Is the CISG a Useful Tool for the Interpretation of the Newly Reformed *Minpō*?

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Abstract

In this article I am considering the role of the CISG in interpreting the recently reformed *Minpō*, the Civil Code of Japan. The *Minpō* was promulgated by the end of nineteenth century and had never experienced a real structural reform. However, on 26 May 2017, the National Diet of Japan approved a radical reform of the *Minpō*. This reform seems to have been fostered by the success of international rules like the CISG, which Japan ratified in 2008. In this paper, taking as an example the issue of non-conformity of goods, I will try to verify how much the reformed *Minpō* got close to the CISG. Following, I will try to find whether the CISG can be a useful interpretation tool for the reformed *Minpō*.

I. Introduction: How to Regulate an International Sale

An international sale of goods is not different from a domestic one in its essence. In fact, a sale of goods, wherever the parties usually have their place of business, consists primarily in the transfer of property from the seller to the buyer on one hand and in the payment of the price by the seller on the other hand.

However, a sale of goods that is *international*, meaning a transaction that crosses one or more States, is different in some ancillary aspects from a domestic one. In fact, it is usually a transaction that requires a carriage contract to cover long distance transports and involves a considerable number of parties situated in different countries. This raises the possibility of a suit in a foreign court about an export license or an involvement in a foreign State political turmoil[1] or even a foreign governmental intervention of which the parties to a sale contract may not be aware. However, more fundamentally, an international sale of goods is made between parties with different legal cultures or different sensibilities about a particular legal concept. For instance, according to the Italian Civil Code (*Codice Civile*), a valid contract is concluded in the presence of a common will of two or more parties (Art 1321), a social function (the concept of *Causa*), a lawful object (*Oggetto*) and in some cases a written form as established on Art 1325.[2]

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[1] H.J. Berman and C. Kaufman, 'The Law of International Commercial Transactions (Lex Mercatoria)' 19 *Harvard International Law Journal*, 221, 222 (1978).

[2] V. Roppo, *Il Contratto* (Milano: Giuffrè, 2011), 311.

On the other hand, Japanese Law establishes that a contract is 'concluded' with the common will of two parties and in some cases a written form or the delivery of the object of the contract.[3] How do we regulate these differences between the parties?

These differences can be managed by the parties themselves under the rule of freedom of contract by providing in the contract with the solution to all aspects of the transaction. This brings certainty to the parties and permits adjusting the contract to their special needs. However, the parties may not be able to provide for all possible situations arising from an international contract's problems. There can be a case where they must defer conflicts to the domestic legal system of the parties or to a third neutral system. This can bring about uncertainty to the consequences of parties' actions because the parties may not know each other's law system or the third country's legal system they may have chosen. In addition, domestic law is more focused on an internal perspective and thus cannot always be ready to the commercial needs of international transactions.

Therefore, the idea of a set of common rules to regulate these transactions. This may eliminate the differences between different domestic legal systems and apply to the needs of a trade that is *international*. This was UNCITRAL's purpose in drafting the Convention on International Sale of Goods in 1980 (CISG).[4] The Convention is the result of almost fifty years of work and is now considered a successful international law[5] considering the large number of ratifying States including Italy (11 December 1986) and Japan (1 July 2008). CISG is especially useful given the huge quantity of the scholarly material about its interpretation and jurisprudence from all over the world applying its provisions.[6]

This success also made this set of rules a source for domestic law reform attempting to adapt domestic law to present globalized trade.[7] For example, the *Minpō*, the Japanese civil code, was recently reformed after over a hundred years. The property law was promulgated in 1896, and the succession law in 1898. The *Minpō* had not had a large-scale reform even after the promulgation of the new Constitution in 1947. As a result, in October 2009 the Minister of Justice of Japan created a subcommittee within the Legislative Council (*Hōsei Shingi kai*) tasked with preparing a draft for the future reform of the *Minpō*. After more than five years, this subcommittee approved a document containing

[3] S. Wagatsuma, *Saiken Kakuron Jōkan (Minpō Kōgi V1)* (Tōkyō: Iwanami Shoten, 1954), 54-55; E. Hoshino, *Minpō Gairon IV (Keiyaku)* (Tōkyō: Ryōshofukyūkai, 1975-76), 25; Y. Shiomi, *Kihon Kōgi – Saiken Kakuron* (Tōkyō: Shinseisha, 3rd ed, 2017), 17-18.

