 Asian-Pacific L. & Pol'y J. 24 (2010), *Isa Chihiro*, *Saiban-in Seido wa Keiji Saiban o Kaeru-ka?* (Does the Quasi-Jury System Change Criminal Trials?).

103 *Furukai Hiroshi, Hans Valerie,* The Future of Lay Adjudication in Japan and Korea, Yonsei L. J. Vol. 3 No. 1 2012, 1-11, 4.

criminal cases had been significantly higher (17.1%) under a former Japanese Jury Act that foresaw an 'all-lay' jury (1928 to 1943). On these numbers, the authors suggest that citizens' participation in a hierarchical and prestigious administration of justice – as the Japanese one is supposed to be – seems to protect the interests of the defendant. This seems plausible but would need further empirical evidence of the functioning of the all-lay juries in the past, which is hardly available.

By 2004, Japanese legal education had been remodelled:[104] the 'law school' model was introduced, a further goal of the judicial reform. The new system requires graduation from law schools as a precondition for taking the national legal examination. All trainee lawyers, judges or prosecutors are required to pass this examination and must additionally master one year of training at the Legal Research and Training Institute of the Supreme Court. After this change, it might be easier to pass the National Legal Examination and raise the success rate, although *Abe* and *Nottage* point out that this examination remains one of the most difficult in Japan.[105] However, there is no compulsory legal representation. The *ratio* of lawyers to the Japanese population, i.e. approx. 1:4,500, is very low. [106] Many other Japanese law graduates (Bachelor degree) normally find employment in the administration, as notaries, as tax consultants or in private corporations, and generally help to establish a well-functioning alternative dispute resolution system and provide legal information to the Japanese population. [107]

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[104] *Kahei Rokumoto*, Legal Education, in Foote (ed), Law in Japan: A Turning Point, Seattle 2007, 190-232.

[105] *Abe, Nottage*, .

[106] The numbers of district law cases in Japan eg show for the periode 1998 to 2000, that in 32'000-34'000 cases of totally 156'000 – 157'000 there was no representation by a lawyer at all: *Yasuhei Taniguchi*, Representation in Japanese district Court Cases, in: Foote (ed) Law in Japan: A Turning Point, 2007, 80- 98, 87. The Reform Council intended an augmentation of 3'000 succesful candidates p.a. and an increase up to 50,000 legal professionals by 2018. The statistics so far show an increase to 31'000 professionals in 2010 from 17'000 in 1999 and in 2009 there were 2'200 sucessful candidates, whereas in in 1999 only 500 had passed: see the homepage of the *Nichbenren* (Japanese Association of the Lawyers) http://www.nichibenren.or.jp/en/ (accessed 10 July 2013).

[107] *Riles Annalise, Uchida Takashi*, Reforming Knowledge? A Socio-Legal Critique of the Legal Education Reforms in Japan" (2009). Cornell Law Faculty Publications. Paper 37, about 50'000 p.a.

3.1.3 ADR

There are basically three types of ADR in Japan: judicial, government-mediated and private ones.[108] Of these, the judicial ADR (*,hereforth: Chôtei*) [109] in the form of civil law conciliation, and especially domestic relations conciliation, have the longest tradition. These are also the most frequently applied today, being statutory for family proceedings before litigation. [110] *Chôtei* can be defined as a pre-litigation procedure conducted through the regular summary and district courts. On average, every third newly filed civil case goes to *Chotei.* The procedure is quick and inexpensive.[111]

Besides the Chôtei procedure, different forms of ADR (hereforth: *chûsai*) developed, such as the further evolution of government mediation procedures:[112] In the field of consumer protection, for instance, a special conciliation process was established by law in 1999 for cases of excessive debt. Moreover, special 'consumer lifestyle centres' were established by local governments, and some private-sector institutions included ADR processes in this field as well: examples are the Moneylenders Association (Tokyo) and the Bankers Association (Tokyo).[113] Today in Tokyo there is also a governmental mediation service available for non-custodial parents to help them see their children.[114] – However, private commercial arbitration within Japan and local arbitration centres are not

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[108] The terminology/translations are not everywhere as distinct, often mediation/conciliation are blurred (eg Chinese law: *Pissler*, ZChinR 2008, 310), but if possible hereafter the following is used: ‚mediation' (German ‚Mediation', Japanese: *assen, chûsai*) as voluntary and non-binding, whereas ‚conciliation' (German: ‚Schlichtung', Japanese: *chôtei*) is sometimes statutory as the *Chotei* can be and a conciliator is more directive in his/her advice than a mediating person and ‚arbitration' is a specific form, since the parties have chosen specific arbitators to decide on a case in (German: Schiedsgerichtsverfahren, Japanese: *chûsai*). ‚ADR' stands for all forms of dispute resolution outside court.

[109] 調停 (*chôtei).*

[110] *Baum, Schwittek, Burkei*, 1375, *Iwazaki Kazuo,* Japan in: Pryles (ed) Dispute Resolution in Asia, 3rd. ed, 2006, 201-235.

[111] The main sources of law for the conciliation before court are: The Civil Conciliation Act (民事調停法, *Minji chôtei hô*) Law No. 222/1951 regulates ‚conciliation' made by commissioner/committee organized by court and the trial, decision and conciliation for cases relating to families is regulated by the Domestic Relation Trial Act (家事審判法, *Kanji shinpan-hô*) Law No. 152/1947, see further *Minamikata Satoshi*, Mediation for Mediators?, *Hosei Riron*, vol. 39 no.1 2006, 133.

[112] *Motoko Yoshida*, Recent Development in ADR in Japan, ZJapan/J. Japan L 20 (2005) 193.

[113] *Baum, Schwittek, Burkei,* 1377.

[114] *Yomiuri Shinbun*, 20 November 2012 (11/20/12 DYYSHIM 3).

widespread in Japan;[115] on the other hand, international dispute resolution is widely used.

The first Japanese arbitration legislation was already enacted as part of the Civil Procedure Code in 1890. The oldest arbitration institution is the Japan Shipping Exchange, established in 1912.[116] The Japanese Commercial Arbitration Association (JCAA) goes back to 1950 and still follows its own rules, which are consistent with the Arbitration Law. Besides arbitration in international business, it eg offers administrative mediation among Japanese business partners under the UNICTRAL rules.[117] Following the recommendations of the Justice Reform Council to reform the arbitration regulations as well, a new Arbitration Law was passed on August 1, 2003 (henceforth: *Chûsai hô*).[118] In broad outline, the law follows the UNICITRAL Model Law on International Arbitration of 1985.[119] A feature specific to Japanese civil litigation *and* arbitration remains that a judge acting as an arbitrator may impose a settlement at any stage of the proceedings. However in the case of arbitration, this only applies when all parties have previously come to a written agreement (Art. 38 *Chûsai hô*).[120]

Alternative dispute resolutions have a long historical tradition,[121] which is something Japan shares with the civil legal systems of Korea and China (cf. 3.3.3, 3.3.5).[122] Also, the outstanding success of Japanese ADR probably stems from the fact that Japanese citizens have access to all relevant legal information without going

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115 *Nakamura, Nottage*, 231.

116 According to the statistics of the Japanese Shiping Exchange the arbitration cases p.a. in Shipping or Maritime affairs have not dimished substantially since 1991, but there are more withdrawn cases: *Taylor, Pryles*, 25.

117 *Nakamura, Nottage*, 252.

118 仲裁法 (*Cûsai hô*) Law No. 138/2003, in force since March 1, 2003, transl. by Arbitration Law Follow-up Research Group, available http://www.kantei.go.jp/foreign/policy/sihou/arbitrationlaw.pdf (accessed 3 August 2013).

119 It contains special provision to protect consumers (Art. 3), eg a writtten notice to the consumer, explaining the procedure, the information that a cancelling of the arbitration is possible at any time and a non-appearance means such a cancellation: *Nakamura, Nottage*,235.

120 Art. 38 (1)(2) Chûsai hô reads as: (1) If, during arbitral proceedings, the parties settle the civil dispute subject to the arbitral proceedings and the parties so request, the arbitral tribunal may make a ruling on agreed terms. (2) The ruling as provided for in the preceding paragraph shall have the same effect as an arbitral award.

121 *Röhl*, 665, Baum, Schwittek, Burkei, 1374.

122 *Ali*, *Shala F.,* Arbitration in Asia in a Comparative Perspective: Examining the Role of the Arbitrators in Facilitating Settlement, in: Ali, Ginsburg (eds). International Arbitration in Asia, 3rd ed, New York 2013, 1-51, 34, 39.

to court,[123] which again is one reason for the relatively low litigation rate in Japan.[124]

3.2. South Korea

3.2.1 Primary sources of law and legislative bodies

Here too, six Acts are at the centre of a large body of legislation: the Constitution, the Criminal Act, the Criminal Procedure Act, *Minpŏp* (Civil Act), the Civil Procedure Act and the Commercial Act.

The current *Constitution of the Republic of Korea* (대한민국 헌법/大韓民國憲法, henceforth: *Hŏnpŏp*) was enacted in 1987.[125] The first line of its Preamble reads: '*We, the people of Korea, proud of a splendid history and traditions dating from time immemorial, [...]*'.[126] A salient point is that the Constitution awards the Constitutional Court jurisdiction over questions of impeachment.[127] – This is completely reasonable in view of the fact that the *National Assembly,* which makes these decisions, is unicameral. This legislative body is elected directly by the citizens (by secret

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123 *Riles Annalise, Uchida Takashi*, Reforming Knowledge? A Socio-Legal Critique of the Legal Education Reforms in Japan" (2009). Cornell Law Faculty Publications. Paper 3, proposing that the many legally trained people, without top-degrees, are important actors in the ADR knowledge system.

