The Problem of Delay in the Contract Formation Process: A Comparative Study of Contract Law

Mikio Yamaguchi †

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Introduction

Man is by nature a social animal, and society's maintenance requires the existence of laws.[1] Laws may vary between societies because they reflect different social backgrounds. Scholars note that an observer cannot sufficiently understand his own legal system without comparing it to a different legal system.[2] Thus, a comparative method illuminates variations in legal conceptions and enhances one's understanding of the nature of law itself.[3] With that in mind, this Article presents a comparative study of contract law, focusing on the problem of delay in the contract formation process. The paradigmatic case of our concern is as follows: A buyer receives an offer for the sale of goods on September 10, 2004. The offer prescribes, "If the offeree wants to accept the offer, a message of acceptance must be received by October 1, 2004." Since the written offer clearly prescribes the due date of receipt, the buyer mails a letter of acceptance on September 20, 2004. If the transmission were normal, the letter of acceptance would reach the seller before October 1, 2004. However, the seller actually receives the letter of acceptance on October 10, 2004.[4]

Legal systems approach the problem of delay in the transmission of acceptances differently. In common law systems, there has been "no occasion" to confront this problem because the "mailbox rule" makes the acceptance effective when it is sent.[5] By contrast, many civil law codes with "receipt rules" have legislative provisions that deal with delays in the transmission of acceptance.[6] This suggests that legal rules addressing the problem may be necessary in legal systems that have rules making acceptance effective when received, but that such rules may not be necessary in legal systems that have rules making acceptance effective when sent. However, in common law systems such as in the United States, the mailbox rule does not govern every case.[7] For example, the mailbox rule does not govern when the offeror, like the seller in our paradigm case above, has so

1. *See* ARISTOTLE, POLITICS, bk. I, ch. II, § 9 (Ernest Barker trans., Oxford Univ. Press 1948); ROSCOE POUND, JUSTICE ACCORDING TO LAW (1951) [hereinafter POUND, JUSTICE]; *see also* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 694-95 (2d ed. 1985) (stating that "[i]f law means an organized system of social control, any society of any size and complexity has such systems"); ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW (rev. ed. 1965) [hereinafter POUND, PHILOSOPHY] (developing the notion of law as a form of social control).

2. *See* P.S. ATIYAH & R.S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY, AND LEGAL INSTITUTIONS 418 (Clarendon Press 1987).

3. *See id.* at 415-20.

4. Hereinafter labeled as "paradigm case."

5. JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 198 (3d ed. 1999).

6. *Id.*

7. JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 2.23, at 107 (4th ed. 1998).

prescribed in his offer.[8] This creates an issue concerning the meaning of "no occasion" to deal with the problem. Additionally, this creates an issue concerning the desired solution. To answer these questions, it will be useful to compare the contract formation process in the American legal system with that in the Japanese legal system. Both the Civil Code of Japan, unlike many civil law jurisdictions, and the American legal system generally make an acceptance effective when sent. However, unlike the American system, the Civil Code has a legal rule which governs the problem of delay in the transmission of acceptance.[9]

The comparative study shows that American contract law focuses on the different legal identities of the contracting parties, viewing one as the "master of the offer"[10] and the other as the "casting voter."[11] In contrast, Japanese contract law views them equally or "symmetrically."[12] Neither the chronological order of the establishment of the offer and acceptance nor the different status of offeror and offeree has any legal significance under the civil law in Japan.[13] The comparative study also shows that the American legal system has developed its characteristic rules which balance the parties' interests—either by protecting the offeree from the power of the master of the offer, or by protecting the offeror from the power of the casting voter. In contrast, the Japanese legal system has developed institutions that control the means of acquiring the casting vote. The balancing of the parties' interests is not only a particularly American approach to the contract formation process, but also a major function of American contract law, especially when an unforeseen circumstance occurs.[14]

Since American contract law generally has appropriate mechanisms for balancing contracting parties' interests, it is understandable that there has been no occasion to provide a definitive approach to solving the problem of delayed acceptances. Nonetheless, it is necessary for American law

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8. "The offeror, it must be remembered, is master of his offer and so he has power to negate the mailbox rule." *Id.* at 117.

9. Minpo, the Civil Code of Japan, makes an acceptance effective when it is sent, MINPO, art. 526, para. 1; yet it has a provision to deal with the problem of delay in the transmission of acceptances. *Id.* at art. 522. Different arguments may be available in both the United States and Japan when the contracting parties use "instantaneous" methods of communication, such as email. *See* Raymond T. Nimmer, *Electronic Contracting: Legal Issues*, 14 JOHN MARSHALL J. COMPUTER & INFO. L. 211 (1996).

10. The phrase "master of his offer" can be seen in RESTATEMENT §§ 29 cmt. a, 52 cmt. a, 58 cmt. a.

11. *See* Kagayama, *infra* note 12, at 546-49.

12. *See* Shigeru Kagayama, *Tetsuke no Hoteki Seishitsu– Moshikomi no Yuin, Yoyaku to Tetsuke no Kankei*, *in* MINPOGAKLU NO KADAI TO TENBO 543 (2000); *infra* notes 42-65 and accompanying text.

13. *See* Kagayama, *supra* note 12, at 547-48. According to the accepted translation of the Japanese Civil Code, "in order to form a contract, it is an indispensable requirement that some manifestations of intent which is opposed to each other agrees [sic] (assent). In order to establish an assent, objective agreement and subjective agreement are necessary." SAKAE WAGATSUMA, SAIKEN KAKURON 54 (1954). The author cites many German legal terms in his treatise.

14. *See* Robert A. Hillman, *An Analysis of the Cessation of Contractual Relations*, 68 CORNELL L. REV. 617 (1983) (revealing the significance of the balancing approach in American contract law by focusing on the problem of cessation).

to confront specifically the problem of such a delay because an unforeseen delay in the transmission of an acceptance creates an imbalance, which does not stem from the difference between the offeror and the offeree, between the parties. The following hypothetical demonstrates the imbalance. Suppose prices increase sharply on October 1st in the paradigm case: If there is no rule for the problem of delayed transmission of acceptances, such an acceptance is considered a counteroffer, allowing the original offeror to speculate in a fluctuating market. Courts, however, have strongly resisted sanctioning parties' attempts to speculate.[15]

Cases for which there is no judicial precedent must be governed by the "general principle, applicable to cases most nearly analogous, but modified and adapted to new circumstances, by considerations of fitness and propriety, of reason and justice, which grow out of those circumstances."[16] Thus, the rationale used to develop the rule addressing a delay in the transmission of offers is similarly applicable to the problem of a delay in the transmission of acceptances. This is so because an offeror in the case of a delayed transmission of an acceptance is in an analogous position to an offeree in the case of a delayed transmission of an offer to the extent that the imbalances in both cases do not stem from the difference between the offeror and the offeree, but from the difference between the addressor and the addressee of the acceptance. This Article argues that the rule governing delay should provide that, when the offeror has reason to know that the acceptance has been timely sent, but it arrives late due to an unforeseen delay in transmission, the delayed acceptance is effective, unless the offeror promptly informs the offeree of his intention to retract the offer on account of the delay.

Interestingly, Japan's legislative provisions stipulate the same rule but result from a different rationale.[17] While the common law reaches the solution by invoking "good faith,"[18] the Civil Code of Japan reaches the solution by appealing to the "security or stability of transaction[s]."[19] American contract theory is closely related to "the free market of classical economic theory,"[20] while Japanese contract theory deems the principle of good faith to be the "supreme notion" governing the entire law of obligation.[21] In the American legal system, most commentators agree that the concept of good faith does not become relevant until the contracting par-

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15. *See* HONNOLD, *supra* note 5, at 197 n.2.

16. Norway Plains Co. v. Boston & Maine R.R., 67 Mass. 263, 267-68 (1854).

17. *See* MINPO art. 522.

18. Robert S. Summers, *"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195 (1968).

19. *See* E. ALLEN FARNSWORTH, FARNSWORTH ON CONTRACTS § 4.1 (2d ed. 1998); The Civil Code Draft Amendment Statement of Reasons, *reprinted in* MINPO SHUSEAN (ZEN SAN PEN) NO RIYUSHO, 503 (Toshio Hironaka ed., 1987). Although a literal translation of the Statement of Reason would be "security of [commercial] transaction," it seems better translated in this way.

20. *See* GRANT GILMORE, THE DEATH OF CONTRACT 7-8 (1974).

21. WAGATSUMA, SAIKEN KAKURON, *supra* note 13, at 33; SAKAE WAGATSUMA, SHINTEI SAIKEN SORON 14 (1964). This treatise advances the traditionally accepted theory of contract in Japan.

ties have reached an agreement.[22] This antipathy toward good faith stems from a fear that expanding the domain of good faith would subvert the security or stability of commercial transactions.[23] Thus, one must find the meaning of "good faith" and "security or stability of transactions" in the contract laws, which touches on the more fundamental inquiries into the nature of contract law and its role in society. Consequently, this Article reconsiders the nature of contract law in exploring a solution to the problem of delay in the contract formation process.

Part I of this Article briefly reviews the structure of the several different types of American law applicable to our paradigm case. Part II of this Article compares the legal structure of the contract formation process in the American legal system with that in the Japanese legal system. Then, Part III analyzes legal consequences of a delayed transmission of an acceptance, which reflect the characteristics of the American legal system that are discussed in the preceding Part. Part IV reconsiders the nature of contract law as it appears in the solution to the problem of delay in the contract formation process.

I. Law Applicable to the Problem of Delay in the United States

A. Structure of Applicable Law

In the American legal system, contract law is primarily common law, consisting of court decisions, which differ from state to state.[24] Further, many legislative enactments, which also vary from state to state, regulate contracts.[25] Despite these variations, uniformity of rules across jurisdictions is highly valued in the field of contract law.[26] Thus, courts find the Restatement (Second) of Contracts legally more persuasive than Restatements in other areas of law.[27] Similarly, the promulgation of uniform codes—such as the Uniform Commercial Code ("UCC")[28] and the Conven-

22. *See* FARNSWORTH, *supra* note 19, § 7.17 (stating that a court will supply a term only if "an agreement is already in existence"). The duty of good faith is therefore not imposed on parties until they have reached an agreement.

23. Jacques Ghestin & Barry Nicholas, *The Pre-Contractual Obligation To Disclose Information*, *in* CONTRACT LAW TODAY: ANGLO-FRENCH COMPARISONS 188 (Donald Harris & Denis Tallon eds., 1989).

24. *See* ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1.21, at 75 (rev. ed. 1993); NORIO HIGUCHI, AMERIKA KEIYAKU HO 27 (1994); *see also* ROBERT S. SUMMERS & ROBERT A. HILLMAN, CONTRACT AND RELATED OBLIGATIONS 26 (4th ed. 2001) (stating that "[m]ost of the law giving legal effect to agreements is common law made by courts").

25. *See* CALAMARI & PERILLO, *supra* note 7, § 1.6, at 15.

26. *See* CORBIN, *supra* note 24, at 37.