[4] M.J. Bonell, 'Introduction to the Convention', in C.M. Bianca and M.J. Bonell eds, *Commentary on the International Sales Law* (Milano: Giuffrè, 1987), 9.

[5] I. Schwenzer, 'Introduction', in I. Schwenzer ed, *Commentary on the UN Convention on the International Sale of Goods (CISG)* (New York: Oxford University Press, 4th ed, 2015), 1.

[6] S. Kröll, L. Mistelis and P. Perales Viscasillas, 'Introduction to the CISG', in S. Kröll, L. Mistelis and P. Perales Viscasillas eds, *UN Convention on Contracts for the International Sale of Goods* (Portland: Hart Publishing, 2nd ed, 2018), 12-15.

[7] I. Schwenzer, n 5 above, 10.

the guidelines for the reform of the obligations part of the *Minpō* (*Minpō no Kaisei ni Kansuru Yōkō An*). After the approval of these guidelines by the Legislative Council on February 2015, the draft was received by the Cabinet and submitted to the National Diet which approved the draft on 26 May 2017.[8]

One of the main reasons for this reform seems the favorable opinions expressed to CISG by a large number of States.[9] Thus, in interpreting the reformed the *Minpō* we can consider the CISG as a reference.

How close did the *Minpō* get to the CISG?

In this paper, first I will consider the original idea that prompted the CISG rules and drafting history as well as its features as a common rule for the international sale of goods. As an example, I will refer to the issue of *non-conformity of goods*. Second, I will consider how the conformity of goods provisions in the *Minpō* changed with the reform and the similarities to the CISG. I will also discuss whether the CISG can be considered an interpretation tool for these new provisions.

II. CISG as an Expression of the Modern *Lex Mercatoria*

1. The Ancient Lex Mercatoria

The idea of using a set of common rules for a transnational commercial transaction is not a recent one. In the 11th and 12th centuries, Europe experienced a commercial renaissance associated with the opening of trade with the markets of the East and general political and economic developments, including the development of agriculture, the rise of towns and cities as autonomous political units and the consequent birth of the merchant class.[10] This growth of commerce, together with the revival of law study in the universities and the growth of legal systems, contributed to the development of the *Lex Mercatoria*. This law governed only transactions between merchants in fairs, markets and seaports and it was distinct from local, feudal, royal or ecclesiastical law. Its special features consisted in the transnational character of its provisions. Its principal source was mercantile customs. It was administered not by professional judges but by merchants themselves. Its procedure was speedy and informal, and it stressed equity as an overriding principle.[11]

Later, in the 17th and 18th centuries, the rise and development of Nation State led to the nationalization of *Lex Mercatoria*. This brought clarity of rules at the domestic level regarding sales; at the same time, it made *Lex Mercatoria* lose its original flexibility. Then, the spreading of legal positivism in 19th century

[8] T. Tsutsui, 'Saikenhō Kaisei no Ikisatsu to Gaiyō' 1511 *Jurist*, 16-17 (2017).

[9] H. Nakata, *Keiyakuhō* (Tōkyō: Yūhikaku, 2017), 5-6.

[10] J.H. Berman, *Law and Revolution* (Cambridge, Massachusetts and London, England: Harvard University Press, 1983), 333-336.

[11] ibid 339-356.

made international transaction be subjected only to domestic laws.[12]

Nonetheless, the merchant class kept on producing its own rules in form of standard contracts and private regulations.[13] In the 20th century, with the flourish of international transaction, we find, just like the *Lex Mercatoria* in the Middle Ages, a new research for a *common ground* in international sales by means of a body of law reflecting the customs, usages and needs of international trade. UNCITRAL's 1980 Convention on the International Sales of Goods can be viewed as an expression of this tendency.[14]

2. CISG Drafting

The idea of an international convention regulating international sales dates back to 1929. In that year the International Institute for the Unification of Private Law (UNIDROIT) undertook the task of preparing such an international convention. After many years of drafting, in 1964 the Uniform Law for the International Sale of Goods (ULIS) and the Uniform Law for the Formation of Contracts for the International Sale of Goods (ULF) were finalized. However, their content was considered too close to continental law codification and too abstract and dogmatic.[15] In the end only nine countries adhered to those Uniform Laws.[16]