124 This is one of the best researched topics in Japanese legal doctrine, although I'm afraid one without final answers, see for comprehensive overviews on this issue: *Feldmann*, 58, *Anderson, Ryan*, 141, *Ginsburg Tom*, *Hoetker G*, The Unreluctant Litigant? An Empirical Analysis of Japan's turn to Litigation, University of Illinois College Law, Law and Economic Working Papers 14, 2004.

125 (대한민국 헌법/大韓民國憲法 (*Taehanmin'guk Hŏnpŏp)* 29 October 1987, effective since 25 February 1988 see http://english.ccourt.go.kr/home/att_file/download/Constitution_of_the_Republic_of_Korea.pdf (as of dec. 3rd 2012), South Korea's first Constitution (1948), was based on the Weimar system. It has been amended many times and largly rewritten five times (constitutions of 1960, 1962, 1972, 1980, 1987).

126 Whereas the first line of Japanese Constitution reads according to its history: ‚We, the Japanese people, acting through our duly elected representatives in the National Diet The Japanese Constitution (1946) reads: ‚We, the Japanese people, acting through our duly elected representatives in the National Diet determined that we shall secure for ourselves and our posterity the fruits of peaceful cooperation with all nations and the blessings of liberty throughout this land, [...]

127 Art. 111 (1), Art. 113 *Hŏnpŏp*, cf. *Lee*, Law, Politics and Impeachment, The impeachment of Roh Moo-hyun from a Comparative Constitutional Perspective, American Journal of Comparative Law Vol. 53 (2005) 403-406, 409: In March 2004 former Korean president Roh Moo-hyun was empeached by the National Assembly, then reinstated by the Constitutional Court (2004 HunNa 1, May 1, 2004). The impeachment vote threw the country into a state of turmoil.

ballot).[128] However, certain legislative powers are also delegated to the President and Executive (Art. 52, 73, 75). Specifically, any bills passed by the National Assembly must be promulgated by the President. The latter may ask for them to be reconsidered, but once the National Assembly has done so and does not wish to make any changes, the Act comes into force (Art. 53). The law also grants the judiciary a certain competence to legislate (Art. 108, 113 (2)).[129]

As already mentioned, the *Minpŏp* was enacted in 1958. It retains the overall 'pandectistic' structure of the German Civil Code and is divided into five books, with general provisions forming its first part. Thus the content of Article 1 is very close to Art. 1 of the Swiss Civil Code (1907) and reads as follows: '*In civil matters, if there is no applicable provision in the Statutes, customary law shall apply, and if there is no applicable customary law, sound reasoning shall apply.'* However its direct source was Japanese law.[130] – An emphasis on customs as a source of law has remained an issue in Korean legal doctrine relating to judicial decisions up to today:[131] In the past, it was a source of 'indigenous' and 'national' law in contrast to the 'colonial law', but is now applied more often in the context of constitutionality. [132] The *Minpŏp* is comprehensive, and most civil disputes are regulated by this code. However, special acts are enacted in some areas such as employment and leasehold law.

At this point, mention will be made only of the International Private Act that follows the pattern of the civil code and gives a clear account as to when Korean courts are in charge and when Korean laws are applicable.[133] Korea acceded to the United Nations Convention on Contracts for the International Sale of Goods

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128 Art. 40-65, 41 *Hŏnpŏp*.

129 *Park Young-Do*, Verfassungsrecht, in: Einführung in das koreanische Recht, 2010 Berlin, Heidelberg etc, 11ff, 25, on politics: *Kim Youngmi*, The Politics of Coalition in South Korea, Between Institution and Culture, Abingdon, New York, 2011, 111.

130 *Kim*, Law and Custom, 58.

131 *Kim*, Law and Custom, 286.

132 *Kim*, Law and Custom, *Choi,* 221, for the latter, the active role of the Constitutional Court and the pluralisation of society are two factors, see further *Hahm*, 6 ff., generally on the Constitutional Court,. *West, James M, Yoon*, *Dae-Kyu* The Constitutional Court of the Republic of Korea: Transforming the Jurisprudence of the Vortex? 40 Am. J. Comp. L. 73 (1992).

133 Name Koranisch enacted in 7 April 2001, Statutes of the Republic of Korea, III, 817, Journal of Korean law 2001, 204, translated into English by The Ministry of Government Legislation: http://www.moleg.go.kr/english (accessed 17 July 2013), judgements are systematically reported in Supreme Court Reports (*Gong*).

(CISG) without any reservations on February 17, 2004, and this has been in force since March 1, 2005.[134] Unlike the *Minpŏp*, for example, which is very strict on additional and different terms for the 'accepting' party that may become a counter-offer or a rejection, the CISG makes relevant distinctions for the 'acceptance' of a contract.[135]

3.2.2 The judicial system

The Korean judicial system is composed of district courts, the high courts and the Supreme Court. Besides that, there are some special courts such as the Patent Court, two Family Courts (Seoul 1963, Busan 2011) and the Administrative Court. The Patent Court is at the same level as the high courts and has jurisdiction over the entire nation.[136] The other two courts are co-equal to the district courts.

The *Supreme Court of Korea* is the final appellate court, while another special court system deals with military trials.[137] Supreme Court judges are appointed for ten years (renewable mandates), but cannot be removed from office except for impeachment or imprisonment.[138] One controversial point in this doctrine was the *'selection pool of judges'*: Since most judges are selected and appointed from the training institute run by the Supreme Court, they are relatively young and inexperienced.[139] However the age of the future judges will be raised gradually since the amendment of the Court Organization Act in 2011; until 2022 a Supreme Court

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134 This means, that between South Korea, China (since 1986) and Japan (since 2009) today the CISG is applicable as 'national law', unless it is excluded. Whereas China made a reservations to Art. 1 (b) CISG, meaning, that when one party is located in a non-contracting state, the treaty does not apply: cf. http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10&lang=en (accessed 26 July 2013). The District Court for the Eastern Seoul in Korea gave a judgment on a supply contract between a Korean corporation and a Chinese one in 2007: 2006 Gahap 6384, cf. *Shin Chang Sop*, The Enforcement of the United Nations Convention on Contracts for the International Sale of Goods: A Case Comment, Asian Business Lawyer 57 (2009) 4.

135 *Yun Sung Seung*, Additional Terms and Warrants under the U.N. Convention on Contracts for the International Sale of Goods (CISG), Korean Yearbook of International Law Vol. 4 2004, 203-226,211.

136 Art. 3(1) of the Korean Court Organization Act, enacted 1 March 1998, amended 18 July 2011.

137 Art. 101-110 *Hŏnpŏp*, Art. 110 (2), judgements are systematically reported in Supreme Court Reports *Gong*.

138 The Chief Justice is only appointed for a six year term and he can not be re-appointed (Art. 105 (2) *Hŏnpŏp*.

139 *Kwon*, 165.

judge shall have 10 years of working experience prior to his/her appointment.[140]

The *Constitutional Court* of Korea was established in 1988, modelled after the Federal Constitutional Court of Germany or according to *Hahm* a 'European-style' Constitutional Court was established.[141] It consists of nine judges, who are appointed by the President of Korea for a six-year term (renewable mandates).[142] It is a specialised body set up to adjudicate constitutional matters such as the constitutionality of statutes, petitions and impeachments, or the dissolution of political parties.[143] – It is separated from the judiciary. If a lower court has to decide in a specific case on the constitutionality of the applicable law and regards this as unconstitutional, it has to request adjudication by the Constitutional Court. In contrast, this request is not needed when it assumes the constitutionality of the immediate applicable acts relevant to the outcome of the case. In fact, any adult can bring his case to the Constitutional Court, which is one reason why its political impact is so great.

After the removal of the authoritarian regime and the beginning of the democratization process in South Korea in 1987[144] also the 'democratic concern' for legal revisions became more and more important.[145]

The judicial reforms at the heart of the *Roh Moo Hyun* administration (2003-2008) were then mainly two-fold:[146] 1.) Since public participation in the judiciary is regarded as an important way to promote the 'spirit of democracy', the introduction of a pilot project for criminal proceedings in 2008 was one aim.[147] Two

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140 Cf. Introductory Book of the ‚The Supreme Court of Korea' of March 2012, available at the their homepage (accessed 23 July 2013), 1-77, 23.

141 *Hahm, 7*, *Ginsburg*, Judicial Review, 218.

142 Art. 112 (1), Art. 111 *Hŏnpŏp*.

143 *Ginsburg*, Judicial Review, 213, 239, see further Art. 111 (3) *Hŏnpŏp*.

144 *Cho Kuk,* Transitional Justice in Korea: legally coping with past wrongs after democratisation, in: Yang (ed), Law and Society, Seoul 2013, 189-224,

145 *Lee Jay Hyup*, Getting citizens involved: Civil participation in judicial decision making in Korea, East Asian Law Rev. 2009 Vol. 3 177-, 181.

