

# Reform of The Civil Code of Japan

## Introduction

Japan is about to reform its Civil Code (*minpo*), which will clearly affect international business in Japan. Formal government level discussions have already started, a number of legal magazines have already published articles relating to the possible reforms and numerous seminars/presentations have been provided by scholars and practitioners. The Ministry of Justice has submitted an outline of the reform plan for public comments between 1 June and 1 August 2011. The purpose of this client briefing is to highlight the reasons why the contemplated reform of the Civil Code is important and its potential impact on the Japanese legal system (particularly relevant for those from common law jurisdictions), and which parts of the Civil Code are to be revisited as part of the reform. Further client briefings will discuss some of the key areas of the proposed reform.

## What is the Civil Code?

Before discussing the proposed reform of the Civil Code, it is useful to summarise the key features of the Civil Code, as it is a unique feature of civil law jurisdictions such as Japan. The Civil Code is one of the most important items of legislation if not **the** most important legislation for many legal practitioners in Japan. Due to this, the reform of this one specific law, carries a higher level of importance, expectation and risk to Japan and the Japanese legal society (including Bengoshi, in-house lawyers and legal staff) than, say, the reform of a single law in a common law jurisdiction.

The Civil Code covers broad topics such as the law of obligations (including "contracts" and relevant provisions including termination, remedies, guarantee, assignment of contract, set-off, etc.), property, security and collateral, torts, and family law (domestic relations and succession). The Civil Code also provides for general rules governing many non-criminal legal relationships (e.g., agency, statutes of limitation, capacity and minors). In short, the Civil Code provides a basic legal framework for the daily life of an ordinary citizen in Japan (excluding criminal matters). As the Civil Code is also relevant for business transactions, such a citizen would need to know and understand the Civil Code in order to progress in the business world.

The Civil Code was adopted in 1896 and has been strongly influenced by German law, French law and even English law. For over 100 years, there have been various amendments, for instance, the Family Law Amendment in 1948 (due to the establishment of the New Constitution), and the introduction of the blanket mortgage/blanket guarantee concepts. The Civil Code was also substantially amended as a result of the adoption of new legislation such as the Land and House Lease Law, the Product Liability Law, the Automobile Damage Compensation Law and the Employment Contract Law, etc. However, the basic framework of the Civil Code still remains.

## Key Issues

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## Why reform the Civil Code now?

Many Japanese laws have been reformed recently, for example, the Civil Procedure Code and the Bankruptcy Law. Further, and importantly, Japan adopted a "new" Companies Act in 2005. Companies Act used to form part of the Commercial Code of 1899 and the adoption of the new Companies Act was not just a change of format, but also entailed significant changes to the substance of the old company law which was modernised in line with international standards.

In a similar vein, a large number of scholars have argued that many sections of the Civil Code are outdated and as such a total rewrite rather than a partial revision is required. The Government has decided to reform, among others, the law of obligations (contracts and relevant provisions) and part of the "General Rules" portions of the Civil Code. These reforms could have a huge impact on business contracts and other business transactions. Whilst property, security and collateral and torts *provisions* will not be amended, *transactions* involving property (e.g., real property sale and purchase transactions) or security and collateral (i.e., mortgages/pledges) could be influenced substantially by these reforms as these transactions are documented by contract.

## What is the Civil Code reform process?

After the Government proposed to reform the Civil Code in 2006, several groups of scholars announced their reform plans. One of the most, if not the most influential paper is said to be the "Basic Policy for Reform of the Law of Obligations" published in March 2009 (Basic Policy). In preparing the Basic Policy, more than thirty renowned scholars specialising in the Civil Code, Commercial Code or Civil Procedure Code participated in numerous discussions, which were also attended by officials of the Ministry of Justice (MOJ).

In October 2009, the MOJ consulted with the Legislative Council of the MOJ, which is the council to study and deliberate basic law relating to civil, penal, and other legal business upon a request of the Minister of Justice, for the revision of the Civil Code (law of obligations). In response to this consultation, the general assembly of the Legislative Council decided to establish a "Working Group on the Civil Code (Law of Obligations)" to handle this task.

Since November 2009 and using the Basic Policy as a basis for discussion, this Working Group has held regular meetings on the reform plan, the minutes of which are available to the public. The Legislative Council has submitted an outline of the reform plan for public comments to be made between 1 June to 1 August 2011.