As a result, soon after the finalization of ULIS and ULF, the United Nations Commission on International Trade Law (UNCITRAL) established a working group of fourteen States to ascertain which modifications of ULIS and ULF might render them capable of wider acceptance by countries of different legal, social and economic systems.[17] The working group completed its work in 1978 and the General Assembly of the United Nation authorized the convening of a diplomatic conference to finalize the conventions which in the meantime had been combined into a single draft. In March 1980, representatives of sixty-two States[18] and eight international organizations met at a Conference in Vienna to finalize the Convention.[19]

At the end of the conference, the draft was voted on a plenary session article by article, each article requiring approval by a two-third majority. Out of eighty-eight substantive articles of the CISG, seventy-eight of them were approved unanimously and eight additional articles received no more than two negative

[12] M. Yamate, 'Lex Mercatoria Nitsuite no Ichikōsatsu (1)' 33-3 *Hōzatsu*, 342, 360-363 (1987).

[13] ibid 363-364.

[14] K.P. Berger, *The Creeping Codification of Lex Mercatoria* (The Hague: Kluwer Law International, 2nd ed, 2010), 60.

[15] M.J. Bonell, n 4 above, 17.

[16] I. Schwenzer, n 5 above, 1.

[17] J.O. Honnold, 'The 1980 Convention: A Brief Introduction', in H.M. Flechtner ed, *Uniform Law for International Sales Under the 1980 United Nations Convention* (Alphen aan den Rijn: Kluwer Law International, 2009), 9.

[18] Participating States consisted in twenty-two delegations from western developed worlds, eleven from socialist regimes, twenty-nine from Third World countries.

[19] M.J. Bonell, n 4 above, 3-7.

votes. All the other articles were approved by large majorities or approved without dissent after a revision *ad hoc*.[20]

This process, at first sight so *peaceful* by the numbers, was not without any kind of *sacrifice*. The CISG's scope of application is limited to sales of movable goods made for business purpose (Art 2). Moreover, CISG doesn't regulate all the aspects of a sale of goods contracts but only the formation and the obligations of the seller and the buyer, explicitly excluding instances about the validity of contract or the effect the contract may have on the property in the goods sold (Art 4). In addition, we can see that some provisions seem more like a *compromise* as they do not give a clear solution.[21] For instance, some of CISG provisions delegate the matter at hand to national courts like the case of the remedy of specific performance (see Art 28). Otherwise, the provision establishing the rules for exemption in damages (Art 79), does not make clear if its scope of application extends to hardship cases.[22]

Nevertheless, the CISG does give a common ground for an important portion of international sales by providing rules that are supposed to be understood and applied in the same way in CISG-member States and are, at the same time, tailor-made for international sales needs. But how the CISG does concretely regulate international sales?

One example can be found in how the CISG tried to create a common rule regarding the non-conformity of goods in international trade.

3. CISG Content: The Example of Non-Conformity of Goods

The CISG's drafters had to take account of and find a common core among all the domestic laws of the delegates in order to create transnational provisions to regulate international sale of goods.[23] In the case of the non-conformity of goods provisions, for instance, one can see two traditional approaches when considering continental law and common law.[24] On continental law side, we usually find a two-tier approach inspired by the Roman law-model consisting of a set of specific rules, parallel to the general law of breach of contract, with their own remedies creating a statutory liability for the seller about quality issues. For instance, the Italian Civil Code, together with the general liability for breach of

[20] J.O. Honnold, n 17 above, 5-12.

[21] G. Eorsi, 'A Propos the 1980 Vienna Convention on Contracts for International Sale of Goods' 31 *The American Journal of Comparative Law*, 333, 345, 353-356 (1983).

[22] On this aspect see I. Schwenzer, 'Article 79', in I. Schwenzer ed, *Commentary on the UN Convention on the International Sale of Goods (CISG)* (New York: Oxford University Press, 4th ed, 2015), 1142-1143; D. Tallon, 'Exemptions', in C.M. Bianca and M.J. Bonell eds, *Commentary on the International Sales Law* (Milano: Giuffrè, 1987), 591-595; J.O. Honnold, 'Exemptions', in H.M. Flechtner ed, *Uniform Law for International Sales Under the 1980 United Nations Convention* (Alphen aan den Rijn: Kluwer Law International, 2009), 627-630.

[23] M.J. Bonell, n 4 above, 9.