146 *Furukai, Hans*, Lay Adjudication in Japan and Korea, Yosei Law J. Vol. 3: 1 (2012) 1, *Lee Jae-Hyup*, Korean Jury Trial: Has the New System Brought About Changes? Asian-Pac. Rim L. & Pol' J. 2010 Vol. 12: 1, 58,

147 Or as a young Korean scholar puts it with *Toqueville: The jury is before everything a political institution, one ought to consider it as a mode of the sovereignty of the people. Kim Junho*, The Challenges and Outlook of ot Trial by Jury in Korea, Journal of Korean Law 455 (2009), 456, Act for Civil Participation in Criminal Trials *(*형사 재판의 시민 참

points are of interest from a continental European standpoint: firstly, the defendant's consent is needed for a jury trial (Art. 36 (1)), a fact which accounts for the low number of cases.[148] Secondly, jurors are laymen who are not entirely chosen randomly from the public. They are selected from graduates undergoing legal probation, academia or NGOs, a situation which comes close to a form of specialized court.

The *legal education* is similar to that of the Japanese judicial system:[149] after graduation, a period at judicial research training at an institute run by the Supreme Court and a national judicial examination guarantees quality and strong homogeneity among all legal professionals in Korea, regardless of their future profession. On comparable grounds as in Japan, reforms were required to address issues such as the scarcity of attorneys, a very low pass rate of 1-5% for the bar exam, a lack of international legal knowledge as well as of transparency and diversity among professionals due to their homogenous legal training and the power of the public sector.[150] Many Korean lawyers and legal scholars have been and still are active in learning Western law and jurisprudence.[151]

The founding of 25 law schools (2009) characterized by a general shift from an academic to a more practical focus, so that over time more candidates will pass the bar exam and more diverse professionals will be equipped for a global business life.[152] This on-going process also led to the Foreign Legal Consultants Act (2009),

여에 대한 행동, *Gukminui hyeongsajaepan chamyeoe gwanhan beopryul*), Law No. 8495, 1 June 2007.

148 *Han Sang Hoon, Park Kwangbei*, Yosei Law J. Vol. 3: 1 (2012) 1: these authors state, that the numbers are increasing.

149 See generally *Choi Dai-Kwon*, *Rokumoto Kahei* (eds), Judicial System Transformation in the Globalizing World 6-7, Seoul 2007, 383.

150 *Kwon*, 159.

151 *Choi Chongko*, Traditional Legal Thoughts in Korea, J. of Korean Law 75 (2003),77.

152 *Kwon*, 175.

which authorizes a partial opening up of the domestic market for legal services.[153]

3.2.3 ADR

Conciliation, whether before a court or out of court, also has a long tradition in Korea. The Korean *Judicial Conciliation of Civil Disputes Act* [154] regulates a simple and relatively informal procedure to conciliate private parties before district courts and their branches or equivalent administrative institutions. Conciliation is not statutory, but the judge in charge of a case can decide whether to manage the conciliation himself or to order a committee to do so. He/she may also call for a mandatory conciliation, such as when mediation has failed or was rejected by one party (Art. 30). – Conciliation can also be statutory and be run by special administrative agencies, such as the Copyright Deliberation and Conciliation Committee.

Private arbitration also grew in Korea during the 1960s, when the National Arbitration Act was promulgated (1966).[155] The Korean Commercial Arbitration Board (KCAB) has existed since the 1970s (first under another name) and is the sole authorized arbitration institution in the country. Arbitration in international transactions and domestic commercial disputes has become common in South Korea.[156] The *Arbitration Act* was amended in 2010 in order to make it consistent with the UNCITRAL Model Law. It defines arbitration as a procedure designed to resolve any disputes under private law by arbitrators or by awarding arbitration, if agreed by the parties (Art. 3 (1))[157] and applies to domestic *and* international arbitrations (Art. 2).

The KCAB operates with domestic and international arbitration rules, the latter applying directly to any case of KCAB arbitration

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153 By Presidential Degree No. 9524, 25 March 2009, effective 26 Sept 2009, cf. *Choi Kyungho*, Korean Foreing Legal Consultant Act, Legal Profession of American Lawyer in South Korea, Asian-Pac. Rim L. & Pol'y J 2009, 101: A major reason for this step was the Free Trade Agreement with the US, signed in 2007 and stating that the Korean market shall open up.

154 (사법 화해 법, *sabeob hwahae beob*) promulgated as Law No. 1767, 16 March 1966, amended as Law No. 10207, 31 March 2010 available http://www.moleg.go.kr/english/korLawEng?pstSeq=52693 (accessed 3 August 2013).

155 (중재법해 법/ 仲裁法, *jungjaebeobhae beob*) promulgated as Law No. 547, 4 April 1960, amended as Law No. 10373, 23 July 2010.

156 *Chang,* 251, *Yoon, Kim, Lee,* 263.

157 Which could mean eg, that an environmental case is not in the scope of arbitration: *Yoon, Kim, Lee*, 273.

with an international character.[158] The parties can request mediation in any procedure and the KCAB also offers mediation before arbitration.[159] In fact, the KCAB has run some 800 mediations a year with a success rate of 50%.[160]

Despite being called an 'arbitration procedure',[161] the dispute settlement procedure of the Korea-EU Free Trade Agreement, which evolved from the WTO dispute settlement mechanism, is not a legally binding form of arbitration (with an award). Instead, it provides for the following procedure: consultation followed by the establishment of a panel, resulting in the submission of a report by the panel and ultimately the implementation of the report.

3.3. China

3.3.1 The people's congress system and legislative bodies

According to the Chinese Constitution (中华人民共和国宪法 ,*Zhonghua renmin gongheguo xianfa*, henceforth: *Xianfa*)[162] the National People's Congress (NPC) is the highest state organ, the Standing Committee being its permanent body (Art. 57 *Xianfa*). The NPC is unicameral and composed of approx. 3,000 deputies, who are elected for a period of five years. The Standing Committee of the 12th NPC has 176 members, whereas the day-to-day work is performed by the Chairmen's Council (Art. 68 *Xianfa*). The NPC with its Standing Committee officially represents the legislative power.[163] However, the people's congress system comprises many different legislative bodies with various competences. The

[158] Cf homepage of the KCAB: www. kcab.or.kr (accessed 23 July 2013), *Yoon, Kim, Lee,* 264.

[159] *Chang*, 256.

[160] Homepage of the KCAB: www. kcab.or.kr (accessed 23 July 2013), see ICC Statistics 2012.

[161] *Kim Hee-Sa*n, Dispute Settlement Mechanisms of Korea-Eu FTA, Yonsei Law Journal 205 (210).

[162] Promulgated on December 4, 1982[162] and partially amended since then. The Constitution of the Peoples' Republic of China, in English http://www.npc.gov.cn/englishnpc/Constitution/2007-11/15/content_1372965.htm (accessed 26 July 2013), The first Constitution was adopted in 1954, but revised comprehensively in 1982, critical voices also refer to the *Xianfa* as a ,national declaration' instead of a constitution: *Clark*, 42.

[163] Art. 58 *Xianfa*.

Constitution and the Chinese Legislation Law (henceforth*: Lifafa*) list the following:[164]

- Only the NPC has the power to amend and enforce the Constitution[165] and to enact and amend basic laws governing criminal offences, civil affairs, state organs and other matters (Art. 62 (1-3) *Xianfa*). 'Basic laws' are those national laws that relate to fundamental elements of the state and society.
- The Standing Committee may enact all other laws and interpret the basic laws and the Constitution (Art. 67 (1-4) *Xianfa.*).[166]
- The *State Council* is the highest organ of the administration and can thus enact administrative regulations (over 600 by today[167]) in accordance with the laws and the Constitution.[168]
- Various ministries,[169] commissions, the People's Bank of China, the Auditing Agency and a body reporting directly to the State Council and exercising regulatory functions, may enact administrative rules within the scope of their authority (Art. 71 *Lifafa*). The ministerial administrative rules form the largest group of legal enactments that are relevant in daily life.[170]
- The President of the PCR may also enact statutes (Art. 81 *Xianfa*).

The NPC also elects the *President and Vice-President of the PRC* (Art. 62 (4) *Xianfa*) and appoints the Premier of the State Council on the basis of a nomination by the President.[171] And the NPC elects the *President of the People's Supreme Court* as well as the Procurator-General of the People's Supreme Procuratorate (Art. 62 cif. 7, 8 *Xianfa*).

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164 中华人民共和国立法 (*Zhonghua renmin gongheguo lifafa*), enacted on March 15, 2000, effective since July 1, 2000, available http://english.gov.cn/laws/2005-08/20/content_29724.htm (accessed 3 August 2013).

165 Amendments to the Constitution must be proposed by the Standing Committee or by one-fifth or more of the NPC deputies, and they must be passed by a two-thirds majority vote of all deputies.

166 Although it is not clearly defined what falls in the range of ‚basic laws': WANG, ;

167 *Wang*, 34, cf. law reporter: State Council Gazette (official), Lawbook.com.cn (visited July 5, 2013).

168 Art. 89 (1) *Xianfa*, Art. 7, 12, 56 *Lifafa.*

169 See for an example: ‚*The Guidelines on the Examination and Approval of Contracts and Articles of Association of Foreign Investment Enterprises'* 11 July 1991 by the Ministry of Foreign Economic Relations and Trade, published by the Ministry of Foreign Trade and Economic Cooperation, 5 October 1993, reported in: State Council Gazette and Ministry and Commission websites, Law-book.com.cn (visisted 5 July 2013).

170 *Wang*, 36.