27. *See id.* at 37 n.28 (1994), *citing* Yoshiaki Nomura, *America Keiyaku Teishoku Ho no Saikin no Doko*, 40 HANDAI HOGAKU 924 (1991).

28. The UCC is an example of a collection of so-called "uniform state laws." It is the result of attempting to achieve uniformity or generalization of the laws in every state by way of adopting a same model rule in each state's legislature. The National Conference of Commissioners on Uniform State Laws began the attempts in 1982. The UCC has been one of the most successful examples of these attempts. *See* HIGUCHI, *supra* note 24, at 28 n.10.

tion on Contracts for the International Sale of Goods ("CISG")[29]—has been favored in the area of contract law.[30] The UCC was enacted in 1951, amended in 1958, and adopted by every state, except Louisiana, by 1962.[31] Despite its name, the UCC governs not only contracts between merchants but also contracts for the sale of goods in general.[32] Thus, the UCC governs the paradigm case.[33] The United States has signed and ratified the CISG, an international treaty.[34] It is a "self-executing treaty with the preemptive force of federal law,"[35] which, sets out substantive provisions of law that govern the formation of international sales contracts and the rights and obligations of the buyer and the seller.[36] The CISG applies to sales contracts between parties who conduct business in different countries bound by the Convention.[37] When it applies, the CISG preempts state law, including Article 2 of the UCC. This avoids a situation where the availability of independent state contract causes of action might be available and might "frustrate the goals of uniformity and certainty embraced by the CISG."[38]

Article 2 of the UCC does not specifically say when a sales contract is formed.[39] Rather, the fundamental principles governing contract formation are derived from the common law concepts of offer, acceptance, and rejection.[40] Note that the CISG applies if the seller in the paradigm case conducts business in the United States and the buyer conducts business in Canada, even if they are incorporated in the same state.[41] When both contracting parties conduct business in the United States, the common law governs the problem of delay. However, when the contracting parties conduct business in two different countries, the CISG applies.

B. Priority of the Applicable Law

In the American legal system, the law that courts should apply and the law courts actually apply may not be the same. The American system is unique because of the frequency of circumstances under which judges are authorized to "override" legislation.[42] For example, in *McIntosh v. Mur-*

29. UN Convention on Contracts for the International Sale of Goods, U.N. Doc. A/CONF.97/19 (1980), *published in* 52 Fed. Reg. 6262 (1987) [hereinafter CISG].

30. *See* HIGUCHI, *supra* note 24, at 28 n.10.

31. Louisiana has adopted part of the UCC but not Article 2, which governs contracts for the sale of goods. *See id.*

32. *See id.* at 29.

33. *See id.*

34. *See* Asante Techs., Inc. v. PMC-Sierra, Inc., 164 F. Supp. 2d 1142, 1146 (N.D. Cal. 2001).

35. Richard E. Speidel, *The Revision of UCC Article 2, Sales in Light of the United Nations Convention on Contracts for the International Sale of Goods*, 16 NW. J. INT'L L. & BUS. 165, 166 (1995).

36. CISG, *supra* note 29.

37. *Id.*

38. *See Asante Techs., Inc.*, 164 F. Supp. 2d at 1151; Speidel, *supra* note 35, at 167.

39. *See* Nimmer, *supra* note 9, at 220.

40. *See id.*

41. *See Asante Techs.*, 164 F. Supp. 2d at 1147.

42. *See* ATIYAH & SUMMERS, *supra* note 2, at 43.

phy,[43] the Supreme Court of Hawai'i avoided applying the Statute of Frauds by interpreting a promise that was not to be performed within one year as equivalent to a promise not performable within one year.[44] The court declared that "in spite of whatever utility the Statute of Frauds may still have, its applicability has been drastically limited by judicial construction," and noted that "learned writers continue to disparage the Statute."[45] The judicial affinity for overriding legislation may result from the belief that "instead of a series of detailed practical rules, established by positive provisions," the common law consists of "a few broad and comprehensive principles, founded on reason, natural justice, and enlightened public policy."[46] Therefore, to find a legally effective solution to the problem of delay in the American legal system, one should identify the few broad principles in governing the contract formation process.

II. Comparative Study of the Contract Formation Process

A. Legal Structure of the Contract Formation Process

1. Structure of the Contract Formation Process Under the Common Law

Under American law, a legal relationship does not evolve into a contract until the two contracting parties engage in the voluntary acts of offer and acceptance.[47] An offer is defined as "the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it,"[48] or "an act whereby one person confers upon another the power to create contractual relations between them."[49] An acceptance is defined as "a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer,"[50] or "a voluntary act of the offeree whereby he exercises the power conferred upon him by the offer, and thereby creates the set of legal relations called a contract."[51] Under the common law, the offeror is generally the "master of his offer."[52] Just as the offeror can avoid making an offer by appropriate language or conduct, the offeror can narrowly limit the offeree's power of acceptance.[53] Because the offeror has an advantage over the offeree in the contract formation process, the law seeks

43. *See* McIntosh v. Murphy, 469 P.2d 177 (Haw. 1970).

44. *Id.* at 181. A similar tendency can be seen in other contract cases. *See* Hill v. Gateway 2000, 105 F.3d 1147 (7th Cir. 1997).

45. *See McIntosh*, 469 P.2d at 180.

46. *See* Norway Plains Co. v. Boston & Maine R.R., 67 Mass. 267 (1854).

47. Arthur L. Corbin, *Offer and Acceptance, and Some of the Resulting Legal Relations*, 26 YALE L.J. 169, 170-71 (1917).

48. RESTATEMENT (SECOND) OF CONTRACTS § 24 (1981) [hereinafter RESTATEMENT].

49. Corbin, *supra* note 47, at 181.

50. RESTATEMENT § 50.

51. Corbin, *supra* note 47, at 199.

52. The phrase "master of his offer" can be seen in RESTATEMENT §§ 29 cmt. a, 52 cmt. a, 58 cmt. a.

53. RESTATEMENT § 29 cmt. a.

to protect the offeree.[54] It is not uncommon to find sections in a contract treatise covering "protection of the offeree," but it is highly uncommon to find sections addressing "protection of the offeror" in the same treatise.[55]

The common idea linking these definitions is that the offer creates a power that binds both parties, and that an acceptance is an exercise of that power. Therefore, "[t]he offeror has, in the beginning, full power to determine the acts that are to constitute acceptance."[56] However, after the offeror makes that determination, "the legal consequences thereof are out of his hands, and he may be brought into numerous consequential relations of which he did not dream, and to which he might not have consented."[57] At least under the common law of the United States, this characteristic makes contract formation distinguishable from other factual negotiations.[58] Thus, once the offeror extends his offer, the offeree has an advantage over the offeror in the contract formation process. Foreign scholars often emphasize the offeree's advantage in the common law,[59] that when closing a deal, the offeree has a "casting vote."[60] The unique character of the offeror and the offeree under the American common law will be clearer when we compare these definitions with the understanding of the character of the offeror and offeree in civil law jurisdictions.

2. *Structure of the Contract Formation Process from a Comparative Perspective*

In both the Japanese and the American legal system, an offer and an acceptance generally form a contract.[61] However, in the Japanese system, most scholars consider an offer to be a manifestation of intent that is symmetrical to acceptance.[62] Neither the chronological order of the offer and acceptance, nor the different status of the offeror and offeree, possesses the same legal significance under Japanese civil law that they do under American common law.[63] This symmetrical understanding of offer and acceptance is also incorporated into the CISG, "which represents a series of compromises between common law and civil law notions."[64] For example, under the common law in the United States, the offeror has the power to

54. *See, e.g.*, FARNSWORTH, *supra* note 19, §§ 3.23-3.26c (referring to these sections as "Protections of the Offeree").

55. *See id.*

56. Corbin, *supra* note 47, at 199.

57. *Id.* at 200.

58. *See id.* at 199-200.

59. *See* HIGUCHI, *supra* note 24, at 110-19 (stating that the offeree is in an ex ante advantageous position). *See generally* Kagayama, *supra* note 12 (explaining that offer and acceptance are not equivalent and that the acceptor is in an advantageous position because he has absolute power over whether a contract comes into being).

60. Kagayama, *supra* note 12, at 546-49.

61. *See* MINPO arts. 521-28; WAGATSUMA, SAIKEN KAKURON, *supra* note 13, at 56.

62. Kagayama, *supra* note 12, at 546-49.

63. *Id.* at 547-48; *see also supra* note 13 and accompanying text.

64. *See* CORBIN, *supra* note 24, § 3.24, at 445.

exclude default rules.[65] However, in the Japanese legal system and the CISG, it is not only the offeror[66] but the "parties"[67] who may exclude default rules. This comparison demonstrates that the common law emphasizes the legal character of each contracting party, while Japanese contract law and the CISG do not recognize the sharp distinction between offeror and offeree.

B. A Major Function of the Common Law in the Contract Formation Process

In the American legal system, the contract formation process has some characteristic rules and principles, some of which are deemed to be "fundamental tenets" of the common law.[68] Such rules include the principles of revocability,[69] the mailbox rule,[70] and the counteroffer theory.[71] Although they have been explained independently, they all represent attempts to balance the power between the parties by protecting the offeree from the offeror, or vice versa.

1. Common Law Rules and Principles That Reflect the Balancing Function

It is advantageous to consider events chronologically,[72] beginning with the appearance of an offer. In American law schools, students learn what constitutes an offer by distinguishing offers from statements that are not offers, such as invitations to make an offer.[73] In cases of doubt as to whether a proposal is an offer, courts are disinclined to characterize a proposal as an offer and to thereby hold its maker to the contract.[74] This reluctance to characterize proposals as offers is one of the ways in which courts seek to balance the parties' interests. Courts have reason for cau-

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65. The Restatement contains numerous provisions allowing the offeror to exclude default rules provided for in the Restatement. *See, e.g.*, RESTATEMENT § 28 ("unless a contrary intention is manifested"); *id.* § 30 ("unless otherwise indicated by the language"); *id.* § 38 ("unless the offeror has manifested a contrary intention"); *id.* § 54 ("unless the offer requests"; *id.* § 56 "except . . . where the offer manifests a contrary intention"); *id.* § 63 ("unless the offer provides otherwise").

66. *See* CISG, *supra* note 29, art. 6, which prescribes that "the parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions." As to the rule under the Japanese legal system, see MINPO arts. 90-91; SAKAE WAGATSUMA, SHINTEI MINPO SOSOKU 253-55 (1965).

67. *See* CISG, *supra* note 29, art. 6; WAGATSUMA, *supra* note 66, at 253-55; MINPO, arts. 90-91.

68. *See, e.g.*, FARNSWORTH, *supra* note 19, § 3.17, at 283 (stating that "[i]t is a fundamental tenet of the common law that an offer is generally freely revocable and can be countermanded by the offeror at any time before it has been accepted by the offeree").

69. *See id.* at 283-87.

70. *See* CALAMARI & PERILLO, *supra* note 7, § 2.23, at 116-17.

71. *See id.* § 2-20, at 98-100.

72. *See* CORBIN, *supra* note 24, § 2.1, at 99.