[24] P. Hubner, 'Comparative Sales Law', in M. Reiman and R. Zimmerman eds, *The Oxford Handbook of Comparative Law* (New York: Oxford University Press, 2006), 956-960.

contract (Arts 1218, 1453 and following), establishes a special liability for the seller regarding the quality of the goods in a sale for *latent defects* (Art 1490), *lack of expressed or essential qualities* (Art 1497) and *bad functioning of goods* (Art 1512). Also, there is a category created at a jurisprudential level: the delivery of different goods (*aliud pro alio datum*).[25] The remedies for these issues are a strict liability in terms of contract termination and reduction of price remedies and a fault liability in terms of damages.[26] However, the problem with this approach is the difficulty in drawing a line between the two systems since a lack of quality can even be considered just a breach of contract.[27]

On the other side, we have a unitary approach typical of Common law systems in which the quality issues are resolved within the system of the general rules of breach of contract. For instance, Section 14 of the UK Sale of Goods Act (1893) focuses on the terms of contract and specifically whether they are *warranties* – which gives the buyer title to claim only damages – or *conditions,* giving to the party claiming non-conformity the right to terminate the contract.

In this situation, the CISG drafters decided to adopt a uniform notion of *lack of conformity* establishing that

> 'the seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract' (Art 35.1).

In doing so, the CISG tries to avoid any local concept potentially menacing the *international* interpretation of its dispositions and creates a common concept of *non-conformity within the system of breach of contract*.[28]

In addition, the CISG had another task: creating rules for the good of a sale that is international in its nature. In this context, considering – for instance – the expenses and the risk concerning a sale that is international compared to a domestic one, the CISG tries to favor the valid existence of the contracts against its premature termination on the initiative of one of the parties, the so-called *favor contractus* principle.[29] Regarding non-conformity of goods, CISG may allow voiding the contract for a lack of quality or quantity only if it amounts to fundamental breach of contract, that is if the non-conformity destroys the core

[25] A. Luminoso, 'Vendita', in R. Sacco ed, *Digesto delle discipline umanistiche – Sezione Civile* (Torino: Utet, 1999), XIX, 645.

[26] ibid 647-648.

[27] P. Hubner, n 24 above, 957.

[28] I. Schwenzer, 'Article 35', in I. Schwenzer ed*, Commentary on the UN Convention on the International Sale of Goods (CISG)*, 593.

[29] B. Keller, 'Favor Contractus: Reading the CISG in Favor of the Contract', in C.B. Andersen and U.G. Schroeter eds, *Sharing International Commercial Law across National Boundaries: Festschrift for Albet H. Kritzer on the Occasion of his Eightieth Birthday* (London: Wildy, Simmons & Hill Publishing, 2008), 249, 254-257; H. Sono, 'Favor Contractus no Variēshon', in H. Matsuhisa et al eds, *Minpogaku ni okeru Koten to Kakushin* (Tōkyō: Seibundō, 2001), 258-264.

of the reciprocal exchange.[30] Unless that point is reached, the CISG tries to restore balance in the contractual relationship between the parties giving a set of remedies to the buyer. Specifically, if the lack of conformity concerns quantity, the buyer may demand delivery of the missing quantity (Art 51.1, Art 46.1) and if the lack of conformity takes another form like wrong quality or wrong delivery, the buyer has the right to require a delivery of substitute goods but only if the lack of conformity amounts to a fundamental breach of contract (Art 46.2). In addition, the buyer can even require the reparation of goods unless it unreasonable to do so (Art 46.3) and he has anyway right to price reduction under Art 50 and to damages under Art 74.[31]

So, as can be observed from the content of Art 35, the CISG drafters tried to look for transnational provisions and fit them to international transactions needs. These drafting efforts made good results: the CISG nowadays represents one of the most successful conventions made by UNCITRAL with at present eighty-nine countries as contracting states.[32] In addition, many States used CISG as a model to reform their domestic sales law,[33] including Japan in the recent reform of the *Minpō* in areas like the non-conformity of goods provision.

III. Non-Conformity of Goods in the *Minpō*

1. The Pre-Reform *Minpō*

The pre-reform *Minpō* regulation about non-conformity of goods is very similar to the Italian system mentioned above in adopting the two-tier approach inspired by Roman law model.[34]

In fact, according to general rules of sales contract in the present *Minpō*, a valid sale contract consists in the obligation of the seller to transfer to the buyer the property of the subject matter of the contract and, on the other hand, the obligations of the buyer to pay the price for it (Art 555).[35] Then, according then general rule, reciprocal obligations arising from a contract must be consistent with their purpose (Art 415).[36] Thus, a case of non-conformity of goods in terms

[30] For some leading cases on conformity of goods on fundamental breach see, in Germany, Bundesgerichtshof, 3 April 1996, available at https://tinyurl.com/y78n73ya (last visited 15 November 2018) (Cobalt Sulphate Case) and, in the United States of America, Federal Appellate Court (2nd Circuit) *Rotorex Corp* v *Delchi Carrier*, 6 December 1995.