171 See for further appointment of the NPC (Art. 62 (5) *Xianfa*).

This brief outline of the state structure and the organization of the NPC shows that although a distinction is made between different state functions, there is no strict separation of powers in *Montesquieu's* sense. Whereas this state structure exists *de jure*, power is still held by the Chinese Communist Party (CCP),[172] which is now almost 100 years old, works on all levels and holds the great majority of the deputies in the NCP, the Standing Committee and the State Council as well as further state functions.[173]

3.3.2 Primary sources of law

The current *Xianfa* was promulgated on December 4, 1982[174] and partially amended four times. One distinct feature of the Constitution is the overall supremacy of the socialist system.[175] A new paragraph to Article 11 was adopted with the first amendment on April 12, 1988. It reads: '*The State permits the private sector of the economy to exist and develop within the limits prescribed by law. The private sector of the economy is a complement to the socialist public economy. The State protects the lawful rights and interests of the private sector of the economy, and exercises guidance, supervision and control over the private sector of the economy.*' The fourth amendment to the Constitution in 2004 added a basic provision on human rights (Art. 33).[176]

Only formal and important national regulations enacted by the NPC or its Standing Committee are called laws, such as the Criminal Law, the Criminal Procedure Law, the Contract Law and the Civil Procedure Law.[177] Besides laws, various administrative and administrative regulations and a wide range of different local enactments have emerged.[178] In fact, an impressive legal body has

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172 *Wang*, 42, P*eerenboom*, 241.

173 Peoples' Daily Online 29 March 2013: The Organization status of the CPC (visited 26 July 26, 2013).

174 The Constitution of the Peoples' Republic of China, in English http://www.npc.gov.cn/englishnpc/Constitution/2007-11/15/content_1372965.htm (visited in July, 2013), The first Constitution was adopted in 1954, but revised comprehensly in 198, *Clark,* 42.

175 Art. 1 (2) *Xiafa*.: ,*The socialist system is the basic system of the People's Republic of China. Disruption of the socialist system by any organization or individual is prohibited.'*

176 Art. 33 (2-4) *Xiafa*: *,(2) All citizens of the People's Republic of China are equal before the law'. (3) The State respects and preserves human rights. (4) Every citizen is entitled to the rights and at the same time must perform the duties prescribed by the Constitution and other laws.'*

177 Cf. Official law reporter: The Gazette of the State Council (中华人民共和国务院公报せ *Zhongua Renmin Gongheguo Guowuyuan Gongbao*).

178 Cf. Art. 63, 64 *Lifafa*.

become established within the last 30 years, which has also given rise to the notion of a 'battling chaos'[179] and raised the question as to whether the state is meant to 'rule by law' rather than implement the 'rule of law'.[180] – Generally, it is important to recognize the meaning of the administrative regulations and the top-down hierarchy of the different legal norms: the constitution, laws, administrative regulations, local regulations and ministerial administrative regulations are equal to the local ones.[181]

The *Judicial Interpretations* (司法解释*, Sifa jieshi*) of the laws and statutes by the Supreme People's Court can be a further source of law*,* [182] although there is a doctrinal question as to whether their legal basis is sufficient:[183] Nevertheless they are called 'secondary laws'.[184] A resolution of the NCP Standing Committee in 1981 permitted the SPC to enact judicial interpretations,[185] although the Constitution itself remains ambiguous. The main purpose of these judicial interpretations was and still is to guarantee the uniform application of the law in general (Cf. 4.3.2).

Jurisdiction and legal doctrine are generally no sources of law. Because of this reason, they are relatively seldom cited in Chinese

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179 The impression of a lack of clear line of the legislative authority: PEERENBOOM, 2002, at 239 *sub seq*, at 241.

180 *Peerenboom,* 8, 559.

181 Art. 79-82 *Lifafa*, *Wang*, 39.

182 The civil division of the Supreme People's Court edits two academic series: 'Reference and Guide to Civil Trial' (Law Press, 2000-, quarterly) and 'Civil and Commercial Trial Review' (Law Press, 1999-, irregularly). Apart from the judicial interpretations connected with civil trials, these series also contain special columns such as the policy of civil justice, directive proposals of the SPC, important judgements and speeches of the leaders of the Supreme People's Court delivered in symposiums relevant to civil trial.

183 *Wang*, 24, 37 set's a question mark to the qualitiy of the judicials interpretations as equivalents for case laws, *Pissler Knut Benjamin* rises eg the question in which way the reference materials used fort he judicials interpretations may be considered als source of law: ZChinR 2012, 381, see further: *Peerenboom Randall*, Courts as Legislators, The Rule of Law in China Series, Policy Brief 1, The Foundation of Law, Justice and Society, Oxford 2006, *Ahl Björn*, Die Justizauslegung durch das oberste Volksgericht der VR China – Eine Analyse der neuen Bestimmungen des Jahre 2007, ZChinR 2007, 251, *idem*, Neue Massnahmen zur Vereinheitlichung der Rechtsprechung, ZChinR 2012, 1, see for a reprint in: ZChinR 2007, 322-327: 最高人民法院关于司法解释工作的规定 (Provisions of the Supreme People's Court judicial interpretation on the Bestimmungen des Obersten Volksgerichts über die Justizauslegung vom 26.3.2007).

184 *Keith Roland, Zinqui Lin,* Judicial Interpretation of China's Supreme People's Court as ‚Secondary Law' with Special Reference to Criminal Law, China Information (Sage Journals vol. 23 no. 2 (2009), 223-255.

185 *Chen Hongyi*, An Introduction to the Legal System of the People's Republic of China, Hong Kong 2004,119.

judgements, but nevertheless considered.[186] Further, not all Chinese court decisions or cases are published and available to the public.[187]

3.3.3 Judicial system

According to the Organic Law of the People's Courts (henceforth: *Zuzhifa)*[188] the Chinese court system consists of courts at four levels: the basic, intermediate, higher and People's Supreme courts. There are also military courts and other special courts such as the railway, water transportation and forestry courts (Art. 2 *Zuzhifa*). But the Chinese system also involves *two hearings*, ie once a court at the next higher level has reviewed a case and made its judgement, the verdict is final (Art. 12 (1) *Zuzhifa*).[189] The existence of one appellate instance leads unsurprisingly to the fact that lower courts don't regard Supreme Court decisions as very relevant.[190]

The *People's Supreme Court* (SPC) is the highest court in the judicial organization of the PCR[191] and exercises judicial power independently (Art. 4 *Zuzhifa*).[192] As the supreme appellate court, it makes final decisions in criminal, civil, economic and administrative cases. First hearings are practically non-existent.[193] Chinese courts are organized in a formal and bureaucratic manner, with distinct hierarchies among the judges.[194] At the very top of the hierarchy stands the SPC as the supervisory organ over the practices of the people's courts and the special people's courts at all levels.[195] However, its jurisdiction does *not* extend to the courts of

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186 *Han,* 73.

187 Cf. Gazette of the Supreme People's Court (最高人民法院公报 *Zuigao renmin fayuan gongbao),* www.court.gov.cn/qwfb/zgrmfygb; *http://www.lawyee.net/Case/Case.asp;* Legal Daily (www.legaldaily.com.cn) is a People's Republic of China state-owned newspaper under the supervision of the PRC Ministry of Justice and covers legal developments.

188 中华人民共和国人民法院组织法, (Zhonghua renmin gongheguo renmin fayuan zuzhi fa,)

189 *Wang,* 47.

190 *Ahl Björn*, Neue Massnahmen zur Vereinheitlichung der Rechtsprechung, ZChinR 2012, 2ff.

191 最高人民法院 (Zuigao renmin fayuan), cf. Supreme People's Courts webpage in Chinese, http://www.court.gov.cn/jgsz/rmfyjj) and in English, http://en.chinacourt.org. (visited in July 2013), for the reports see the Gazette of the Supreme People's Court (最高人民法院公报 *Zuigao renmin fayuan gongbao).*

192 One of the ‚hot' topics in doctrine: Cf. *Peerenboom* (ed), Judicial Independence in China.

193 *Wang*, 45.

194 *Liu*, 91, 93 eg an interview-partner said, that the authority of the courts president was enormous.

195 All peoples' courts can also give advice and make suggestions to administrial agencies in the form of judicial suggestions.

the administrative regions of Hong Kong and Macao.[196] – The SPC reports its work to the NPC and its Standing Committee, which have the right to remove the President and Vice Presidents as well as all members of the jury from their positions (Art. 63 *Xianfa*).

There are also *judicial committees* on all levels of the Chinese court system: they comprise senior judges who discuss important legal cases and are 'mandated' to give their opinion on the courts (Art. 11 *Zŭzhifa*). In reality, this can lead to cases being discussed and decided 'off-bench'.[197] – If we also consider that these judicial committee judges of the SPC are elected by the NCP (by nomination of the SPC President, Art. 11 (2) *Zuzhifa*), it becomes clearer just how the theory of '*democratic centralism'* (Art. 11 *Zuzhifa*) can be realized. – Furthermore, the judicial committees can step in to exercise 'informal' supervision when a 'mistake' occurs in a court ruling (Art. 14 *Zuzhifa*), although this form of interference is now restricted by law. – However, interference by the Party (although not on a daily basis) and by administrative agencies is not uncommon, mainly within administrative procedures[198] Not that long ago, a couple of Chinese scholars (lead of *Zhang Quianfan*) and attorneys made a public attempt for a consual constitutional reformproject in 2012,[199] which contains eg a call for less interference with the courts by the administrational agencies and judicial committees.

In 1999 the NCP decided to initiate a *'judicial reform'* (推进司法改革 *Tuijin sifa gaige*) and soon afterwards the SPC announced a five-year reform plan to build a fair and well-functioning judicial system:[200] Procedural 'fairness' was and still is at the heart of these

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196 Cf. Art. 82 Basic Law of the Hong Kong Special Administrative Region, http://www.basiclaw.gov.hk/en/index/index.html (accessed 12 July 2013) and Art. 82-94 Basic Law of the Macao Special Administrative Region, in English, Portugese and Chinese: http://www.umac.mo/basiclaw/english/main.html (visited 12 July 2013).