73. *See, e.g.*, SUMMERS & HILLMAN, *supra* note 24, at 403-17. The casebook discusses Lefkowitz v. Great Minneapolis Surplus Store, 86 N.W.2d 689, 691 (Minn. 1957) in the subsection entitled "The Offer," and concludes that "whether in any individual instance a newspaper advertisement is an offer rather than an invitation to make an offer depends on the legal intention of the parties and the surrounding circumstances."

74. *See* FARNSWORTH, *supra* note 19, § 3.10, at 237.

tion when the offeror gives the casting vote by manifesting his intention to make an offer because binding the proposing party to a contract exposes that party to liability based on the recipient's expectation interest even without any reliance.[75] Courts can only make case law when presented with a dispute between parties.[76] When this happens, the parties generally dispute the existence of the contract. With respect to closing the deal, the offeree has the casting vote.[77] Therefore, the only way a court can balance two parties' interests at the time of litigation is by hesitating to characterize a proposal as an offer. In this way, the court balances the parties' interests by protecting the offeror from the power of the casting voter, or offeree.

Once an offer becomes effective, it is a "fundamental tenet" of the common law that the offeror may revoke the offer at any time prior to its acceptance.[78] Courts allow offerors to revoke offers for reasons similar to the contractual requirement of mutuality of obligation. If the offeror could not freely revoke the offer, he would be bound by the offer even though the offeree would not be bound. This would "subject the offeror to the risk that the offeree might speculate in a fluctuating market."[79] When one considers that courts have opposed efforts "by one party to speculate at the expense of another,"[80] the principle of free revocability illustrates the courts' concern about possible imbalances between the parties.[81] This imbalance arises because after the offeror extends an offer, the offeree has an advantage over the offeror.[82] But this principle of revocability places the offeree in an unstable position.

The offeree "may need time to decide whether to accept the offer and, during that time, may need to spend money and effort in deciding."[83] The doctrine of consideration, combined with the principle of revocability, would make it impossible to give proper protection to the offeree in the absence of some additional mechanism.[84] The option contract, which lim-

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75. *See id.* Similar functions can be seen in the "consideration doctrine," which serves a "cautionary function." *See* Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800 (1941). For liability of an offeror based on his offer, see P.S. ATIYAH, ESSAYS ON CONTRACT 143 (1990).

76. Robert A. Hillman, *The Crisis in Modern Contract Theory*, 67 TEX. L. REV. 103, 135 n.218 (1988).

77. *See* Kagayama, *supra* note 12, at 546-49.

78. *See* CORBIN, *supra* note 24, § 2.18, at 217 (stating that even in the case an offer containing a promise that the offer will not be revoked for a prescribed period and where both parties believe that the offer is thereby irrevocable, "there may still remain a power to revoke"); FARNSWORTH, *supra* note 19, § 3.17, at 283; SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 5.8, at 668 (4th ed. 1990) (stating that "even if the offer expressly states that it shall not be withdrawn; revocation is still possible"); *see also* CALAMARI & PERILLO, *supra* note 7, § 2.23, at 106 (stating that "[a] revocable offer to a bilateral contract may be revoked at any time prior to its acceptance").

79. *See* FARNSWORTH, *supra* note 19, § 3.17, at 284.

80. *See* HONNOLD, *supra* note 5, at 197 n.2.

81. *See* Corbin, *supra* note 47, at 199.

82. *See* RESTATEMENT §§ 29 cmt. a, 52 cmt. a, 58 cmt. a; *see also supra* note 58 and accompanying text.

83. FARNSWORTH, *supra* note 19, § 3.23, at 321.

84. *See id.*

its revocability, developed in the United States to protect the offeree.[85] Traditionally under the common law, courts found it difficult to protect the offeree from the offeror's power of revocation.[86] Under the traditional view, in the absence of consideration, any promise by the offeror to limit his power of revocation was simply a *nudum pactum*, or naked contract.[87] In other words, a "representation that an offer will remain open is a bare promise, unsupported by consideration, and therefore, unenforceable."[88] The option contract allows the offeree to provide consideration in exchange for a limitation on the offeror's power to revoke.[89]

An offeror can revoke the offer at any time prior to its acceptance without making an option contract.[90] In such cases, the parties will confront the issue of when an acceptance becomes effective. Many arguments have been made with respect to the effective moment of acceptance. The "mailbox rule," which makes acceptance effective when dispatched, is almost universally accepted in common law jurisdictions.[91] Section 63(a) of the Restatement and major contract treatises endorse the mailbox rule.[92] The mailbox rule differs from the "receipt rules" found in many civil law jurisdictions, which make acceptance effective when received by the offeror.[93] The receipt rules are useful because if acceptance becomes effective when the offeror receives the acceptance, the offeror has notice that the obligation binds him.[94] Indeed, most notices sent by mail are not operative until received.[95] Thus, there must be some reason why common law jurisdictions have adopted the mailbox rule when a reasonable alternative rule exists. Perhaps the rationale for the mailbox rule is that it protects the offeree by placing the risk of loss and inconvenience on the offeror and shortening the period of free revocability.[96] Unlike the general mailbox rule, an acceptance under an option contract is not effective until received by the offeror.[97] This difference seems to support the conclusion that the

85. *See, e.g.*, Marsh v. Lott, 97 P. 163 (Cal. Ct. App. 1908).

86. *See* FARNSWORTH, *supra* note 19, § 3.23, at 321.

87. *See* SUMMERS & HILLMAN, *supra* note 24, at 442.

88. *See id*; *see also* WILLISTON, *supra* note 78, § 5.8, at 666 (stating that "[a]s a result of the rule that unsealed promises without consideration are not binding, offers, unless under seal in a jurisdiction recognizing the seal or given for a consideration, may be revoked by the offeror at any time prior to the creation of a contract by acceptance").

89. *See* RESTATEMENT § 63(b).

90. *See supra* note 78 and accompanying text.

91. *See* Soldau v. Organon, Inc., 860 F.2d 355, 356 (9th Cir. 1988).

92. *See id.*

93. *See* RESTATEMENT § 63(a).

94. *See* Mactier's Adm'rs v. Frith, 6 Wend. 103 (N.Y. 1830), *quoted in* CORBIN, *supra* note 24, § 3.24, at 440-41 n.8.

95. *See* CORBIN, *supra* note 24, § 3.24, at 443 (noting that "an offeror can always so word the offer and so limit the power of acceptance as to make the receipt of the acceptance necessary to the creation of a contract" such that when an offer provides that notice of acceptance must be received within thirty days, courts may interpret the offer as requiring receipt by the offeror of the acceptance within thirty days").

96. *See id.* at 440-441; HIGUCHI, *supra* note 24, at 125-26; Friedrich Kessler & Edith Fine, Culpa in Contrahendo, *Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 HARV. L. REV. 401, 417 (1964).

97. RESTATEMENT § 63(b).

"mailbox rule" aims to protect the offeree because the revocability of option contracts is already limited, thereby obviating the need to balance the parties' interests.[98]

Another way the common law seeks to balance the powers of the offeror and offeree is through rules governing the medium of acceptance. Under § 30 of the Restatement, an offer invites acceptance by any reasonable medium unless otherwise indicated.[99] The concept of reasonability is flexible.[100] The Restatement states that even an offeree's unreasonable method of acceptance is effective when sent if "it is seasonably dispatched and provided that it is received within the time a seasonably dispatched acceptance sent in a reasonable manner would normally have arrived."[101] These rules balance the parties' interests in the same way that the mailbox rule does. The offeror is entitled to negate these rules, including the mailbox rule, by prescribing otherwise in the offer.[102] However, courts are disinclined to construe language as calling for a particular medium of acceptance.[103] This tendency of courts limits the power of the offeror more directly.

2. *Balancing Function from a Comparative Perspective*

When one compares the contract formation process in America to that of Japan, it is clear that balancing the parties' interests is a major purpose of the common law that governs the process. Some unique institutions in the Japanese contract formation process[104] include *Tetsuke* (earnest), *Moshikomi no Yuin* (invitations to make offers), and *Yoyaku* (pre-contractual reservations). A comparative study shows that the American legal system has developed its characteristic balancing principles, while the Japanese legal system has developed institutions that control the acquisition of the casting vote. Only by balancing the contracting parties' interests can the law prevent one party from obtaining an advantaged position. If such balancing is to occur, legal institutions must be developed to control the contract formation process.

As we have seen, it is advantageous to consider events chronologically, beginning with the appearance of an offer. In Japan, an offer is also distinguished from invitations to make offers.[105] But interestingly, from the

98. In one famous treatise, Farnsworth explains that an option contract is one form of protecting the offeree. *See* FARNSWORTH, *supra* note 19, § 3.23, at 286.

99. *See* RESTATEMENT § 30.

100. *See* CALAMARI & PERILLO, *supra* note 7, § 2.23, at 108.

101. *See id.* at 109. The traditional rule provided that "if the offeree uses an unreasonable medium of acceptance . . . the acceptance is effective when received rather than sent." *See id.*

102. *See id.*

103. *See id.* at 107.

104. *See* Kagayama, *supra* note 12, at 545. Unless otherwise indicated, the following analyses of the institutions of Tetsuke, Moshikomino Yuin, and Yoyaku are mainly based on this work of Professor Kagayama.

105. *See* SUMMERS & HILLMAN, supra note 24, at 403-17.

viewpoint of American legal system, the following situation is pointed out as a part of the Japanese explanation of the invitation to make offers:

> One of the major concerns of the parties in the contract formation process will be which party will acquire the casting vote. In the case of contract formation between individuals, the parties seem not so interested in which party will offer and which party will accept. However, an enterprise recognizes this point precisely in the contract formation between enterprise and a consumer. For example, a consumer is never given a "form of acceptance" but is always given a "form of offer." In this way, the enterprise tries to avoid being an offeror by intent.[106]

An enterprise has no problem if the consumer makes an offer, because the enterprise can choose whether to accept it. However, the enterprise cannot gain a profit if it waits for a customer to make an offer. On the other hand, if the enterprise carelessly makes an offer, it risks being bound to transact with a consumer who has no credit. Therefore, the enterprise makes an invitation to make offers but does not address it to specific persons. This enables the enterprise to choose good customers from a large pool of offers. The invitation to make offers is a strategy for increasing profits by acquiring the casting vote.

The institution of *Yoyaku* translates as "reservations" and is provided for in the basic Civil Code of Japan. Article 556 of the Japanese Civil Code prescribes that one party's promise to buy or sell becomes effective when the other party manifests his intention to complete the sale.[107] According to traditionally accepted contract theory in Japan, this institution does not create a "pure" reservation but rather a (formed) contract for a sale that becomes effective on condition that the other party manifest an intent to complete the contract.[108] However, the reservation itself does not form a contract. Indeed, the former Supreme Courts of Japan rejected this view and stated that the unilateral reservation of sale is a "pure" reservation, meaning that a contract for sale is formed only by the other party's manifestation of intent to complete it.[109] The institution of reservation is best understood as a mechanism to reverse the position of offeror and offeree. Thus, a person in the position of offeror becomes the offeree if he makes a reservation. If a person, without access to advertising media and unable to invite individuals to make offers, wishes to initiate a deal and to grasp the same casting vote as the offeree, that person can make a reservation.