[31] I. Schwenzer, n 28 above, 616-617.

[32] https://tinyurl.com/585fw5 (last visited 15 November 2018).

[33] I. Schwenzer, n 28 above, 593.

[34] K.Yuzuki and T. Takagi, *Shinpan Chūshaku Minpō (14)* (Tōkyō: Yūhikaku, 1993), 260-261.

[35] Art 555: 'A sale shall become effective when one of the parties promises to transfer a certain real right to the other party and the other party promises to pay the purchase money for it'. Taken from Japanese Law Translation Database System Copyright © 2018 Ministry of Justice, Japan, available at https://tinyurl.com/y9ry6cu6 (last visited 15 November 2018).

[36] Art 415: 'If an obligor fails to perform consistent with the purpose of its obligation, the obligee shall be entitled to demand damages arising from such failure. The same shall apply in

of quality or quantity can be seen at first as a performance 'not consistent with the purpose of the obligation'. That entitles the buyer to the usual remedies for breach of contract as damages (Art 415), termination of contract after a reasonable period to perform (Art 541)[37] and specific performance (Art 414.1).[38] [39]

However, Arts 560-570 of the present *Minpō* provides a set of special liabilities for defects in sale contracts parallel to the remedies for general breach of contract. First, Art 565[40] provides a seller's special liability on lack of quantity established in the contract applying *mutatis mutandis* the remedies in Art 563[41] and Art 564.[42] Secondly, Art 570[43] establishes a seller's special liability for *latent defects* (*kakureta kashi*) on the subject matter of the sales contract. According to Art 570, in presence of functional or qualitative lack in the subject matter of the sales contract the existence of which cannot be realized by a reasonable person,[44] the buyer is entitled to damages or contract termination with no additional time period but the latter is possible only if the purpose of

cases it has become impossible to perform due to reasons attributable to the obligor'. Japanese Law Translation Database System Copyright © 2018 Ministry of Justice, Japan. All Rights Reserved, available at https://tinyurl.com/y9ry6cu6 (last visited 15 November 2018).

[37] Art 541: 'In cases where one of the parties does not perform his/her obligations, if the other party demands performance of the obligations, specifying a reasonable period and no performance is tendered during that period, the other party may cancel the contract'. Japanese Law Translation Database System Copyright © 2018 Ministry of Justice, Japan. All Rights Reserved, available at https://tinyurl.com/y9ry6cu6 (last visited 15 November 2018).

[38] Art 414.1: 'If an obligor voluntarily fails to perform any obligation, the obligee may request the enforcement of specific performance from the court; provided, however, that, this shall not apply where the nature of the obligation does not permit such enforcement'. Taken from Japanese Law Translation Database System, Copyright © 2018 Ministry of Justice, Japan. All Rights Reserved, available at https://tinyurl.com/y9ry6cu6 (last visited 15 November 2018).

[39] T. Uchida, *Minpō II* (Tōkyō: Tōkyō Daigaku Shuppankai, 3rd ed, 2011), 125.

[40] Art 565: 'The provisions of the preceding two Articles shall apply mutatis mutandis in cases where there is any shortage in the object of a sale made for a designated quantity, or in cases where part of the object was already lost at the time of the contract, if the buyer did not know of the shortage or loss'. Taken from Japanese Law Translation Database System, Copyright © 2018 Ministry of Justice, Japan. All Rights Reserved, available at https://tinyurl.com/y9ry6cu6 (last visited 15 November 2018).

[41] Art 563: '(1) If the seller cannot transfer any part of the rights which are the subject matter of the sale because the part of the rights belongs to others, the seller may demand a reduction of the purchase money in proportion to the value of the part in shortage. (2) In the cases set forth in the preceding paragraph, a buyer in good faith may cancel the contract if the buyer would not have bought the rights if the rights consisted only of the remaining portion.(3) A demand for the reduction in the purchase money or cancellation of the contract shall not preclude a buyer in good faith from making a claim for damages'.

[42] Art 564: 'The rights under the preceding Art must be exercised within one year from the time when the buyer knew the facts if the buyer was in good faith, or within one year from the time of the contract if the buyer had knowledge, as the case may be'.