197 This practice is criticized and discussend within and outside China: 肖黎明, 湖北省委承诺不干预司法机关独立办案 法制日报 (*Liming Xiao*, Hubei Provincial Party Committee Pledged Not to Interfere with the Independent Adjudication of Judicial Organs, *Legal Daily 15* April 2003, available at http://www.legaldaily.com.cn/gb/misc/2003-04/15/content_23755.htm (visited 4 August 2013), *Wang*, 50 with further references to critiques, but also with a pro-argument, that the education of Chinese Judges can be promoted effectivily in this way, *Peerenboom*, 2002, 281.

198 *Yulin Fu, Peerenboom Randall*, A New Ananlytic Framework for Judicila Inependence, in: Peerenboom, Judicial Indepence, 95-133, 97.

199 *Ahl Björn*, *Der Machtwechsel und die Hoffnung auf Rechtsreformen, ZChinR 2013, 6-12*, 9 f.

200 Supreme Peoples Court: The People's Courts' Five-Year Reform Plan (最高人民法院:人民法院五年改革纲要, *Rénmín fǎyuàn wǔ nián gǎigé gāngyào*) October 20, 1999, see only

judicial reform plans. The Civil Procedure Law ()[201] was revised in 2012[202] to amend some procedural practices: its *new* provisions state, for example, that professional and lay judges and other administrative persons must withdraw when any decision is taken that affects members of their families and when any other conflicts of interest exist (Art. 44). The scope of re-examining a case was also extended, a change, which could lead to 'a de-facto third judicial instance'.

The Chinese judiciary of today is by no doubt stronger than it was 30 years ago and the SPC determines after *Hualing* and *Fullen* the professional side of civil justice, tops the judicial hierarchy, is in possession of the legal knowledge, is free to make and interpret the rules and is consequently powerful.[203] The judicial reforms had many positiv effects, especially in the legal education of students[204] and judges: Today also in an average rural basic-level court has more college graduates than in the late 1970s.[205] And still there are some more measurements towards independency that should be taken.[206] One substantial concern on the agenda of the doctrine relating to judicial reform is: Chinese judges are told to avoid

Liebman Bejamin, China's Courts Restricted Reforms, 21 Columbia J of Asian Law 21 (2007) 1.

201 The Civil Procedure Law of the People's Republic of China (CPL) became effective 9 April 1991. It was amended twice: in 2007 and 2012, effective since August 31, 2012, available *Legal Daily*, September 2012, 2. It applies to all civil actions in China and provides additionally for ‚Special Provisions Governing Procedures for Civil Actions Involving Foreign Relationships,' and applies therfore also when a foreign individual or enterprise is involved (Art. 237).

202 *Pissler,* ZChinR 2012, . with further reference.

203 *Hualing Fu*, *Cullen Robert*, From Mediatory to Judiciatory Justice. The Limits of Civil Justice Reform in: Margaret Woo, Mary Gallagher (eds) Chinese Justice: Civil Dispute Resolution in Contemporary China 2011, 25-58, 28.

204 *Minzer*, China's Turn Against Law, AJCL 59 (2011)942.

205 Cf. tables from the fieldwork of *Liu*, 83, critical towards the qualities of court officials.

206 Cf. *Peerenboom, Judicial Independence, 4, 87ff, 92 with policy recommendations.*; see also the above-mentioned public call; *Liebmann*, Columbia J. of Asian Law, 21 (2007), 1 ff.

decisions that could give rise to social turmoil and official complaints.[207]

3.3.4 ADR

Alternative ways of resolving disputes such as mediation and conciliation have been favoured among the Chinese for centuries. They are deeply rooted in China and many routines have evolved to handle social conflicts through consensual methods of mediation. There are many different types of mediation or conciliation today, such as judicial, informal and arbitrational mediation. [208]

To increase civil justice and litigation, the Civil Procedure Law has no longer made any provision for statutory conciliation since 1991,[209] and the Administrative Licensing Law has prohibited 'conciliation' in administrative cases since 2003 (Art. 50).[210] Although there has been a clear rise in civil justice since the 1970s and an increase in litigation, as the work reports of the SPC show,[211] mediation at the lower level courts has remained dominant in reality.[212] In the last five years, however, there seems to have been an official shift towards mediation and conciliation again,[213]

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[207] *Minzer*, China's Turn Against Law, AJCL 59 (2011)938, see also the SPC Court Report 10 March 2013 (cf. note 211).

[208] *Tay Alice T.*, The Struggle for Law in China, 21 UBC Law Rev 561 (1987) 62, although eg mediation practices since the founding of the Peoples Republik are different from those in the Qing dynasty, they became less harmony orientated: *Palmer Michael*, The revival of the Mediation in the Peoples Republik of China, 2 in: Butler (ed) Yearbook of Socialist Legal Systems, 1989, *Peerenboom Randall, He Xin,* Dispute Resolution in China: Pattern, Causes and Prognosis, E Asia L Rev 4 (2009) 1, *Minzer*, AJCL 59 (2011) 935, 939.

[209] Civil Procedure Law (*Zhonghua renmin gongheguo minshi susong fa*) April 4, 1991, amended Oct. 28, 2007, cf. Art. 9 and Art. 85-91.

[210] Administrative Litigation Law (中华人民共和国行政诉讼法, Zhonghua renmin gongheguo xingzheng susong fa) promulgated 4 April 1989), available at http://news.xinhuanet.com/ziliao/2005-02/23/content_2609459.htm (visited July 31, 2013).

[211] In the SPC Court Report of March 10, 2013 SPC Chief Supreme Court Judge Wang Shengjun reports to the NCP an increase of 174% cases over the previous five years and settlement rate of 82.4%, available at http://www.china.com.cn/news/2013lianghui/2013-03/10/content_28191634.htm (visited 31 July 2013), *He Fen*, Chinese Alternative Dispute Resolution (ADR) Mediation and Arbitration in: Chinese Arbitration 19, 33 with data of litigationsrate from 1979-2002, which show, that civil law litigation rates increased very clearly till 1999 and then after that decreased a little, not suprisingly the mediation and other ADR numbers declined in 1990ies correspectively, *Hualing, Cullen*, 38, *Minzer*, AJCL 59 (2011) 943.

[212] In fact *Liu* states, that ¾ of the cases at the basic-level court, he did his fieldwork, were mediated and and in general how difficult it is to access actual case materials and how poor a average low level courts statistic are, 80, 96; *Pissler*, ZChinR 2008, 307-324.

[213] According to some authors it's a 'turn against law': *Minzer*, AJCL 59 (2011) 935, *Hualing, Cullen,* 25, to other author's China's court are rather not made for the same functioning as

while the CCP has tightened its control over the courts.[214] The SPC made the necessary rules to further mediation in courts in 2007[215] and the Law on People's Mediation, which was enacted in August 2010,[216] promotes mediation in general in order to realise 'a harmonious society'.

At the same time, arbitration is also increasingly popular.[217] The China International Economic and Trade Arbitration Committee now handles most international economic and trade disputes. According to a recent speech by the SPC President in June 2013, China's arbitration services have great potential, and also have realistic prospects of acting as international arbitrators within the Asia-Pacific region.[218]

4. Case Stories

Three additional examples will provide more insights into these three East Asian civil law systems, their pluralities, familiarities and social practices and how legal and social norms can intersect and stand side by side. However, this selection is entirely personal

Western courts: *Clarke Donald*, Empirical Research into the Chinese Judicial System, in: *Jensen, Heller* (eds), Beyond Common Knowledge: Empirical Approaches to the Rule of Law, Stanford 2003, 164-192, 171.

214 *Lam Willy*, China Brief, 7 June 2011, available at http://www.jamestown.org/uploads/media/cb_11_05.pdf (accessed 23 July 2013).

215 Supreme People's Court Opinion on Further Increasing the Positive Role of Mediation (in Litigation) in Constructing Socialism and a Harmonious Society (*Zui gao renmin fayuan guanyu jinyibu fahui susong tiaojie zai goujian shehui zhuyi hexie shehui zhong jiji zuoyong de ruogan yijian*) of 7 March 2007, available at http://china.findlaw.cn/fagui/p_1/134117.html (accessed 1 August 2013).

216 Civil Procedure Law of the People's Republic of China ()

217 The *Arbitration Law* of the People's Republic of China ( ), promulgated on August 31, 1994, unified the arbitration practices across the country and harmonized with internationally accepted principles, cf. *Tao Jingzhou*, Arbitration Law and Practice in China, 3rd ed, Kluwer Law International 2003.

218 June 27th-29th 2013, the China International Economic and Trade Arbitration Commission ('CIETAC') hosted the 2013 Asia Pacific Regional Arbitration Group ('APRAG') Conference in Beijing (http://www.cietac.org/index.cms, accessed 2 July 2013).

and these examples can by no means be representative of these three systems of civil law.

4.1 Mariko Fuji's employment contract (Japan)

4.1.1 Contract story

Mariko Fuji worked part-time as a secretary for the head of a branch of a Japanese trading company a few years ago. The company imports and exports cheese, and also sells European cheese in Japan. Ms. Fuji is in her 50s, has brought up two children and holds a university degree. Since the business did not go well, Ms. Fuji's boss returned to France and Ms. Fuji was left without a job within a couple of days. The company offered her the job of selling cheeses at their stall in a department store. Ms. Fuji did not like the idea, because she was not so keen on selling cheeses rather than doing office work.