An invitation to make an offer and a reservation both serve the function of acquiring the casting vote: in both cases the maker obtains the power to complete the contract if the other party makes an offer. For example, where person *A* invites offers and obtains an offer from *B*, *A* both initiates the contract formation process and acquires the casting vote in closing the deal. Similarly, if *A* offers a reservation and *B* accepts it, *A* also initiates the contract formation process and acquires the casting vote in closing the

106. Kagayama, *supra* note 12, at 550.
107. MINPO art. 556.
108. *See* Kagayama, *supra* note 12, at 551.
109. *See* Sugawara v. Sugawara, 25 MINSHOROKU 1007 (1919).

deal.[110]

The institution of earnest has its roots in an old trade custom called "*Tetsuke Sonbai Modoshi*," which was developed prior to the introduction of the Western legal system in Japan.[111] Where a buyer advances an earnest on a sale, the buyer can rescind the contract by abandoning the earnest that he paid in advance.[112] The seller can rescind the contract by refunding twice the amount he received as earnest.[113] This institution is similar to an "option contract" because if the market price of goods falls after the buyer advanced on it, the buyer loses only the advanced payment. To understand the institution of earnest, it is useful to review the option contract, which has a unique place in American contract law.

As the preceding subsection shows, "an offeree may need time to decide whether to accept the offer and, during that time, may need to spend money and effort in deciding."[114] The doctrine of consideration, combined with the principle of revocability, makes it nearly impossible to properly protect the offeree in the absence of some additional mechanism.[115] Traditionally under the common law, a "representation that an offer will remain open is a bare promise unsupported by consideration, and, therefore, unenforceable."[116] The option contract allows the offeree to provide consideration in exchange for a limitation on the offeror's power to revoke.[117] Because consideration is not required for a contract to be legally enforceable in the Japanese legal system,[118] the development of an institution similar to the option contract seems unnecessary. Nonetheless, a similar institution does exist in Japan and is known as "earnest." The institution of earnest differs from the general option contract because under option contracts, only the party who paid for the option is entitled to rescind, whereas under the Japanese institution of earnest, the party who received the earnest in advance is also entitled to rescind by refunding twice the amount of what he received. In a sense, the institution of earnest is a "bilateral" option.[119]

The person making the invitation or the reservation and the payer of earnest-money obtains the casting vote to complete the contract. While these institutions have been considered separate or distinct from the common law understanding of offer and acceptance, they all are strategies for

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110. *See* Kagayama, *supra* note 12, at 565.

111. *See id.* at 544, *citing* KENJIRO UME, MINPO YOGI 481 (1887); YUTAKA YOSHIDA, TETSUKE 160 (1985); Minatsu Yokoyama, MINPO art. 775 (Tetsuke), *in* MINPOTEN NO HYAKUNEN 309 (Toshio Hironaka & Eiichi Hoshino eds., 1998).

112. *See* MINPO art. 557.

113. *See id.*

114. FARNSWORTH, *supra* note 19, § 3.23, at 321.

115. *See id.*

116. *Id*; *see* WILLISTON, *supra* note 78, § 5.8, at 666.

117. *See* RESTATEMENT § 63(b).

118. *See, e.g.*, TAKASHI UCHIDA, KEIYAKU NO SAISEI 30-31 (1990); HIGUCHI, *supra* note 24, at 90-96; *see also* MINPO, art. 549 (prescribing that "[a] contract of gift becomes effective when one of the parties manifested his intent gratuitously to transfer property of his own to the other party and the other party agrees to accept it").

119. Kagayama, *supra* note 12, at 544.

acquiring the casting vote. If the law balances the interests of the contracting parties, they will be less able to obtain an advantaged position. However, if it does not, the parties will be able to obtain an advantaged position. In such a legal system, it may be necessary for the law to provide institutions that control the "strategies of acquiring the 'casting vote.'"[120]

III. Analysis of the Problem of Delay in the Transmission of Acceptance

A. American Approach

The foregoing analysis shows that contract formation is the creation of a power that binds both parties. The common law uses a balancing approach to regulate this process. With this background, Part III analyzes the particular situation of a delay in the transmission of acceptance.

1. Common Law Approach

In common law systems, there has been "no occasion" to deal with the problem of delayed acceptances.[121] Under the common law, when cases are presented for which there is no judicial precedent, they must be governed by the "general principle, applicable to cases most nearly analogous, but modified and adapted to new circumstances, by considerations of fitness and propriety, of reason and justice, which grow out of those circumstances."[122] Thus, to solve the problem of delay in the transmission of acceptance, one must begin by finding the "most analogous" circumstances.

The problem of a delayed transmission of an acceptance is analogous to a "late acceptance," which is governed by the "counteroffer theory," to the extent that the acceptance has not reached the offeror in the time of receipt was due. Under the common law view, a late acceptance is merely a counteroffer, which creates a contract only if the original offeror accepts the counteroffer.[123] Thus, under the counteroffer theory, a late acceptance

120. *See id.* at 546, 564 (stating that these institutions can be considered as the "strategies of acquiring the 'casting vote'").

121. *See* HONNOLD, *supra* note 5, at 198. Several articles assert that there is a rule that governs this problem. However, these articles offer incoherent explanations. *See* CALAMARI & PERILLO, *supra* note 7, § 2.20(b); Franco Ferrari, *A Comparative Overview in Offer and Acceptance Inter Absentes*, 10 B.U. INT'L L.J. 171; Franco Ferrari, *Formation of Contract in South American Legal System*, 16 LOY. L.A. INT'L & COMP. L.J. 629; Kessler & Fine, *supra* note 96. Some of them provide a rule, citing cases similar to those provided and cited later in this Article. However, without a precise analysis, such as that provided later in this Article, the cited case might not apply to our paradigm case, since the case provides a rule "where no time was specified and the time limit is merely that indefinite period called 'reasonable time.'" *See* CORBIN, *supra* note 24, § 3.20. One must analyze these cases carefully, because a "case that might be thought analogous may here be distinguished," particularly in this situation. *See id.*

122. *See* Norway Plains Co. v. Boston & Maine R.R., 67 Mass. 263, 267-268 (1854).

123. *See, e.g.*, Ismert & Assoc., Inc. v. New England Mut. Life Ins. Co., 801 F.2d 536, 541 (1st Cir. 1986), *citing* Kurio v. United States, 429 F. Supp. 42, 64 (S.D. Tex. 1970); Childs v. Adams, 909 S.W.2d 641 (Ark. 1996); Sabo v. Fasano, 201 Cal. Rptr. 270, 272 (Cal. Ct. App. 1984); Achour v. Belk & Co., 251 S.E.2d 157 (Ga. 1978); *In re* Marriage of

is a counteroffer that may bind the offeree if the original offeror accepts the counteroffer. The essence of the counteroffer theory of the late acceptance is that "unless the offeree *exercises his power of acceptance* before [the offer] expires, there is no power to accept."[124] In the case of a delay in the transmission of an acceptance, the offeree has sent his notice of acceptance such that, if its transmission were normal, it would reach the offeror by the due date. The buyer in the paradigm case properly "exercises his power of acceptance" before "the end of the time limit of the offer," because the offeree "has completed every act essential to" exercise his power of acceptance.[125] If this is so, it becomes doubtful whether the counteroffer theory, which applies to late acceptances, should apply to the problem of delay in the transmission of acceptances.

The counteroffer theory, which governs late acceptances, also contributes to the balancing of the parties' interests. Under the counteroffer theory, an acceptance with a material change from the terms set forth in the offer is not an acceptance of the original offer but rather a new offer.[126] In the case of late acceptances, the offeree wants to change the manner of acceptance prescribed by the offer.[127] According to this theory, if an offeree wants to assume the role of the "master of the offer" and change the contents of the offer, he must give up the power of the "casting voter" for the sake of balancing the interests of the parties.[128] The counteroffer theory, however, focuses on the difference between the "master of the offer" and the "casting voter," which does not create the imbalance existing in the problem of delay in the transmission of acceptance.

The following hypothetical demonstrates the imbalance that arises when the unforeseen delay occurs after the offeree sent his acceptance to the offeror. Suppose prices increase sharply on October 1st in the paradigm case. If there is no rule applicable to the problem of delay in the transmission of acceptance, the late acceptance constitutes a counteroffer,

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Masterson, 453 N.W.2d 650 (Iowa 1990), *citing* Morrison v. Rayen Inv., Inc., 624 P.2d 11, 12 (Nev. 1981). The following cases "treat the late acceptance as a counteroffer which must be accepted by the original offeror to create a contract." *See Kurio*, 429 F. Supp. at 65; Morrison v. Rayen Inv., Inc., 624 P.2d 11, 12 (Nev. 1981); 22 W. Main St., Inc. v. Bouiszewski, 34 A.D.2d 358, 361 (N.Y. 1970); Bridge v. O'Callahan, 118 N.Y.S.2d 837, 838 (N.Y. City Ct. 1953); Frandsen v. Gerstner, 487 P.2d 697, 700 (Utah 1971); Wax v. N.W. Seed Co., 64 P.2d 513, 515 (Wash. 1937); RESTATEMENT § 70.

124. *See Sabo*, 201 Cal. Rptr. at 272, *citing Kurio*, 429 F. Supp. at 64, 65; *Morrison*, 97 Nev. 58 at 12; *Bouiszewski*, 34 A.D.2d at 360-61; *Frandsen*, 487 P.2d at 700; *Wax*, 64 P.2d at 515.

125. *See* RESTATEMENT § 66 cmt. a.

126. *See* Hill v. Gateway 2000, 105 F.3d 1147 (7th Cir. 1997); *see also* RESTATEMENT § 39. When strictly applied, this is known as the "mirror image" rule. Although its application is not as strong today, its principle is still sustained.

127. *Cf. supra* notes 100-103 and accompanying text.

128. When we consider that "the bargaining process (especially when it is done between the parties at arm's length) has become more limited in modern society," the power to change the substance of the offer is likely to change the substance of the resulting contract. *See* CALAMARI & PERILLO, *supra* note 7, § 1.3, at 5. *But see* Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 Nw. U. L. REV. 854.

and the original offeror can speculate on a fluctuating market to the detriment of the original offeree. Courts have strongly resisted attempts by one party to speculate at the expense of another.[129] The offeror is in advantaged position, not because he is the "master of the offer" but because he can obtain the reason to know of the delay. An analogous problem arises when transmission of an offer is delayed.