[43] Art 570: 'If there is any latent defect in the subject matter of a sale, the provisions of Article 566 shall apply mutatis mutandis (…)'.

[44] S. Wagatsuma, *Saiken Kakuron Chukan I (Minpō Kōgi V2)* (Tōkyō: Iwanami Shoten, 1957), 288.

the contract cannot be achieved due to the present defect (Art 566).[45]

This entire system has been much discussed. First, whether the Art 565 special liability is to be considered a liability concerning parties very rights or a liability on the goods has been debated. In fact, since Art 565 applies *mutatis mutandis* the remedies of defects in rights, it can be considered accordingly as a liability in rights but at the same time a lack in quantity can be considered a defect of the goods.[46]

Furthermore, the present *Minpō* was drafted to provide a body of law that could make Japan earn the trust of Western Powers and revise unequal treaties signed with Western Powers in the middle of 19th century. For this purpose, legal concepts were transplanted directly from European legal culture by a small group of law experts. This resulted in a wording that sometimes seems alien to everyday life[47] and can lead to different interpretations of the scope of the warranty. There was a discussion regarding the meaning of the word *defect* in Art 570 since it can be intended objectively as a feature which that kind of subject matter of contract usually possesses.[48] However, recent tribunal decisions and recent doctrinal opinions[49] give a more subjective position according to which the feature of the object must be considered in the context of the contract.[50]

There has been a long discussion, about the relationship of the Art 570 special liability on hidden defects and the general rule on breach of contract.[51] A first position formulated in the 1920s claimed that this warranty was only applicable in the case of unique goods. According to this position, in the case of a sale of unique goods, a seller's duty consists only in the delivery of goods and nothing more since unique goods cannot be considered defective. However, this makes the balance of a sale contract tremble since the buyer has the obligation to pay even in presence of a defect. Art 570 has the function of counterbalancing the buyer's obligation, thereby guaranteeing a protection to him for the sale of unique goods. In this light, Art 570 special liability was considered a non-contractual obligation imposed by law on unique goods sales. Its remedies were only termination of contract and damages limited to reliance interest. However, this position was heavily criticized in terms of scope of application. It was

[45] Art 566: '((1)In cases where the subject matter of the sale is encumbered with for the purpose of a superficies, an emphyteusis, an easement, a right of retention or a pledge, if the buyer does not know the same and cannot achieve the purpose of the contract on account thereof, the buyer may cancel the contract. In such cases, if the contract cannot be cancelled, the buyer may only demand compensation for damages (…) (3) In the cases set forth in the preceding two paragraphs, the cancellation of the contract or claim for damages must be made within one year from the time when the buyer comes to know the facts (…)'.

[46] K. Yamamoto, *Minpō Kogi IV-1* (Tōkyō: Yūhikaku, 2005), 300.

[47] H. Nakata, n 9 above, 4.

[48] S. Wagatsuma, n 44 above, 288.

[49] Supreme Court of Japan Decision, 1 June 2010 (H21(JU)n.17; H21(O)n.17); T. Uchida, n 39 above, 135.

[50] K. Yamamoto, n 46 above, 280-281.

[51] T.Uchida, n 39 above, 127-128.

considered too strict and not reflecting the reality of transactions. It put all the expectations on quality and functionality of the goods outside the framework of the contract and excluded the possibility of reparations and, if possible, substitution. This created a provision applicable only in a few cases. In addition, this would have given the buyer the possibility of making claims about quality issues for non-unique goods for ten years in accordance with the general rule in Art 167.1.[52] This was held to be unrealistic when applied to actual business transactions.[53]

Therefore, in the 1960s this special liability started to be considered as a *contractual-related matter*. According to this, a seller has the duty to transfer the property of the goods with quality and functionality matching the price paid by the buyer, regardless of whether they're unique goods or not. In case the seller delivers goods with latent defects, he commits a breach of contract according to Art 570 which acts as a special rule for that kind of breach. Seen as such, Art 570 special liability grants the buyer remedies provided by general breach of contract liability like complete fulfillment, substitution and reparation in addition to remedies provided by Art 570 itself. The scope of damages will follow the general rule in Art 416 so that fulfillment profits also are included.[54]

2. Reformed Non-Conformity Rule

The above discussion about the content of Arts 565 and 570 shows it was felt a reform was needed. In fact, the new reform was desired for two main reasons.