4.1.2 Primary legal sources

Ms. Fuji's employment contract was very basic: names, addresses, job title, salary and starting date. Detailed written contracts are not customary in this field.

Although there are a couple of Acts relating to labour law[219] as well as the relatively new Labor Contract Law Act (herafter: *Rôdo keiyuko hô*),[220] these do not provide for clearly defined protection against dismissal such as is known in Swiss or German law, for example. Nevertheless art. 16 of the law states, that an unfair dismissal is illicit.

Since the problem of part-time work is not directly addressed by this law, the lack of protection shows and will show above all in part-time work.

In Japan, a large increase in non-tenured women – and especially young people, known as 'free-ter' (the suffix comes from the German 'Arbeiter') – can be recorded. The *Part-time Labour Act*[221] does not require a commitment to equal treatment of part-and full-time work, justifying the preferential dismissal of part-time

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[219] The *Labor Standard Act* (労働 基準法, *Rôdo kijun hô*) Law No. 49/1947, amendment Law No. 103/2003, states since 2003 in article 18 (2) that an unfair dismissal is illicit, before this was doctrine and legal practice, see *Oda*, 383 ff., leading-cases are:

[220] 労働契約法 (*Rôdô keiyaku hô)* Law No. 128/2007, partially amended 10 August 2012, Law No 65/2012, effective since 1 August 2012 or April 2013 depending on the provisions.

[221] Japanese No. From 2007.

workers. A further problem is that part-time workers, mostly women, who in fact perform full-time work, do not fall within the scope of the Part-time Act. – And despite the very recent amendments of the *Rôdo keiyuko hô*, which will secure the status of fixed-time employment - from a duration of five years on - and abolish repeted fix-term agreements,[222] this would also today not apply, because Ms. Fuji worked only since three years at this firm.

4.1.3 Social practices at the workplace

Labour relations in Japan have become more insecure since the financial crisis. Economic pressures and high competition have restricted the social practice of lifetime employment (*shûshin koyô*, 終身雇用) and purely age-related payments.

Nevertheless the practice of 'lifetime employment' is still widespread in Japan compared to other countries,[223] but it applies mainly to '*white-collar workers'* and not to '*freeters'*, part-time workers such as Ms. Fuji.[224]

The Japanese employer-employee relationship includes further social practices, or 'rituals' as *Bell* calls them, such as singing the company song or physical exercises at the beginning of the working day (these have become fewer with time, but still exist) or eating together in the canteen, leaving the office at approximately the same time (especially late at night) or going on group trips with colleagues.[225] Heads of companies tend to have strong feelings for their employees and are more likely to stick to them in hard times. This may explain why Ms. Fuji was offered another job so different from her former one.

4.1.4 Mimoto hoshô shô

The other 'paper' associated with Ms. Fuji's contract was more interesting: her husband's 'signature' (which is *de facto* a seal in Japan) was immediately apparent on it. It was a *Mimoto hoshô-sho*

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222 Ie: Contracts of an over-all periode of five year can be transformed to open-end employments, if the employee applys for (art. 18). Futhermore a non-renewval of a fixed-time contract without 'good grounds' will be considered as illicit, too (art. 19).

223 Though it did shrink since the financial crisis in Japan:

224 Social scientist *Sugimoto Yoshio* (ed), Modern Japanese Culture, Cambridge 2009, eg pointed out, that lifetime employment in Japan, is one of the often cited cultural misunderstandings, because it did always apply only to the ‚white-collar' professionals, also the ‚free-ter' problem is – from the perspective of young people a critique and new kind of resistance to join the full-time labor force.

225 *Bell Daniel A.*, China's New Confucianism, Princeton 2008, 49: stating, that China is now adopting these *‚Japanese rituals'* at working places.

(身元保証書), literally translated as a 'document stating security': her husband undertook vis-à-vis the company to guarantee the good character and fidelity of their future employee, his wife. Furthermore, he declared himself liable for any possible future damages caused by his wife.

The *Mimoto hoshô-sho* is a relic of feudal times, a form of 'declaration' or 'confirmation' which every employee needed to be able to prove his/her origin, family background, religion and character. Without such a 'confirmation', there was no possibility of finding a job. The 'Mimoto hoshô-sho' was also meant to stabilise feudal society.[226] Its use was restricted in 1933 to very limited cases, and it was abolished after World War II because it does not suit a democratic society. Nevertheless, it was still in use until a few years ago.

The *Mimoto-hosho-shô* seems to fall in line with the traditional *Ie-system,*[227] relating to the family, household or clan, with a single – male – holder of all properties and assets, and manager of all business. It was, in fact, an economic unit. The patriarchal *Ie-system* and its status were also abolished after World War II, because it discriminated against wives and daughters. Nevertheless, social scientist *Chizuko Ueno*[228] has argued that although the *Ie-system* has been in decline following the American-inspired reforms in family law, the rise of the 'Western' nuclear family model has led to the current roles of 'white-collar businessmen' and 'housewives' and has therefore also led to women working part-time outside the home taking up some of their traditional homemaker roles – creating new forms of gender repression unknown under the traditional *Ie-system*.[229]

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226 *Chiba Masaji*, Three-Level Strucutre of Law in Contemporary Japan – The Shinto Society, Asian Indigenous Law, Chiba (Hrsg.), London/New York 1985, 331.

227 The literal meaning is: 家 (i*e*) the 'house'-*system,* see further on the terminology and different cases of the Ie-System: *Kitaoji Hironobu*, The Structure of the Japanese Family, American Anthropologist Vol. 73 Issue 2 (1971) 1036-1057.

228 *Ueno Chizuko*, Gendai kazôku to seiritsu no shuen (Rise an Fall of the Modern Family), Iwanaomi Shoten 1994.

229 See for an excellent example for different cultural dimensions taken from a Japanese corporate law case: *Knop Karen, Michaels Ralf, Riles Annalise*, From Multiculturalism to Technique: Feminism, Culture and the Conflict of Law Styles, Stanford Law Review, Vol. 64 (2012), Issue 3, 1, 26, 42.

4.2 Dong Bang Shin Ki long-term commitment (South Korea)

4.2.1 Contract story

The Korean pop group 'Dong Bang Shin Ki' enjoys great popularity in Korea and Japan. It consisted originally of five male singers, who had their official debut on January 14, 2004, when they launched their first album and gave a live performance to numerous foreign and domestic fans. The entertainment agency S.M. Entertainment was in charge of the event: it is one of the three largest entertainment agencies in Korea, and specialized in record planning, production and distribution as well as entertainment management.[230] – Following the introduction of a new management system in the 1980s designed 'to raise the prospective star' of a group by means of a long-term commitment, it invested in promising young musicians and planned their careers on a long-term basis. Thus the company was not only in charge of promoting, managing and supervising the production and distribution of all products such as albums, but also of establishing and handling all legal aspects for the band (such as loans, brokerage) and deciding over their daily schedule (such as training and appearances). – 'Dong Band Shin Ki' have relied on this comprehensive management system not only in most of their daily activities, but also in entertainment activities since their 'trainee period', which comprised three years for band member A and about six years for band member B. The first 'entertainer-exclusive affiliation' contract with the company was concluded in May 2003 with band member A, in June 2003 with member C and in February 2000 with member B. Later there were several changes to these contracts, although they essentially comprised legal acts, which stated an exclusive affiliation with the entertainment agency and prohibited the singers from carrying out any entertainment activities with other management companies. This was initially a

[230] Provisional Suspension of the Validity of Exclusive Affiliation Contract by Trial and Appellate Courts AC, Seoul Central District Court Order from Oct. 27, 2009 (2009Kahap2869) in the case of Kim Jae-jung et al. v S.M. Entertainment, Inc., a limited translation provided by Supreme Court of Korea, 2011, cf. *Yoon Jung Keun*, A Case of Slavery Contract between Singers and Agency in Korea: 2009KaHap2869, Asian Business Lawyer Vol. 5 (2010) 123, before the Seoul High Court, 1 April 2004 (No. 13613/2002) had turned down a corresponding suit filed by SM Entertainement and stating, that their contracts with musicians violated relevant national fair trade law with regards to unequal bargaining power as well as posed a threat to civil and social security acc. to 103 and 104 *Minpop*, because in 2002 the Korean Fair Trade Commission had already given the SM Entertainement Agency (hereafter SM agency) order to change its contracts with musician

ten-year contract, but just before the release of their first album in January 2004, the band members accepted the respondent's proposed contract modifications, and especially the extension of their contract period to 13 years, ie to January 2017. In addition, the contract period was extended by the time during which a singer could not perform personally (specifically due to upcoming military duties). This led to the duration of the contract becoming 15 years for one of the members. It was also agreed that in case of termination of the contract, the singers would pay large compensation damages or a penalty for breach of contract (*three times* the total investments and twice the daily losses during the fixed duration of the contract), whereas the agency was permitted to rescind, assign or delegate the contracts to other parties without any further obligations.[231]

4.2.2 Primary legal sources

Art. 103 of the Korean Civil Code reads in English as follows:[232] '*A juristic act whose object matter is contrary to good morals and other social order shall be null and void.'*[233]

According to the findings of the Korean courts, the above-mentioned contracts took unilateral advantage of Entertainment's superior status and imposed unfair conditions on the singers, especially on their performance and by obliging them to pay compensation damages or penalties: this resulted in unilateral excessive violation of their financial freedom. Based on Art. 103 CC, the court thus decided that part of the contract contents were invalid, that they violated a sound social policy and order: the duration of the contract was regarded as excessively long and was

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[231] As to current knowledge, the case is still not settled: The agency and the band tried to settle after and made several changes in their contracts. SM raised then an appeal and filed a suit in April 2010 for compensation of approx. 2 billion US dollars, whereas the three involved band members have declared having signed an exclusive contract with the Japanese company Avex.