Generally, there is no "time limit" for tendering offers. Thus, the delay in the transmission of an offer is typically not a problem. However, a delay in the transmission of an offer is a problem in the following situations: In the first scenario, *A* writes *B*, "I am eager to sell my house. I would take $20,000 for it. If you want to buy my house, I need to hear from you by May 1st." *B* promptly answers, "I will buy your house for $20,000 cash."[130] In doubtful cases, courts are reluctant to characterize a proposal as an offer.[131] Thus, *A*'s proposal is likely to be considered an invitation to make offers.[132] Therefore, it is not *A*'s letter but *B*'s letter that constitutes an offer. If so, *A* must receive *B*'s letter by May 1st. Therefore, there is a time limit on the offer's effectiveness. In the second scenario, *A* writes *B*, "I promise to deliver you my house if you promise to pay me $20,000. If you want to buy my house, I must receive your letter of acceptance by May 1st." Suppose *A*'s letter is categorized as an offer. In the latter scenario, can *B* accept *A*'s offer if *B* receives *A*'s letter after May 1st? Common law rules exist to govern the latter type of delay in the transmission of the offer.[133]

The effect of delay in the transmission of an offer, as in the first hypothetical scenario, and the effect of mistake in the transmission of an offer, as in the second hypothetical scenario, are determined by "analogous principles."[134] These problems are determined by similar principles because the circumstances are analogous. First, both problems involve the question of contract formation. Second, in the cases of both mistake and delay in transmission of the offer, unforeseen circumstances occur after the offeror has sent his offer. Third, if the offeree exploits the defect, the offeror is adversely affected.[135] In the case of a mistake in the transmission of an offer, "the majority view is that the message as transmitted is operative unless the other party knows or has reason to know of the mistake."[136] This is also true when there is a delay in the transmission of an offer. In other words, if "the offeree knew or should have known that the offer was delayed, he may not take advantage of the delay."[137] Cases concerning a mistake or a delay in the transmission of an offer are both gov-

129. *See* HONNOLD, *supra* note 5, at 197 n.2.

130. *See* RESTATEMENT § 26, illus. 4.

131. *See* FARNSWORTH, *supra* note 19, § 3.10, at 237.

132. *See id.*

133. *See, e.g.*, RESTATEMENT § 49; CALAMARI & PERILLO, *supra* note 7, § 2.20(a), at 88; CORBIN, *supra* note 24, § 2.17, at 213.

134. *See* RESTATEMENT, ch. 6 intro.

135. *See id.*

136. *See* CALAMARI & PERILLO, *supra* note 7, § 2.24 at 112.

137. *See* WILLISTON, *supra* note 78, § 5.21 at 749.

erned by the same case—*Germain Fruit Co. v. Western Union Tel. Co.*[138]

In *Germain*, the offeror dispatched an offer by telegraph, quoting oranges at "two [dollars and] sixty [cents]."[139] As delivered to the offeree, the dispatch was altered by the omission of the word "two."[140] As received, offeree reasonably understood the offer as oranges at $1.60 per box, though the market price was $2.60 per box.[141] The offeree ordered a certain amount of the oranges, the offeror shipped the oranges, and the offeree received them but refused to pay more than $1.60 per box for them.[142] Under these circumstances, the Supreme Court of California rejected the offeree's contention that "[t]he recipient of the message has the *absolute right to rely upon* the message as correct and to act upon it."[143] The rule is that "if it is apparent from the face of message, or otherwise, that an error has been made, no contract results [because] [t]he addressee is not justified in relying upon its contents."[144] The court found that the offeree had reason to suspect that a mistake had been made and that the offeree acted in bad faith.[145]

It is troublesome to conclude that the legal consequence of *Germain* is "merely that the contract is voidable by the party adversely affected,"[146] or, that "there is no power of acceptance at all."[147] Suppose that the offeree inquired about the price after discovering the mistake, and that the offeror quoted the price as $1.60 per box, because the offeror wanted to keep business with the offeree for a long period, or because the market price sharply declined after he made the offer. Courts do not usually consider the adequacy of consideration in determining the validity of a contract.[148] It is also troublesome to conclude that when applying this principle to the first delay in the transmission of the offer, the defect renders the contract voidable. If *A* (the individual inviting others to make an offer) does not have the power to accept as a result of *A*'s knowledge of the delay, *B* (the offeror) is adversely affected.

In *Germain*, the court found "not only that there was reason to suspect that a mistake had been made, but [that the offeree] *actually knew* that the message had not been correctly sent and acted upon it *in bad faith*."[149] Under such circumstances, the offeree had a duty to inquire as to whether

138. *See* Germain Fruit Co. v. W. Union Tel. Co., 70 P. 658, 659 (Cal. 1902).
139. *See id.*
140. *See id.*
141. *See id.*
142. *See id.*
143. *See id.* at 659 (emphasis added).
144. *See* CALAMARI & PERILLO, *supra* note 7, § 2.24, at 112 n.7.
145. *See Germain Fruit Co.*, 70 P. at 659.
146. *See* RESTATEMENT, ch. 6 intro.
147. *See* CORBIN, *supra* note 24, § 2.17, at 213 (noting that most courts would hold that there is no power of acceptance where the offeree knows or has reason to know that the offer was delayed).
148. *See* CALAMARI & PERILLO, *supra* note 7, § 4.4, at 172-73 (stating that courts "have believed that it would be an unwarranted interference with the freedom of contract if they were to relieve an adult party from a bad exchange").
149. *See Germain Fruit Co.*, 70 P. at 659 (emphasis added).

the telegram was correct.[150] The party that has reason to suspect that a mistake has been made has a duty based on the principle of good faith to inquire as to the correctness of the offer.[151] If he does not perform this duty, the contract is voidable by the party adversely affected (in this case, the offeror).[152] This principle is also applicable to delays in the transmission of offers. If a party has reason to know of the delay, the delayed offer is effective unless that party informs the second party in a timely manner of his intention to retract on account of delay.

This principle governing a mistake or delay in the transmission of an offer also applies to a delay in the transmission of acceptance. Indeed, in *Phillips v. Moor,* the Supreme Judicial Court of Maine held that

> if the party to whom it is made, makes known his acceptance of it to the party making it within any period which he could fairly have supposed to be reasonable, good faith requires the [offeror], if he intends to retract on account of delay, to make known that intention promptly.[153]

The Court stated that if the offeror does not propmptly inform the offeree of his intent to retract, he waives any objection to the late acceptance.[154] Thus, when the offeror has reason to know of a delay in the transmission of the acceptance, the offeror has a duty to promptly inform the offeree that he intends to revoke or else the acceptance will bind the offeror.[155]

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150. *See id.*

151. *See id.* Good faith can also be the basis of an affirmative duty prior to the formation of the contract. *See* Summers, *supra* note 18, at 204 n.43.

152. *See* RESTATEMENT § 153 cmt. e. *But cf. id.* § 154 cmt. c (noting that if the mistaken party willfully chooses to remain ignorant of relevant facts, that party may be held to bear the risk of the mistake).

153. Phillips v. Moor, 71 Me. 78, 80 (1880).

154. *See id.*

155. *See id.* Although the result of the interpretation of *Phillips* is similar to this Article, the theory is different. *Cf.* CALAMARI & PERILLO, *supra* note 7, § 2.20 at 89 (discussing the view held by some that if the "acceptance is late but sent in what could plausibly be argued to be a reasonable time the original offeror has a duty to reply within a reasonable time); CORBIN, *supra* note 24, § 3.20 at 411 (stating that the contract is formed in *Phillips* "not because silence in such case is an acceptance of a counteroffer, but because the offeror has reason to know that the offeree thinks there is a contract . . ."). This Article's proposal does not solve the problem of speculation, sanctioning of which courts have strongly resisted. Suppose that in the paradigm case, the market changed sharply during the last week of September. Because the offeror decides whether to form a contract, he can decide in light of the market changes. *See* HONNOLD, *supra* note 5, at 197 n.2. His situation is similar under the counteroffer theory (i.e., late dispatch), except that here he must take affirmative action if he chooses not to be bound by a contract. Also, here, it was not the offeree's delay that made him vulnerable to speculation. The offeree would suppose, at the time of the change in market, that his acceptance had already arrived. Speculation is particularly problematic where the offeree has made his declaration late and has done so by performing his obligation under the contract in advance. PETER SCHLECHTRIEM, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 155 (Geoffrey Thomas trans., 2d ed. 1998). The injustice of allowing the offeror to choose whether he will be bound in this situation becomes apparent as the period of the delay lengthens. E.A. Farnsworth, *Comment on Art. 18,* in COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 194 (Cesare M. Bianca & Michael J. Bonell eds., 1987). Suppose that the delay is several months. Could the offeror still hold the contract? We should remember that

Note that the party protected by the law in the case of a delayed transmission of an acceptance is the offeree, who is in a similar position to that of the offeror in the case of a delayed transmission of an offer. The difference between the offeror and the offeree does not destroy the analogy between the problem of delay in the transmission of offer and acceptance. There is an imbalance between the parties in the case of an unforeseen delay during transmission that is based on neither the power of the offeror, nor the power of the offeree. The imbalance is based on the fact that the receiver of the offer or acceptance has reason to know of the delay because of indications such as the letter's date or postmark.[156] Consequently, whether the offeror or the offeree receives the delayed manifestation of intent (that is, an offer or an acceptance) does not destroy the analogy to a delayed transmission, and so a similar rationale may apply.

One can obtain the same result under the counteroffer theory, which applies to late acceptances, but there is a theoretical difference, which creates a practical difference. The "duty to speak" is also present in the context of the counteroffer theory.[157] Under the counteroffer theory, a late acceptance is not an acceptance but a new offer.[158] However, in some exceptional situations, a late acceptance may create a duty to speak by the offeror if he wishes to reject the acceptance on account of delay; thus the offeror's silence operates as acceptance to the counteroffer.[159] This Article proposes that a duty to speak does not arise under the counteroffer theory, which governs late acceptances. This theoretical difference brings about different conditions for the imposition of the "duty to speak." Under the counteroffer theory, there are two exceptional situations where the offeree's silence constitutes acceptance: "those where the offeree silently takes the offered benefit and those where one party relies on the other party's manifestation of intent that silently operated as acceptance."[160] However, this Article suggests that in the case of a delay in the transmission of acceptance, the offeror has a duty to speak regardless of these facts, if the offeror has reason to know that the acceptance was timely sent but received late due to a delay. It is not the original offeror's duty as the new offeree of a new offer, but a duty of the original offeror as an addressee who is in a

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this is the situation governed by the "analogous principles" applicable to *Germain* and *Phillips*, under which a party has the duty to protect the other party, based on the principle of good faith. According to this theory, the problem of speculation can be easily avoided by simply holding that the offeror would not be acting in good faith if he treated the delayed acceptance as acceptance in such circumstances. *Cf.* HONNOLD, *supra* note 5; Farnsworth, *supra*; SCHLECHTRIEM, *supra*.

156. *See* CORBIN, *supra* note 24, § 2.17, at 213, § 3.20, at 410.

157. The words "duty to speak" can be found in Restatement, section 70, comment a, which states that "the original offeror may have a duty to speak, for example, if the purported acceptance embodies a plausible but erroneous reading of the original offer." RESTATEMENT § 70 cmt. a; *see also* CALAMARI & PERILLO, supra note 7, at 89-90.

158. *See* CORBIN, *supra* note 24, at 410-11.