One reason was more theoretical. It consisted basically of trying to solve the problem of critical wording and the gap between the black letter law and the real application of the provisions that happened to be created due to the influence of doctrinal opinions and tribunal decisions.[55]

The second reason was that the reform was needed due to the evolution of the international market.[56] Modern commerce evolved in a way that basic transactions came to be based on non-unique goods which must be delivered without quality problems.[57]

With this background, the reform committee felt the need to reformulate the *Minpō* to reflect the new realities regarding the quality and quantity of goods system. Specifically, the new Art 562 provides:

> 'When a delivered object of the contract does not conform to the content

[52] Art 167: 'A claim shall be extinguished if not exercised for ten years'. Taken from 'Japanese Law Translation Database System', Copyright © 2018 Ministry of Justice, Japan. All Rights Reserved, available at https://tinyurl.com/y9ry6cu6 (last visited 15 November 2018).

[53] T. Uchida, n 39 above, 127-128.

[54] ibid.

[55] H. Nakata, n 9 above, 312; T. Tsutsui, n 8 above, 20.

[56] H. Nakata, n 9 above, 5-6; T. Tsutsui, n 8 above, 20.

[57] H. Nakata, n 9 above, 312.

of the contract in terms of type, quality or quantity, the buyer may make a claim to the seller for completion of the obligation by repairing the subject matter, delivery of a substitute or completion of the obligation by delivery of the remaining part (…)'.

In addition, Art 563 provides the possibility of a price reduction in case there is no completion of the obligation. Art 564 provides the remedies for breach of contract (damages and termination of contract). However, in case of termination, the new rule in Arts 541 and 542 provides that a contract can be terminated only in case of a *fundamental breach*.[58]

In short, we can see four main changes regarding non-conformity of goods provisions. First, Art 562 seems to put an end to the discussion regarding the nature of warranties on non-conformity in the present *Minpō*. In fact, the new provision confirms the doctrinal position by which the non-conformity of goods is not a liability not connected to the contract, putting it as a kind of breach of contract.[59] Secondly, lack of quantity issues has been put into the umbrella of non-conformity of goods[60] and thirdly cryptical terms like *defect* have been eliminated.[61] In addition, the *Minpō*, seems to have been reformed to guarantee the survival of the contract. This is proven by a system of remedies that follow the principle of *Favor Contractus*.[62]

How do these new provisions relate to the CISG system of non-conformity of goods?

IV. Conclusion

The *Minpō* reform on conformity of goods and Art 35 of the CISG were drafted with different theoretical purposes. The former has firstly the objective of reflecting the doctrinal opinions and decisions accumulated in over a hundred years of legal history. The latter was supposed to find the *golden path* between legal cultures. However, both seem to have reached the same conclusion considering that the new Art 562 of the *Minpō* seems to adopt an approach very close to Art 35.1 of the CISG. In fact, they both put all cases of non-conformity of goods in the context of breach of contract using the same wording.[63]

[58] Y. Shiomi, n 3 above, 94-102.

[59] Y. Shiomi, 'Baibai, Ukeoi no Tanpo Sekinin' 1045 *New Business Law*, 7, 8 (2015); T. Furutani, 'Minpōkaisei to Baibai ni okeru Keiyakufutekigōkyūfu' 51(3-4) *Sandaihōgaku*, 819, 819-820 (2018).

[60] Y. Shiomi, n 3 above, 91; S. Wagatsuma et al, *Wagatsuma, Arizumi Konmentāru Minpō (Sōsoku, Bukken, Saiken)* (Tōkyō: Nihonhyōronsha, 2018), 1160.

[61] Y. Shiomi, n 3 above, 90; T. Furutani, n 59 above.

[62] H. Matsuo, *Saikenhōkaisei o Yomu – Kaiseiron kara Manabu Shinminpō* (Keiōgijukushuppankai: Tōkyō, 2017), 3-4.

[63] M. Nozawa, 'Minpō(Saikenhō)no Aratana Chihei - Baibai' 739 *Hōgaku Seminar*, 36, 37 (2016).

In addition, the *Minpō* reform and the CISG have in common the objective of adapting the rules on non-conformity of goods to the issues of international commerce. Regarding non-conformity of goods provision, the reformed *Minpō*, just as the CISG does, seems to follow the *favor contractus* principle on remedies, trying to guarantee as possible the survival of the contract.

Can we say that they have the same provision so that we can use the CISG to interpret Art 562 of the reformed *Minpō*?