[232] Translation as from the homepage of the Ministry (moleg).

[233] Acc. to *Kim*, Law and Custom, one could probably also say ‚customs of fact' (cf.), although I can't agree fully with the translation from the German ‚gute Sitten' (§ 138 German CC, Art. 19 Swiss CO) to ‚customs', See further Supreme Court decision 28 July 2005 (2005Da23858) regarding the validity of an insurance contract: A juristic act against ‚social order' includes not only acts whose rights and obligations contravene 'good morals' and 'social order', but also acts which contravene social order because of its 'nature' of being contrary to social order, arising from their mandatory implementation by law, or its combination with motive which are contrary to social order, and acts whose motive, expressed or known to the other party, are contrary to social order: Cf. Supreme Court decisions 11 February 2000 (99Da56833) and 29 November 2001 (99Da33311).

considered void. The following reasoning was important: before their official debut in January 2004, the singers were in no position to object substantially to any propositions of the entertainment company, because it had so far 'only invested' in them. Then, beginning in 2004, when the prolongation of the contract was dictated, the singers had little bargaining power because they had been waiting for this debut for a long time. But even after they had become established as singers, as regards the remaining agreement they had no comparable negotiating power to that of the entertainment company.

The court also ordered the agency not to act against the will of the band when dealing with third persons. But otherwise it also acknowledged the professional ties between the parties.

As there is no specific provision in the *Minpŏp* or the Standard Labour Act about the enforceability of restrictive *employment agreements* (involving non-competition or non-disclosure clauses, for instance) article 103 CC is of general significance in this field, and court precedents regarding the enforceability of employment contracts are important:[234] A restrictive employment agreement must be reasonable, meaning that it must run for an appropriate term, be limited to a certain geographic area and apply only to relevant employees.[235]

4.2.3 The context of the 'social order'

From a Continental-European perspective, the outcome of the court decision in this case is unsurprising. It is probably more astonishing that only three of the five members, who are now also called 'The Rising Gods of the East' felt restricted in their financial freedom, and that they had not felt that way at all for many years. How did that come about? And why did the members not feel restricted in their freedom before? Was that due to their age (born 1986) and their lack of experience in business matters? Or did other reasons such as respect towards parents, power-holders and superiors play a

[234] Eg Supreme Court decision No. 2012Do667, that states ‚any contract or internal regulations' that include the automatic assignment or granting of exclusive license to the employer regarding any invention are not invalid as a whole, whereas the part relating to employee inventions is valid', see *Geuyner Thomas L., Jang Song-Hyon*, Doing Business in Korea: An Expanded Guide, 2nd. ed, Seoul 2010.

[235] However acc. to the Unfair Competition Prevention and Business Secret Protection Act Law No. 911 of December 1961, amended by Law No. 4478 a 'trade secret' must be kept, when there is a corresponding agreement. But courts have held, that general knowledge or skills acquired through work does not constitute a trade secret.

role? – In the absence of inside information on this case, we can calculate their ages: four of the five singers were born in 1986 and one in 1988, so all of them would only have *achieved their majority after 2003 and one after January 2004* (at the age of 20 years acc. to Art. 4 *Minpŏp*). So there was probably also some kind of pressure by the parents to render the exclusive contract and its extension valid in the first place, which meant that the five members had to deal not only with a powerful company, but also with their parents.[236] To young people schooled in Confucian ethics, parents and a large national entertainment company meant status and respect. Neither parents nor a large company which gives a young person substantial 'training' are partners to be opposed very easily. This might to some extent explain their reluctance to question this restrictive contract after their debut (2004), until they had achieved some success and made money, which might have brought greater self-determination. Further, Korean legal history has shown that during the long-lasting reign of the *Chosŏn* dynasty, Confucian ethics were dominant and the laws were more associated with the notion of punishment and order than with the concept of private rights. This notion was promoted to favour the family and household structure during colonial times due to Japanese influence and prevailed until long afterwards. – This case must be further placed in the context of a severe decline in the music business.[237] Like elsewhere, the music market in Korea had suffered from electronic piracy and the ongoing decline of live performances. As a consequence, the contractual partners must have felt greater pressure from both sides.

4.3 Lu Shih's remedies (PRC)

4.3.1 Contract story

Lu Shih is a engineer in his 60ies. He bought a small electric heater made by a Chinese company in Shanghai for his private condo, online via a standard form. When he used the heater for the first time, it worked well. But when he turned it on the next day and started to read at his study at home, the heating system overheated and caused a sudden explosion, which injured his leg, damaged his study and left the wooden floor with a wide burn mark. Lu Shih

[236] Cf. New York Times, 10 August 2013, C1, a growing number of teenager, spported by their parents, are entering K-Pop Schools.

[237] *Yoon Jung Keun*, A Case of Slavery Contract between Singers and Agency in Korea: 2009KaHap2869, Asian Business Lawyer Vol. 5 (2010) p 123.

also missed three days at work and could not attend an important meeting. When he told his landlady what had happened, she felt responsible and offered to talk to the company and settle the matter for him.

4.3.2 Primary legal sources

Conclusion of Contract

The contract was concluded with a *standard form*. These were common in a socialist market economy where many transactions involve the interests of the state. The state has liberalized contract forms over the last 30 years, but they are still widely used because they help to handle the new volume of trade and business relationships and at same time ensure a certain control.[238]

There are neither any special provisions relating to standard-form contracts nor to online transactions in the Chinese civil law. The contract is therefore a valid sales contract in a consumer-to-business relationship and is legally binding on both parties. The following laws are applicable:

The General Provisions of Civil Law of 1986,[239] which state – even when not called as such – in Art. 57-58 the principles of freedom of contract and the exceptions to *pacta sunt servanda*, of which neither applies here. Both basic principles of contract law were stipulated explicitly later on in the following relevant law:

The Chinese Contract Law (中华人民共和国合同法 *Zhonghua renmin gongheguo hetong fa, henceforth: Hetongfa*), enacted in March 15, 1999. The *Hetongfa* is a comprehensive legislation divided into three parts: general provisions, special provisions with regulations on 15 types of contracts, and supplementary provisions, and comprises a total of 428 articles.[240] It aimed to be 'worthy of an

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238 *Torbert Preston M., Zhao Jia*, Peoples Republic of China, in: Commercial Laws on Asia, Guttermann, Brown (eds), Hong-Kong 1997,288.

239 see note 51 Art. 57: '[a] civil juristic act shall be legally binding once it is instituted […]' Art. 58: [...] civil acts, which were performed by a person against his true intentions as a result of cheating, coercion or exploitation of his unfavorable position by the other party civil acts were in the following categories shall be null and void: 1) those performed by a person without capacity for civil conduct, 2) those that according to law may not be independently performed by a person with limited capacity for civil conduct, 4) those that performed through malicious collusion are detrimental to the interest of the state, a collective or a third party, 5) those that violate the law or the public interest, 6) economic contracts that violate the state's mandatory plans, and 7) those that performed under the guise of legitimate acts conceal illegitimate purposes. Civil acts that are null and void shall not be legally binding from the very beginning.

240 *Han,* A Snapshot of Chinese Contract Law, 241.

international competitive market', meaning at that time that the lawmakers also relied on international models such as the CISG[241] (for instance regarding remedies for nonconformance) and the UNIDROIT Principles of International Commercial Contracts (1994).[242] Although the courts are not bound by the CISG and the UNIDROIT Principles, they have been found to use them as reference in court rulings. [243]

Following art. 130 and art. 11 *Hetong fa* Lu Shih's contract is a valid purchase of sale, to which the parties agreed, because there is no special form required.

The SPC has published three important *Judicial Interpretations* on these general provisions and a couple on the special parts of this Contract law: the first, of December 1, 1999, introduces more or less 'practical guidelines' in the form of articles for the judges, who were not familiar with certain new rules. The second, from February 9, 2009, contains 30 articles on the general provisions, interpreting and making them more precise and adding new helpful features such as introducing important civil law regulations such as the 'change of circumstances' (art. 26).[244] The third and relatively new one concerns the special part of contract law: of May 10, 2012 (No. 12).[245]

In addition, the *Consumer Rights Protection and Security Act*[246] applies because in this case the rights and interests of a consumer in

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241 *Han Shiyuan*, China and The CISG and its Impact on National Legal Systems, in: Franco Ferrari, Munich, 2008, 91, *Han,* E Asian Law Rev 1 (2010), 146.

242 *Zhang Yuqing*, *Huang Danhan*, The new Contract Law in the People's Republic of China and the UNIDROIT Principles of International Commercial Contracts: A brief comparison, Uniform Law Review (2000) 429-440, 430, see today UNIDROIT Principles of International Commercial Contracts (2004).

243 *Han, CISG,* 76 ff.; *Chen, Rhee*, 235; generally see *Ling, 45*; *Münzel Frank*, Invalidity of contracts, A tour d'horizon of Chinese practice, Uniform L. Rev. 5 (2000) 451-468.

244 *Han*, A Snapshot of Chinese Contract Law, 250.

245 *Fashi* No. 8 (2012), published 1 May 2012, in force by 1 July 2012.