159. *See, e.g.*, RESTATEMENT § 70 (explaining the meaning of "duty to speak" under the counteroffer theory of late acceptance). "A late or otherwise defective acceptance may be effective as an offer to the original offeror, but his silence operates as an acceptance in such a case only as stated in § 69." *Id.*

160. RESTATEMENT § 69 cmt a.

position to have reason to know of the delay.[161] Thus, just as an offeree who knows of a delay in the transmission of an offer cannot exploit the delay, an offeror who knows that an acceptance was delayed in transmission has a duty to inform the offeree if he wishes to reject the acceptance.[162]

Under the common law, if the offeror has reason to know that the acceptance has been sent on time, but it arrives late due to an unforeseen delay, the delayed acceptance is effective unless the offeror promptly informs the offeree of his intention to retract due to the delay.[163] The legal character of the offeror as master of the offer is an essential element of the common law's balancing approach so that the offeror may place the risk of the delay on the offeree, just as the offeror negates other rules or principles balancing the parties.[164] However, such a requirement must be clearly prescribed.[165]

2. *CISG Approach*

The common law rule applies to the problem of a delayed transmission of an acceptance if both parties conduct business in the United States, while the CISG applies if the contracting parties have places of business in two different countries.[166] Under the CISG, an acceptance is generally not effective until it reaches the offeror. This approach differs from the com-

161. *See* CORBIN, *supra* note 24, § 3.20, at 411; *cf.* CALAMARI & PERILLO, *supra* note 7, § 2.20, at 89.

162. A similar result can be reached under traditional offer-acceptance analysis without using the counteroffer theory. Under the traditional offer-acceptance analysis, the mailbox rule protects the offeree by placing "the risk of loss and inconvenience on the offeror." *See* CORBIN, *supra* note 24, § 3.24, at 440-41. Thus, there is less need for a particular rule governing a delay in the transmission of acceptance because the law already protects the offeree. *See* Kessler & Fine, *supra* note 96, at 417. In civil law countries, where an acceptance becomes effective when it is received, rules concerning a delay in the transmission of acceptance protect the offeree, because receipt rules place the risk of loss and inconvenience on the offeree. *See id.* at 417-19. The imbalance of the parties in the case of a delay in the transmission of acceptance is based on the status of the addressor and the addressee rather than on the status of the offeror and the offeree. Thus, one can analogize a delay in the transmission of acceptance to the delay in the transmission of an offer. By doing so, the common law methodology's solution to the problem of delay in the transmission of acceptance is persuasive. Otherwise, the rule in *Phillips* may be applicable only "where no time was specified." *See* Phillips v. Moor, 71 Me. 78, 80 (1880); CORBIN, *supra* note 24, § 3.20, at 411.

163. *See* CALAMARI & PERILLO, *supra* note 7, § 2.20, at 89.

164. *See id.* § 2.23, at 107-10. "The offeror, it must be remembered, is master of his offer and has power to negate the mailbox rule." *See id.* at 109. Therefore, "[w]hen the offeror prescribes the exclusive place, time, or medium of acceptance the offer controls. No contract is formed unless the terms of the offer are followed." *See id.* at 107. The offeror can negate many of the rules prescribed in the Restatement. *See, e.g.*, RESTATEMENT, §§ 24, 28, 30, 38, 54, 56, 56, 63. It is significant to find such rules in the real world in which most parties bring contractual claims without drafting their agreements precisely, for necessary purposes other than legal norms. *See* Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 64 (1963).

165. *See* CALAMARI & PERILLO, *supra* note 7, § 2.23, at 107-10; *supra* note 164.

166. *See* CISG, *supra* note 29.

mon law mailbox rule.[167] Therefore, the CISG must have a rule governing the problem of delay in the transmission of acceptance.[168] This rule is embodied in Article 21(2) of the CISG, which states that

> [i]f a letter or other writing containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror orally informs the offeree that he considers his offer as having lapsed or dispatches a notice to that effect.[169]

Because the American legal system is unique in the extent to which its judges are authorized to "override" legislation,[170] we must examine whether or not the provision is legally effective in the American legal system.

The CISG distinguishes between an acceptance sent late and one sent on time that arrives late because of an unforeseen delay in the transmission.[171] Article 21(2) of the CISG deals with the latter situation, where the offeree is diligent in sending an acceptance and the offeror knows or reasonably should know that the delay occurred through the fault of the intermediary.[172] When the offeror knows or should know that the acceptance is late due to a delay in the transmission, the CISG, like the common law, creates an exception to the general rule.[173] Under this exception, the acceptance is treated as effective in order to protect the offeree.[174] However, because the offeror may have changed his position after the acceptance failed to reach him in a timely fashion,[175] the CISG protects the offeror by allowing him to inform the offeree orally or in writing that he considers his offer to have lapsed.[176] This yields exactly the same result as a "duty to speak" under the common law.[177] The CISG thus attempts to

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167. "An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time." *Id.*

168. *Id.*

169. *Id.*

170. *See* ATIYAH & SUMMERS, *supra* note 2, at 43.

171. *See* SCHLECHTRIEM, *supra* note 155, at 150.

172. John E. Murray, Jr., *An Essay on the Formation of Contracts and Related Matters* Under the United Nations Convention on Contracts for the International Sale of Goods, 8 J.L. & COM. 11, 35-38 (1988).

173. *See id.*

174. *See id.* at 37.

175. *See id.*

176. *See id.*

177. *See supra* Part III.A. The same problem of speculation that occurs under the common law can also occur under the CISG art. 21(2), *supra* note 29. Suppose that in the paradigm case, there had been a sharp change in the market during the last week of September. According to a delegation member of the United States to the CISG, it can be argued in two ways. *Id.* First, after a delay, the offeror arguably can no longer justifiably regard the delayed communication as "indicating assent to an offer" under Article 18(1) if intervening events have made the contract unfavorable to the offeree. *Id.* Second, after some period of delay, the offeror would not be acting in "good faith" if he treated the delayed communication as an acceptance in such circumstances. *Id.* (citing CISG art.

balance the parties' interests, just as the common law does.[178] The CISG also mirrors the common law in that it permits the parties to opt out of or vary the effect of any provisions of the CISG.[179]

In conclusion, under both the common law and the CISG, if the offeror has reason to know that the acceptance has been sent on time, but it arrives late because of an unforeseen delay in the transmission, the delayed acceptance is effective unless the offeror promptly informs the offeree of his intention to retract on account of delay. However, the offeror is entitled to place the risk of the delay on the offeree by so prescribing in the offer.

B. Japanese Approach

Because Japan is a civil law system, the most important source of contract law is the Civil Code of Japan.[180] The approach of the Civil Code of Japan to a delay in the transmission of an acceptance differs from that of the common law and the CISG. Unlike the CISG, although similar to the common law, the Japanese Civil Code considers an acceptance effective when it is sent.[181] However, in contrast to the common law, the Japanese Civil Code has a provision to deal with the problem of delay in the transmission of acceptance.[182]

As under the common law, the Japanese Civil Code generally makes the acceptance effective when sent.[183] However, the Civil Code adds a serious restriction to this rule,[184] providing that where the offer specifies a time limit for acceptance, the offer shall lapse if the offeror does not receive notice of acceptance within the specified period.[185] Many arguments can be seen with respect to the relationship between the provision generally prescribing the dispatch rule and the provision adding the "serious restriction."[186] For example, one argument is that arrival is always a condition precedent for acceptance, but once acceptance has arrived, it becomes effective retroactively when sent. Another argument is that the contract forms when acceptance is sent, but that the contract becomes effective

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7). The second view treats the problem of speculation in a similar manner to the common law. *See supra* Part III.A. In conclusion, the legal consequences of the delay in the transmission of acceptance are the same under both the common law and the CISG. In addition, they both depend on the same rationale—the problem of delay in the transmission of acceptance is governed by the same "general principle" both under the common law and the CISG. Therefore, Article 21(2) will solve the problem of delay in the transmission of acceptance for the international sales contract, which will be legally effective in the American legal system.

178. *See supra* Part II.B.

179. CISG art. 6, *supra* note 29.

180. *See* WAGATSUMA, SHINTEI MINPO SOSOKU, *supra* note 66, at 7.

181. *See* MINPO art. 526.

182. *See* MINPO art. 522.

183. *See* MINPO art. 526.

184. WAGATSUMA, SAIKEN KAKURON, *supra* note 13, at 64.

185. MINPO art. 521, para 2.

186. WAGATSUMA, SAIKEN KAKURON, *supra* note 13, at 64-67. *See also* Shigeru Kagayama, *Win Toitsu Baibai Ho Jo Meibun Kitei no Nai Mondai no Kaiketsu*, in RONTEN KAISETSU KOKUSAI TORIHIKI HO 58 (Satoshi Watanabe & Yoshiaki Nomura eds., 2002).

when acceptance is received by the offeror. According to the traditionally accepted theory, however, an acceptance generally becomes effective already when it is sent, unless the arrival is necessary for the acceptance to be effective, or if the offer specifies a time limit for acceptance.[187] According to this view, there exists the problem of delay in the transmission of acceptance. Similar to the counteroffer theory under the common law, an acceptance that arrives after the specified period does not form a contract, though the offeror may treat the late acceptance as a new offer.[188] However, there are some "exceptional situations."[189] Article 522 to the Civil Code of Japan states that

> [e]ven where a notice of acceptance has arrived after the expiration of the period mentioned in the preceding Article [the period for acceptance which is specified by the offer], if the offeror could have known that it was dispatched at such time that it would have under normal circumstances arrived within such period, the offeror shall dispatch, without delay to the other party, a notice of the delayed arrival, unless a notice of the delay has already been dispatched by him before its arrival.[190]

If the offeror has failed to give notice in this case, the notice of acceptance shall be "deemed not to have been delayed."[191]

Comparing this legal rule governing a delay in the transmission of acceptances under the Civil Code of Japan with those under the common law and the CISG, one may conclude that the rules governing the problem of delay in the transmission of acceptances are essentially similar in all three systems. In all three systems, if the offeror has reason to know that the acceptance has been sent on time, but it arrives late because of an unforeseen delay in the transmission, the delayed acceptance is effective unless the offeror promptly informs the offeree of his intention to retract on account of delay.

IV. In Search for the Nature of Contract Law

Despite the differences between the American and the Japanese legal systems, the rules governing the problem of a delay in the transmission of an acceptance produce similar results in both systems. It is useful to examine the reasons behind these rules in order to better understand the nature of contract law and its role in our societies. While examining the rationale behind these rules, one must consider the source of the rules. In the Japanese legal system, the source of law is the Diet, that is, the legisla-

187. *See id.*

188. MINPO art. 523.

189. Similar to the common law approach, the Japanese traditional contract theory treated the problem of delay in the transmission of acceptance as an "exception" to the general rules of "late acceptance." *See* WAGATSUMA, SAIKEN KAKURON, *supra* note 13, at 62 (finding that when an acceptance arrives after the offer has lapsed, the acceptance does not create a contract except in certain cases).