In trying to answer this question, one must not forget the very objective under which the CISG was made. In particular, it was structured to regulate *only* international sales of goods. This can be seen by taking a look at the provisions related to conformity of goods. For example, the relationship between the passing of risk and conformity of goods, a pivotal concept in the international sale of goods since international sales usually include a transportation contract.

In this regard, the Convention relating to the Uniform Law on the International Sale of Goods (ULIS), one of the predecessors of the CISG together with the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF), provided a treatment of the concept of passage of risk that was heavily criticized. Art 97.1 of ULIS disposed that 'The risk shall pass to the buyer when delivery of the goods is effected in accordance with the provisions of the contract and the present law'. Art 19.1 of the ULIS defined *delivery* as 'the handing over of goods which conform with the contract', modelled from the French law concept of *délivrance*.[64] Therefore, under ULIS, if a buyer refused a shipment saying that the quality of goods was not in conformity and claiming for instance the termination of the contract or the substitution of the goods, the risk liability on the goods still stays on the seller even if the goods are physically delivered to the buyer. This situation can be bearable in an international sale involving parties living in confining states or states in a relatively close distance. However, in a sale involving, for example, transportation by sea or long distances to deliver goods, the burden of liability for the seller can be an excessive one.[65] As a matter of fact, the ULIS seemed to be conscious of this problem. It tried to resolve it with Art 97.2[66] which established a duty for the seller to take possession of the goods even if he had rejected them. However, the black letter law itself was considered too complicated as it left a broad room

[64] J.O. Honnold, 'Uniform Law for International Sales' 107 *University of Pennsylvania Law Review*, 299, 318 (1959).

[65] M.L. Ziontz, 'A New Uniform Law for the International Sale of Goods: Is it Compatible with American Interests?' 2 *Northwestern Journal of International Law & Business*, 129, 138-141 (1980).

[66] Art 97.2: 'Where goods dispatched to the buyer have been put at his disposal at their place of destination and he exercises the right to reject them, he shall be bound to take possession of them on behalf of the seller, provided that this may be done without payment of the price and without unreasonable inconvenience or unreasonable expense. This provision shall not apply where the seller or a person authorized to take charge of the goods on his behalf is present at such destination'.

for interpretation.[67] In response to these problems, while establishing the duty of the seller to deliver the goods at Art 30, Art 67.1 of CISG defines delivery as the handing over of the goods and with that, the passage of risk of loss, but passage of risk is intended not to depend on the goods being free from non-conformities.[68]

In contrast with the CISG, the reformed the *Minpō* seems to follow the ULIS path and not the path of the CISG.[69] Art 567.1 of the reformed *Minpō* provides that the passage of risk happens when the seller delivers to the buyer the subject matter of the contract 'limited to specified goods'. Since Art 401 establishes that

> 'In case the subject of the claim is specified only with reference to a type and if the quality of such property cannot be identified due to the nature of the juristic act or intention of the relevant party(ies), the obligor must deliver the property of intermediate quality',[70]

the *Minpō* seems to intend that in case of delivery of non-conforming goods, usually defined only by type and quality nowadays, the risk liability on the goods stays on the seller.[71]

In conclusion, maybe the new *Minpō*, strictly regarding conformity of goods, has been inspired by the CISG and seems to have adopted a very similar approach. However, if one considers the conformity system as a whole, one can still see some points of difference between the two systems in some pivotal concepts like the relationship between conformity of goods and the passage of risk. So maybe we can affirm that even if the objective of this reform was to *internationalize* the *Minpō*, elements can still be found that makes one think that this process is incomplete. After the coming into force of the reformed *Minpō* perhaps one will see a new interpretation of these articles and a solution to this problem. However, at present we can affirm that the *Minpō* is still a rule made for the internal market. Therefore, the CISG jurisprudence and doctrinal opinion should be used with caution.

[67] K. Sono and M. Yamate, *Kokusaibaibaihō* (Tokyo: Seirinshoin, 1993), 129.

[68] P. Hachem, 'Article 67', in I. Schwenzer ed*, Commentary on the UN Convention on the International Sale of Goods (CISG)*, 973.

[69] M. Nozawa, n 63 above, 38.

[70] Taken from 'Japanese Law Translation Database System', Copyright © 2018 Ministry of Justice, Japan. All Rights Reserved, available at https://tinyurl.com/y9ry6cu6 (last visited 15 November 2018).

[71] Y. Shiomi, *Shin Saikensōron I* (Kyōto: Shinsanshuppansha, 2017), 211, 215; S. Wagatsuma et al, n 60 above, 1168.