246 中华人民共和消费者权益保护法 *(Zhonghua renmín gongheguo xiaofei zhe quanyì baoha fa*, hereafter: *Baohu fa)* adopted at the fourth meeting of the Standing Committee of the Eighth National People's Congress and promulgated by Order No. 11 of the President of the People's Republic of China, 31 October 1993, in force since January 1994; available bilingual http://en.pkulaw.cn/display.aspx?cgid=6384&lib=law (accessed 1 August 2013); whereas in general special Judicial Interpretations on specific comcumer consumer contract issues are to be regarded, such as eg. The Justicial Interpretations on the application of law concerning disputes in Transportation in Reference and Guide to Civil Trial, No. 4 Vol. 44 2010, 21.

purchasing a commodity for daily private use[247] are deficient. – This law has existed since *1993*,[248] which is quite early in comparison to other civil legal systems,[249] demonstrating that consumer protection and security are in line with socialist legal thinking. Art. 6 of the law confirms this by affirming there a '*common responsibility to protect the legitimate rights and interests of consumers.'* In addition, if a consumer is injured by a deficient product, the business operator must inform the administration immediately (Art. 18 (2)). – Furthermore, consumer rights are regulated in a rather general way: a consumer shall enjoy the right of free choice (Art. 9), receive a fair deal (Art. 10) and his 'human dignity' and 'customs' shall be respected (Art. 14). Moreover, business operators shall fulfil their obligations according to the law on product quality and other relevant laws (Art. 16),[250] shall provide all necessary information (Art. 17) and shall guarantee the quality, functions, usage and term of validity which the commodities or services they supply should possess (Art. 22). Consumer protection associations shall hear and accept complaints and provide investigation and mediation (Art. 32 (4)).

Remedies

The General Provisions of Civil Law list *remedies* of different types (art. 134) that Lu Shih could combine: one possibility is to ask the seller of the heater for an *apology*. Another concerns the liability for personal injury, which includes medical expenses and

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247 The law does not define consumer; *Ling*, 446; *Chen Yu, Peng Juny*, 论消费者合同及其相关制度的创新 On Innovation of Consumer Contract and Systems Concerned, Journal of Yunnan University, Issue 4, 2005, 33, available at http://www.pkulaw.cn/fulltext_form.aspx?Db=qikan&Gid=1510073236&keyword=consumer%20contract&EncodingName= (accessed 1 August 2013).

248 中华人民共和国消费者权益保护法 , adopted at the fourth meeting of the Standing Committee of the Eighth National People's Congress and promulgated by Order No. 11 of the President of the People's Republic of China on October 31, 1993, in force since January 1994, amendment Law No. , available bilingual http://en.pkulaw.cn/display.aspx?cgid=6384&lib=law (accessed August 3, 2013), whereas again special Judicial Interpretations on special consumer contract issues are to be regarded, such as eg. The Justicial Interpretations on the application of law concerning disputes in Transportation in Reference and Guide to Civil Trial, No. 4 Vol. 44 2010, 21.

249 *Ling*, 108.

250 The Product Quality Law Act,250 however, does not provide for any additional specific rights a consumer could individually claim: 中华人民共和国产品质量法 () Product Quality Law of the People's Republic of China, law no. 71, Februar 22, 1993, available http://en.pkulaw.cn/display.aspx?cgid=6138&lib=law (accessed August 3, 2013).

compensation – living and other expenses are only covered when the injured person remains disabled (Art. 117).

Furthermore, the first lines of art. 112 *Hetongfa* read as follows: '*If a party fails to fulfil its contractual obligations or to fulfil contractual obligations that do not conform to the agreement, or in fulfilling its obligations to take remedial measures, and if there are other losses, then it shall pay damages*.' And following the *Consumer Protection Law,* consumers who suffer from personal injury or property damage resulting from their purchase or use of commodities or receipt of services shall have the right to demand compensations in accordance with the law (art. 11). Moreover, the business operator shall pay the victims' medical and nursing expenses during treatment, compensate their reduced income for loss of working time *and other expenses* (Art. 41 (1)). This means roughly that on the basis of the Consumer Protection Law alone, Lu Shih could already claim for the expenses he had incurred in restoring his study, for his medical expenses and for his loss of working time and further damages made by missing a good business.

In order to protect consumers' rights and prevent market misbehaviour, the *Criminal Code* (1997) [251] also specifically prohibits crimes of production and the sale of fake or badly made goods.

The dispute may be settled either by mediation with the business operator, by requesting mediation by a consumer association, appealing to an administrative department or to an arbitration body or to the local peoples' court (Art. 34 Consumer Protection Law).

4.3.3 Realities

From this brief introduction to a simple consumer law case, it can be seen that in reality a range of legal sources may be consulted. Three different acts apply in the field of contract law alone, although the hierarchy of legal norms remains unclear to some extent. This does not help the consumer to understand what his or her rights according to Chinese law would be in this case. Furthermore, it can be seen that some expressions (especially

[251] Art. 146 prohibts the ‚[...] production or intentional sale of electrical aliances, pressurised containers, inflammable and explosive products which do not meet national or industry standards, and which have caused serious consequences [...]', the Criminal Law of the People's Republic of China has been revised at the Second Session of the Fifth National People's Congress on March 14, 1997, hereby promulgate the revised edition, and shall enter into force as of October 1, 1997, No. 83.

'serious consequences') of Art. 146 of the Criminal Code are relatively vague, which leads to the need for interpretations.

Items such as 'electrical appliance' or 'industry standards' also remain undefined by legislation. The Consumer protection law remains very general (and adaptable) in its provisions and there is not even a concrete definition as to who is considered to be a consumer or business operator. This Consumer protection law is currently under amendment, and more concrete and fundamental consumer rights are proposed, such as a revocation right of seven days, the regulation of online purchases, the burden of proof and privacy issues relating to consumer data.[252]

Since his landlady also offered to approach the heater manufacturer, this would be the easiest way to solve the problem for Lu Shih. – A further question is then, why she should do this, because she has no legal obligation to do so. She nevertheless feels socially obliged by her relationship to him and to her other tenants to perform such a service. In addition, the age count's as well, as Lu Shih is many years superior to her, she feels specially obliged to help.

[252] The NCP published a draft amendment to the Law on the Protection of Consumer Rights and Interests and solicited public comments on the Proposed Amendment until May 31, 2013, now it has been submitted to the NPC Standing Committee (cf. http://www.legaldaily.com.cn, (accessed 1 August 2013).
The Proposed Amendment includes for example the following: 1.) A *right of revocation* and or repair/replacement: If goods or services fail to comply with their quality requirements, a consumer may return them or require them to be repaired or replaced in accordance with laws or agreements within 7 days of receiving them. If the 7 day period has expired, and the termination of the contractual relationship is allowed under PRC Contract Law, the consumer may still return the goods. 2) A new provision with regards to the burden of proof: For durable goods such as automobiles, computers, refrigerators etc. and services, if the defects are spotted within 6 months of the consumer accepting the goods or services, then the *burden of proof is on the company*. 3) The *regulation of online sales and purchases*: Firstly, a company must provide accurate information. Companies which sell products or provide services via the internet, television, telephone or post, and securities companies, insurance companies and banks, shall truthfully provide all necessary information to consumers, such as addresses, contact methods, the quantity and quality of goods, prices or fees, periods of performance, risk alerts, after-sales services, and civil responsibilities. Second, consumers may enjoy a unilateral termination right for goods or services obtained via the internet, television, telephone or post. Consumers may return the products within 7 days of receipt, except for those goods that, by nature, are unsuitable for return. Third, other than directly claim against the seller or service provider, consumers may also claim against the internet platform on which the goods are sold or services are provided.

5. Concluding remarks

Civil law models – written and customary ones - have been circulating in ancient times. More than 100 years ago, Japan, Korea and China considered also European civil law models (eg German Civil Code) for their national civil legislations, going along with a lot of individual intellectual exchanges. These civil law systems have gone through once unbelievable transformations, and in the case of China are still doing so (let us recall the establishment of a well-functioning Japanese judiciary in a couple of years by the Meiji regime). Today there is a need to reform and consolidate these East Asian civil legal systems to comply with current practices, social norms and/or with the large body of adjudication that has been developed. As globalisation and the opening of the markets have encouraged the idea that national laws can be more of a barrier to markets, business and contracts, the wish for more consistency between different legal systems was formulated and numerous international conventions were enacted. Examples can be seen in the sale of goods, in transport and intellectual property. Several academic models of the civil law devised in Europe, which unify a specific field of civil law/contract law (such as PICL) and are designed to set up a common framework for contract law, are circulating to and within East Asia and back to Europe (such as PACL).

It is also fair to say, that the approaches to these East Asian civil law systems are not easy. Despite great efforts, only a small part of the primary legal sources are available in English in China, whereas in Japan the situation is different since the governemental data system was established. Jurisdictionals sources in English are in general still scarce. But even additional studies of the Japanese, Korean or Chinese languages are ultimately not enough to understand the meaning of these legal systems and of specific legal cases. It is important to realize that the Japanese, South Korean and Chinese civil laws and jurisdictions discussed here are embedded in their legal histories and cultural contexts: the judicial reforms in Japan, the meaning of customs or constitutionality in Korea and the problem of the judicial independency in China can't be understood without. – To better understand the distinct cultural contexts of these circulating or non-circulating models of civil law, it will be

necessary to search much deeper than has been possible in this limited sub-chapter. [253]

[253] *Hotz Sandra*, Understanding Legal Culture through the Intersection of Law, Culture and Gender. An Example from Japanese Family Law, JCL 5:2 (2010) 194-215.