190. MINPO art. 522, para 2.

191. MINPO art. 522, para 2.

ture, which is the "sole law-making organ of the State."[192] In the American legal system, statutory law does not enjoy a similar role.[193] Rather, judicial decisions create the rule of law.[194] Therefore, observers seeking the legal reasoning behind the rule governing a delay in the transmission of acceptances should study the Japanese legislature and the American case law.[195]

A. Basis for the American Rule Governing Delayed Acceptances

The basis for the rule governing delay in the transmission of an acceptance (or an offer) shows the importance of good faith in the American contract formation process.[196] For example, in *Germain*, the court imposed a duty to inquire into the accuracy of the offer price based on the principle of good faith.[197] In *Phillips*, good faith required the offeror to inform the offeree of his intention to retract due to delay.[198] In the United States, however, antipathy toward the notion of good faith is apparent. Commentators have explained that good faith does not apply until the contracting parties have reached an agreement.[199] These commentators emphasize that the duty of good faith as embodied in both the UCC and the Restatement "does not extend to negotiations."[200] This antipathy stems from the fear of subverting the "stability of commercial contracts."[201] This fear is reflected in the fact that the CISG finds a place for good faith only in the interpretation of contracts.[202]

As the preceding paragraph has shown, the concept of good faith in American contract *theory* appears to be a duty imposed after a contract is formed. However, existing contract *law* has recognized that, in some cases, the concept of good faith serves as a basis to impose affirmative duties during the contract formation process. From this point of view, it is not so surprising to find that the good faith doctrine may require other affirmative duties, such as the duties of disclosure and diligence.[203] Professor

192. KENPO [CONSTITUTION] art. 41 (Japan).

193. JOHN P. DAWSON, UNJUST ENRICHMENT 125 (1980).

194. Norway Plains Co. v. Boston & Maine R.R., 67 Mass. 263, 267-268 (1854); *see also supra* note 47 and accompanying text.

195. *See* POUND, JUSTICE, *supra* note 1, at 51 ("In the common law, the system of law of the English-speaking world, a statute furnishes a rule for the cases within its purview but not a principle, a starting point for reasoning as to cases outside its purview, not a basis for analogical reasoning. For that, in the common-law system, we look to experience of the administration of justice as shown in the reported decisions of the courts. In the civil-law system, . . . the technique in this respect is wholly different. The civilian reasons by analogy from legislative precepts and regards a fixed course of judicial decision on some point as establishing that precise point but not as providing a principle. It does not give a starting point for legal reasoning.") As to the power of the courts in the Japanese legal system, see KENPO arts. 76, 77, 81. *See also* SAIBANSHO HO arts. 3, 10.

196. *See* Summers, *supra* note 18, at 197.

197. *See* Germain Fruit Co. v. W. Union Tel. Co., 70 P. 658, 659 (Cal. 1902).

198. *See* Phillips v. Moor, 71 Me. 78, 80 (1880).

199. *See, e.g.*, FARNSWORTH, *supra* note 19.

200. *See* Farnsworth, *supra* note 155, at 21.

201. Ghestin & Nicholas, *supra* note 23, at 187.

202. *Id*; *see also* FARNSWORTH, *supra* note 19. One reason is that the common law states were opposed to applying the principle to the formation of contract.

203. Summers, *supra* note 18, at 204 n.43.

Summers has said that "cases have been discovered which . . . require good faith at every stage of the contractual process, from preliminary negotiation through performance to discharge, and in nearly all kinds of contracts."[204] With respect to the role of good faith in the CISG, note that a member of the U.S. delegation to the CISG argued that the CISG should apply good faith to avoid an unjust result in the contract formation process.[205] From these perspectives, good faith is of "great significance in contractual contexts," commercial or noncommercial.[206] Assuming that contract theory is an interpretation of existing contract common law rules and principles,[207] one must reexamine existing contract theory in order to properly interpret existing contract law, in which good faith should be of great significance at every stage of the contractual process.[208]

The notion of good faith also exists in Japanese contract theory. In Japan, good faith is a notion that "governs the law of obligation," including the contract formation process, at least in theory.[209] Yet, interestingly, the Civil Code of Japan, which contains the general contract law, does not refer to the application of good faith in contract negotiations.[210] The Civil Code of Japan states that the exercise of rights and performance of duties must be done in accordance with the principles of good faith and fair dealing.[211] Even before the principle of good faith appeared in a legislative provision, the notion existed that good faith should govern every stage of the contractual process, from preliminary negotiation, to performance, to discharge.[212] Even the Supreme Court of Japan has found that duties are based on the principle of good faith throughout the contractual process.[213] Even though court decisions are less influential in the Japanese legal system,[214] one may conclude at the least that the fact that the Civil Code does not explicitly extend the duty of good faith to negotiations is not necessarily conclusive.[215] One could argue that American contract law may recognize a more extensive role for the notion of good faith because it is the case

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204. *Id.* It continues: "This is not to say that all cases agree as to when a duty of good faith should be imposed, for they do not." *Id.*

205. *See* Farnsworth, *supra* note 155, at 194.

206. Summers, *supra* note 18, at 197.

207. As to the relationship between the existing contract law and the existing contract theory in the United States, see UCHIDA, *supra* note 118, at 147-48 (1990) (citing RONALD DWORKIN, LAW'S EMPIRE 45 (1986)).

208. This does not mean that the solution is unacceptable to the existing American contract theory. Rather, the solution may be more suitable within the culture of existing contract theory, since the solution does not "subvert" but serves to "preserve" the "stability" or security of commercial transactions. *See infra* notes 259-263.

209. WAGATSUMA, SHINTEI SAIKEN SORON, *supra* note 21, at 14.

210. *See supra* note 201 and accompanying text.

211. MINPO art. 1.

212. *See* WAGATSUMA, SHINTEI SAIKEN SORON, *supra* note 21.

213. *See* Decision of Sept. 18, 1984, Supreme Court, (o)No. 159, 1137 HANREI JIHO 51 (1984); Kudo v. Nation, 29 MINSHU 143 (1975).

214. *See supra* notes 234, 237 and accompanying text.

215. *Cf. supra* note 201; *see also Ikeda,* 1137 HANREI JIHO 51 (1984) (affirming the "liability in a contract preparation stage for the reason of the breach of duty of care based on the principle of good faith").

law that recognizes the duty of good faith in the contract formation process.[216] The difference between the American legal system and the Japanese legal system may be the interpretation of the laws and not differences in the laws themselves.

The principle of good faith consequently has a "function of almost almighty provision" in the Japanese legal system, compared to the American legal system.[217] From this perspective, one might think that America and Japan have similar reasons for the solution to the problem of delay in the contract formation process. Surprisingly, however, the reason in the Japanese legal system differs from the reason in the American legal system.

B. Basis for the Japanese Rule Governing Delayed Acceptances

To find the policy underlying the Japanese rule governing delayed acceptances, one must look to legislative history, which explains:[218]

> Without a provision like an Article 522, the offeror needs to do nothing when the acceptance has been delayed due to the unforeseen delay in its transmission, and the result of delayed acceptance is no formation of contract. In the case of unforeseen delay in the transmission of acceptance, however, the acceptor would [reasonably] believe that the acceptance has been arrived [sic] at the offeror in a timely manner so that the acceptor would not doubt that the contract would be formed. Thus, the acceptor will come to incur unexpected damage if the acceptor does not receive any notice of delay. Without a provision like Article 522, therefore, it is not possible to preserve the security or stability of [commercial] transactions.[219]
>
> The Statement of Reasons, the legislative history, refers to the law of obligation in another jurisdiction, which prescribes that an offeror who fails to make a notice of delay shall be liable for damages.[220] However, the Statement suggests that it "takes time and trouble to claim damage, and [that] it will be [of] no utility if he cannot afford to claim."[221]
>
> Thus, Article 522 protects the acceptor by establishing a kind of virtual reality. However, in order to protect the acceptor, the offeror should not incur unexpected damage. In the end, the offeror escapes from sanction if he dispatches a notice of delayed arrival, even without inquiring whether or not the notice actually arrived at the acceptor.[222]

We may conclude that the Japanese Civil Code reached its solution based on economic analysis, instead of the principle of good faith.[223] The

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216. *See supra* notes 179-186 and accompanying text.
217. *See* UCHIDA, *supra* note 118, at 250.
218. *See supra* notes 191-194 and accompanying text.
219. The Civil Code Draft Amendment Statement of Reasons, *supra* note 17, at 502-03.
220. *See id.*
221. *See id.* at 503.
222. *Id.*
223. It is possible to argue that the notion of good faith is not recognized when Article 522 was inserted. *See* WAGATSUMA, SHINTEI SAIKEN SORON, *supra* note 21. Yet, it is certain that the legislature referred to economic needs instead of a "morally" charged concept such as the principle of good faith as its reason for inserting the Article. *Cf. supra* notes 151-157 and accompanying text.

basis for the Japanese rule reasoning conforms more closely to the traditional view of American contract theory, which has a "close historical relationship with the free market as envisioned by classical economic theory."[224] Indeed, an American court stated that the security or stability of commercial transactions is "so vital to the smooth and efficient operation of the modern American economy."[225] Also, American contract theory has somewhat of an antipathy to the extension of the principle of good faith into other areas of contract law.[226] Because of the bargain theory of consideration, American contract law protects only those kinds of contracts which are the "driving force of American capitalism society."[227] Indeed, the spirit of the common law of contracts reflects "[t]he need of stability and certainty in the maturity of law and the importance of the social interests in security of acquisitions and security of transactions in a commercial and industrial society."[228] Such economic notions are not the legal reason for the solution to the problem of delay in the transmission of acceptances in Japan, where the law governing the commercial transactions has its own "guiding principle" discrete from the general law of contracts.[229] Here, as we have seen, the principle of good faith constitutes the "supreme notion" of the general law of contracts.[230]

C. The Nature of Contract Law as It Appears in the Solution to the Problem of Delay in the Contract Formation Process

The foregoing analysis will contribute significantly to legal theory in two ways: First, this Article's solution is sustainable even within the economic culture of existing American contract theory. As we have seen, scholars and courts are opposed to extending the application of good faith to the contract formation process because they fear doing so would subvert the stability of commercial transactions.[231] Yet, the policy underlying the Japanese solution shows that the solution does not subvert, but rather preserves the stability of commercial transactions.[232] Thus, this Article's solution is sustainable even within an economically-oriented contract theory. It must be remembered, however, that American law provides the solution by referring to the notion of good faith, instead of the economic notion.[233] Therefore, secondly, one must reconsider the nature of contract law, at least as a matter of legal theory, which has the role of "interpreting" the existing law.[234]

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224. GILMORE, *supra* note 18, at 7-8.
225. General Motors Co. v. Piskor, 381 A.2d. 16, 22 (Md. 1977).
226. *See supra* notes 200-203 and accompanying text.
227. HIGUCHI, *supra* note 24, at 18.
228. ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 148 (1921).
229. *See* WAGATSUMA, SHINTEI MINPO SOSOKU, *supra* note 66, at 2-6.
230. *See supra* notes 21, 212, 215 and accompanying text.
231. *See supra* notes 200-206 and accompanying text.
232. *See supra* notes 221-231 and accompanying text.
233. *See supra* notes 152-158 and accompanying text; *see also supra* notes 200-206 and accompanying text; *cf. supra* note 226 and accompanying text.
234. *See supra* note 211 and accompanying text.