The revamping exercise is wide-encompassing. By way of example, the agenda of one of the latest meetings of the Working Group (25th Meeting), held on 8 March 2011, a few days before the East Japan Earthquake, covered the topics as follows:

- Demand for performance
- Damages caused by non-performance of an obligation
- Cancellation of contracts
- Assumption of risk
- Delay in acceptance
- Right of subrogation of the obligee
- Right of avoidance (fraudulent acts)
- Claims and obligations of multiple parties (excluding guarantee obligations)

- Guarantee obligations
- Assignment of claims
- Provisions on securities-like claims
- Assumption of obligations
- Transfer (assignment) of contractual status
- Payment
- Set-off
- Novation
- Release and merger
- Necessity to deal with complex situations re: means of settlement (settlement among multiple parties)
- General principles on contracts
- Stage of contract negotiation
- Offer and acceptance
- Advertisements offering prizes
- General conditions (definition and requirements)
- General principles on juridical acts
- Mental capacity
- Manifestation of intention
- Regulation of unfair terms

### **How will the Civil Code be reformed?**

Before the release of the outline of the reform plan we could only speculate as to its specific contents, however the Basic Policy serves as a good guide as it suggests various key proposals which may be reflected in the outline and the bill. According to the Basic Policy, the Civil Code should adopt some ideas from the Consumer Protection Law (CPL), which reflect the modernisation of civil laws, such as special protection rules for the benefit of consumers (e.g., against unfair solicitation). However, several practitioners have expressed their concern over the proposed introduction of these CPL concepts, arguing either that the CPL concepts (which are generally mandatory) may undermine the "Freedom of Contract" principle, or that they may be excessively anti-business in effect, or simply confusing.

## Working Group Discussions

The Working Group is making a very thorough step by step review of the Civil Code provisions. One would be somewhat tempted to see some common law influence in the attempt to cover all circumstances in detail instead of laying down and being satisfied with clarified basic guiding principles. The devil is in the details and regulating all circumstances may be a daunting task. For an example of Working Group meeting discussions, the following is a partial summary of the minutes of the 9th Meeting (18 May 2010):

1. Basic principles on contract:
  - Necessity to stipulate the principle of the freedom of contract in the text of law.
  - Necessity to stipulate general provisions on formation of contract.
  - Necessity to stipulate provisions on effect of contract which is initially impossible.
  - Necessity to stipulate provisions which materialise the principle of good faith and trust for claims and obligations, etc.
2. Contractual negotiation stage
  - Necessity to stipulate provisions on unfair break-off of contractual negotiations
  - Necessity to stipulate provisions on the duty of provision of information and the duty of explanation in the process of concluding a contract.
  - Necessity to stipulate provisions on the responsibility of the negotiating parties over the acts of the third party being involved in the negotiation, etc.
3. Offer and acceptance
  - Necessity to stipulate provisions on the concepts of offer and acceptance.
  - Necessity to arrange provisions on offer with a fixed term for acceptance.
  - Necessity to arrange provisions on an offer without a fixed term for a party at a distance.
  - Necessity to stipulate provisions on an offer between persons engaging in a dialogue.
  - Necessity to clarify provisions on formation of a contract in case of death or loss of capacity to act of the offeror after making an offer.
  - Appropriateness of changing from the principle of postal rule to the principle of arrival rule with regard to the time of forming a contract between persons at a distance.
  - Necessity to review provisions on an acceptance adding modifications to the offer, etc.

## The future Civil Code

Comments on the proposed outline of the revisions are welcome until 1 August 2011. The revamping of the Civil Code is a painful but necessary exercise. In line with the basic principles inspiring the Working Group, the revised Civil Code will be more user friendly and understandable to the general public by turning case law theories into statute. Consumer protection in particular will be enhanced as the current rules are hard to understand from a consumer and consumer consultant perspective mainly because the legal practice is to a large extent based on case law. The revised Civil Code will also be more accessible to the next generation of legal practitioners and make Japanese legal rules more transparent to foreign investors. Business and financial transactions will be facilitated through the improvement of legal foreseeability and increased sophistication. Areas like the sale of goods will be modernised through more focus on industrial products and more generally the rules will be more suitable to today's social mores and economic developments and to some extent reflect the weight of globalisation.

*Where Japanese legal concepts have been expressed in the English language, the concepts concerned may not be identical to the concepts described by the equivalent English terminology as they may be interpreted under the laws of other jurisdictions.*

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