Law is a "social artifact with immense practical importance,"[235] and contract law is no exception. Therefore, the "objective" of law, according to Plato, is as follows:

> [It] is not the welfare of any particular class, but of the whole community. It uses persuasion or forces to unite all citizens and make them share together the benefits which each individually can confer on the community; and its purpose in fostering this attitude is not to enable anyone to please himself, but to make each man a link in the unity of the whole.[236]

It is therefore the role of contract law to channel the parties' wants to serve the objectives of the community.[237] Contracting parties pursue their individual interests, which are originally antagonistic, but end up serving the objectives of the community because their cooperative activity efficiently allocates limited resources and realizes a well-ordered society.[238]

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235. *See* ATIYAH & SUMMERS, *supra* note 2, at 419.

236. *See* PLATO, THE REPUBLIC bk. VII, at 519-20 (H.D.P. Lee trans., 1955).

237. *See* POUND, PHILOSOPHY, *supra* note 1, at 31-32. Pound stated:

> [W]e shall see in these theor[ies] a picture of a system of ordering human conduct and adjusting human relations resting upon the ultimate basis and derived therefrom by the absolute process. In other words, they all picture, not merely an ordering of human conduct and adjustment of human relations, which we have actually given, but something more which we should like to have, namely, a doing of these things in a fixed, absolutely predetermined way, excluding all merely individual feelings or desires of those by whom the ordering and adjustment are carried out. Thus in these subconscious picturings of the end of law it seems to be conceived as existing to satisfy a paramount social want of general security.

Id.; *see also* ATIYAH, *supra* note 75, at 12. Atiyah stated:

> [A]ll legal obligations are, in the last resort, obligations created or at least recognized by the law, but the classical model of contract is easily enough adjusted to take account of this truism. The law of contract, it is said, consists of power-conferring rules. The law provides facilities for private parties to make use of if they so wish. Those who wish to create legal obligations have only to comply with a simple set of rules and the result will be recognized by the law. The function of the law itself in all this is largely neutral in a moral and a distributive sense.

Id.; *see also id.* at 83. Atiyah stated:

> [W]e often imply the promise because we think there ought to be an obligation, not the other way around. Calling the obligation promissory then seems to legitimate the imposition of the obligation by invoking 'neutral' moral principles, but in reality 'we' feel—or must of us do—that there *should be* an obligation in this situation because of many of our basic presuppositions about liberalism, freedom, and the individual's role in society.

238. ADAM SMITH, THE WEALTH OF NATIONS (1776), *quoted in* PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, ECONOMICS 36 (14th ed. 1992). Smith stated:

> [Every individual] generally neither intends to promote the public interest, nor knows how much he is promoting it. He intends only his own security, only his own gain. And he is in this led by an invisible hand to promote an end which was no part of his intention. By pursuing his own interest he frequently promotes that of society more effectually than when he really intends to promote it.

Id.; *see also* Summers, *supra* note 18 at 198 (stating that "in one sense [the contracting parties'] interests will remain essentially antagonistic"); ATIYAH, *supra* note 75, at 5 ("[C]ontract law [is] 'about' fairly broad areas of . . . co-operative activity . . . . In particular, we find the three elements of consent, reciprocity of benefit, and reliance as key elements in much co-operative activity.") (emphasis and quotation marks omitted);

With respect to the contract as an efficient allocator of limited resources for the community, consider the city of New York.

> Without a constant flow of goods into and out of the city, New Yorkers would be on the verge of starvation within a week. . . . [M]any kinds of goods and services must be provided. From the surrounding counties, from 50 states, and from the far corners of the world, goods travel for days and months with New York as their destination.[239]

How is it that 10 million people can sleep easily at night, without living in mortal terror of a breakdown in the elaborate economic processes upon which the city's existence depends? The surprising answer is that these economic activities are coordinated without coercion or centralized direction by anybody through the market.[240] Due to its flow of more accurate information, a market-based economy more efficiently allocates goods and services to private parties than does a command economy driven by remote state officials.[241] Free economic transactions through the market are considered to be superior to the command economy because they distribute limited resources more efficiently.[242]

The principle of good faith has a "pervasive and distinctive relevance" to the cooperative relationship between the contracting parties in commercial and noncommercial contexts.[243] Because of the nature of contractual relationships, it is natural for two parties to assume that each will act in good faith toward the other throughout the course of their contractual dealings.[244] It is a "jural postulate of civilized society, that in such a society men must be able to assume that those with whom they deal in the general intercourse of society will act in good faith."[245] Similar notions of good faith can, of course, be seen in Japan, in which the principle of good faith is the "supreme notion" governing the entire field of contract law.[246] From this perspective, it is not so surprising to find that "good faith" may require affirmative action.[247] As the parties may be strangers, there are no similar duties outside of contract law to protect the parties from each other.[248] Once a "contractual" relation has begun, however, each party owes certain

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POUND, PHILOSOPHY, *supra* note 1, at 136 ("Law did not concern itself at first with agreements or breaches of agreements. Its function was to keep the peace by regulating or preventing private war and this only required it to deal with personal violence and with disputes over the possession of property."); ROBERT S. SUMMERS, ON GIVING FORM ITS DUE-AN ESSAY IN LEGAL THEORY (forthcoming) (manuscript at ch. 8) [hereinafter SUMMERS, FORM]

239. SAMUELSON & NORDHAUS, *supra* note 238, at 42.

240. *Id.* at 36.

241. *See* SUMMERS, *supra* note 238 (manuscript at 32-33).

242. *See* HIGUCHI, *supra* note 24, at 18.

243. *See* Summers, *supra* note 18, at 197.

244. *See id.*

245. *See* POUND, PHILOSOPHY, *supra* note 1, at 133.

246. *See* WAGATSUMA, SHINTEI SAIKEN SORON, *supra* note 21, at 208, 210; text accompanying note 19.

247. *See* Summers, *supra* note 18 and accompanying text.

248. *See* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1728-29 (1976).

duties to the other party.[249] For example, in *Germain*, the "duty to inquire" protected the offeror from losing money by enforcing the sale of oranges at the mistaken price, and by forcing the offeree to ascertain the true intention of the offeror.[250] In *Phillips*, the "duty to speak" protected the offeree by preventing the further cost of meaningless preparation for performance.[251] These duties arising from contractual relations are based on the principle of good faith and are "significantly the product of interests independent of the parties' promises."[252]

Viewing the ends of law more systematically, it has been explained that there are two purposes of law: the maintenance of social order and the realization of justice.[253] Assuming that the maintenance of social order is equivalent to legal certainty, there is a "relation of tension" between justice and legal certainty.[254] For example, legal certainty tends to demand stability in law, while justice may require that the legal solution be reached on a case-by-case basis, and so the solutions required to achieve these ends may contradict each other.[255] This contradiction in law seems to be the basis for the fear that the application of good faith may subvert the security or stability of commercial transactions.[256] Indeed, good faith is the "legal resource" necessary to do justice, and justice demands that stability or certainty be disregarded in certain cases.[257] In a case of delay in the transmission of acceptance, however, both good faith and the security or stability of transactions require the same solution. The solutions to the problem of delay in the transmission of acceptances in both America and Japan seem to reflect a common purpose.

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249. *See* Hillman, *supra* note 14, at 658; *see also* WAGATSUMA, SAIKEN KAKURON, *supra* note 13, at 33-42.

250. *See* Germain Fruit Co. v. W. Union Tel. Co., 70 P. 658, 659 (Cal. 1902).

251. *See* Phillips v. Moor, 71 Me. 78 (1880).

252. Hillman, *supra* note 14, at 658 n.251.

253. The nature of law and the ends of law "ha[ve] been the chief battle ground of jurisprudence, since the Greek philosophers." *See* POUND, PHILOSOPHY, *supra* note 1, at 25. It would not be possible to restate all the arguments here, but it is possible, at least, to consider Plato and Aristotle, the "founders" of Western philosophy. *See* WAYNE MORRISON, JURISPRUDENCE: FROM THE GREEKS TO POST-MODERNISM, 26 (1997). The idea of maintaining social order through law is fully developed in Plato. *See* PLATO, *supra* note 236. Aristotle, however, seemed to focus on justice in NICOMACHEAN ETHICS bk. V, at 116-47 (Terence Irwin trans., 1985). *See* POUND, PHILOSOPHY, *supra* note 1, at 35-39. Law in Japan also aims to maintain social order and justice. *See* AKIRA YAMADA, HOGAKU 69-78 (1964).

254. GUSTAV RADBRUCH, THE LEGAL PHILOSOPHIES OF LASK, RADBRUCH, AND DABIN 109 n.3. (Kurt Wilk trans., 1950); *see also* YAMADA, *supra* note 253, at 69-78, 101-06.

255. *See* RADBRUCH, *supra* note 254, at 109-110.

256. *See* FARNSWORTH, *supra* note 19, § 4.1. Farnsworth explained:

> On the side of enforcing the bargain as made stand the policies favoring the autonomy of the parties, the protection of justified expectations, and the stability of transactions. On the other side stand the policies favoring the prevention of unfairness and the protection of the parties from overreaching. No single formula has evolved to reconcile these competing policies, and often the factors that contribute to a particular decision can be separated, if at all, only with difficulty.

Id. § 7.17 (stating that good faith is "based on fundamental notions of fairness").

257. *Cf.* Summers, *supra* note 18.

Conclusion

The analysis of the problem of delay in the transmission of acceptances provides several interesting issues both to comparative studies and to legal theory. The analysis demonstrates that the legal structure of the contract formation process in the American legal system differs profoundly from that in the Japanese legal system. American contract law emphasizes the identity of each contracting party as a "master of the offer" and the "casting voter," while Japanese contract law views them "symmetrically." Based on these differences, each legal system has developed its own legal rules and principles governing the contract formation process. The comparative method helps one understand these rules and principles in that it enables a systematic explanation of these separate rules and principles. Finally, the American and the Japanese legal systems differ in their methodology for finding solutions to legal problems.

Despite these differences, the analysis shows that the American legal system and the Japanese legal system reach a similar solution to the problem of delay in the transmission of acceptances: if the offeror has reason to know that the acceptance has been sent on time, but it arrives late because of an unforeseen delay in transmission, the delayed acceptance is effective unless the offeror promptly informs the offeree of his intention to retract on account of delay. Curiously, the reasoning by which the common law reached the solution conforms to the traditional view of Japanese legal reasoning, and the reasoning by which the Japanese Civil Code reached the solution conforms to the traditional view of American common law. The difference in reasons leads us to a more fundamental inquiry of legal theory: what is the nature of contract law?

The original concern of this Article was the practical and technical problem of delay in the contract formation process. In order to understand the present situation and to find a solution to the problem, it is necessary to address more fundamental questions, such as the legal structure of the contract formation process and the nature of contract law itself. In finding the problem and its solution, the comparative method will "enhance understanding of the nature of law itself."[258] This Article has hopefully made some contribution both to legal theory and to comparative studies.

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258. *See* ATIYAH & SUMMERS, *supra* note 2, at 418.