CHAPTER - 5

PROBLEMS OF "HIDDEN" E-COMMERCE LAWS IN JAPAN AND THE POSSIBILITY OF USING THE FRAMEWORK OF THE UN CONVENTION ON THE USE OF ELECTRONIC COMMUNICATIONS IN INTERNATIONAL CONTRACTS

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I INTRODUCTION

From the year 2000 to 2001 was a crucial period for Japanese e-commerce law. In 2000, the IT Strategy Headquarters which was created within the Cabinet Office of Japan announced the "IT Basic Strategy" with the aim of promoting the digitalization of the nation. In the following year, the IT Strategy Headquarters set forth the following four agendas in the "e-Japan Strategy": (a) building an ultra high-speed Internet network; (b) establishing rules on e-commerce; (c) realizing an electronic government; and (d) nurturing high-quality human resources for the new digitalization era.[1] To materialize agenda (b), the following three laws were enacted: (i) the Act on Special Provisions to the Civil Code Concerning Electronic Consumer Contracts and the Electronic Acceptance Notice enacted in 2001 (hereinafter, the e-Consumer Contract Act), (ii) the Act on Electronic Signatures and Certification Business enacted in 2000 (hereinafter, the e-Signature Act), and (iii) the Act Governing Legislation on the Use of Information and Communications Technology for the Delivery of Documents enacted in 2000 (hereinafter, the IT Documents Act).

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1 For the e-Japan Strategy, see <www.kantei.go.jp/jp/it/network/dai3/3siryou40.html>.

Due to this background, these three laws are often categorized as the "Three Digital Laws".

Contrary to what the name suggests, however, the Three Digital Laws are far from exhaustive because they provide rules on e-commerce only in a fragmentary manner. In actuality, Japan does not have a uniform set of rules that can be called "Japanese e-commerce law". Of course, this does not mean that Japanese law does not have sufficient rules to address e-commerce. Japan indeed has rules corresponding to most rules addressed in the United Nations Convention on the Use of Electronic Communications in International Contracts (hereinafter, the e-CC). A problem lies in the drafting style of the rules. Rules concerning e-commerce are "hidden" in Japanese law: They are acknowledged as unwritten rules or interpretations of existing statutory laws, or made into express provisions and scattered throughout various kinds of statutory laws. As a result, Japanese e-commerce law does not have a structure within it.

This paper explains how rules on e-commerce are "hidden" in Japanese law by using the e-CC as a point of reference, and addresses problems caused by "hidden" laws [II, III, and IV]. And then, the paper suggests a solution to the problems of "hidden" law [V].

II HOW ARE RULES ON E-COMMERCE HIDDEN IN JAPANESE LAW? –COMPARISONS WITH THE E-CC

The e-CC embraces three principles: the principles of non-discrimination, technology neutrality, and functional equivalence. The three principles are also appreciated in Japanese law, although none of them are made into express provisions.

2.1 The Principle of Non-discrimination (Arts 8 and 12 of the e-CC)

There is no provision in Japanese law that enunciates the principle of non-discrimination as a general rule, like Article 8(1) of the e-CC.[2] Since an oral contract is, in principle, valid and enforceable in Japanese law, parties may freely choose whether to create a writing, as well as the kind of writing to create, including an electronic record.[3] Because of the existence of the general principle of freedom to

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2 Article 8 of the e-CC: (1) A communication or a contract shall not be denied validity or enforceability on the sole ground that it is in the form of an electronic communication. (2) Nothing in this Convention requires a party to use or accept electronic communications, but a party's agreement to do so may be inferred from the party's conduct.

3 Preparations or submissions of writings are mentioned in the Japanese Civil Code only in the following limited circumstances: (a) A gift may be rescinded if it is not in writing to the extent that the performance of the gift has not been made (Article 550); (b) a contract of suretyship is ineffective unless it is made in writing (Article 466); (c) the assignment of a nominative claim is

choose the form of the contract, enacting an express provision to proclaim the principle of non-discrimination was thought to be unnecessary at the time the Three Digital Laws were enacted.[4]

Article 12 of the e-CC also represents the principle of non-discrimination, providing that the validity of a contract concluded through automated message system must not be denied solely because a natural person is not involved. In Japanese law, the same rule is recognized not in the form of an express provision, but rather in the form of an unwritten law derived from, again, freedom to choose the form of the contract. Even though a natural person is not directly involved in the process of making a contract, the will of a person using an automated system is conveyed to another person at the other end of the system, and therefore a contract formulated through an automated system simply indicates that the relevant parties chose an automated system as a manner to enter into the contract. Accordingly, the rule indicated in Article 12 of the e-CC was also thought to be unnecessary to be stipulated insofar as Japanese law acknowledges the freedom to choose the form of the contract.[5]

As outlined above, the principle of non-discrimination is recognized as part of the freedom to choose the form of the contract in Japanese, while Japanese law does not have an express provision promulgating freedom of contract, or freedom to choose the form of the contract. These freedoms are recognized as unwritten principles. As a consequence, the principle of non-discrimination is derived from the unwritten principle in the form of an unwritten rule.

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required to be notified to the applicable obligor, or to be approved by him in a written notice in order for the assignee to claim against a third party the assignment of the claim (Article 467(2)); (d) Article 467 is applicable *mutatis mutandis* to the case where a pledge is created over a nominative claim and the pledger asserts the creation of his pledge against the relevant obligor or third party (Article 364), and also to the case (e) where a party has performed the obligation of another person for the benefit of the latter, and therefore subrogates the corresponding claim against the latter upon permission from the obligee (Article 499); (f) a bearer of a receipt is deemed to have the authority to accept the performance of the relevant obligation (Article 480); (g) an obligor is entitled to request the issuance of a receipt against a person who received the performance (Article 486); and (h) in the case where there is any instrument which evidences a claim, a person who has performed the corresponding obligation is entitled to demand the return of such instrument (Article 487).

4 Fuminori Inagaki, Yoshihito Iwama, Takashi Uchida, Hideki Kanda and Tsunemichi Yokoyama "Denshitorihikihoseidoseibi no Kadai [Awaiting Solutions for Improvement of Laws on Electronic Commerce]" Jurisuto no 1183 6 (2000).

5 Ibid.

2.2 The Principle of Technology Neutrality (Article 4 of the e-CC)

In Japanese law, there is no provision proclaiming the principle of technology neutrality but the principle is recognized and can be perceived from several provisions.

For instance, Japanese law does not have express provisions defining the terms related to e-commerce in the way Article 4 of the e-CC does.[6] However, the concepts defined in the Article are, in essence, understood in the same way in Japanese law. (As for the definition of "business office" used in Japanese law, see below.)

Technology neutrality can also be discerned from the manner of defining the phrase, "electromagnetic record" in Japanese law. An electromagnetic record is defined as a "record produced by electronic means, magnetic means, or any other means unrecognizable to human perception, which is used in information processing by computers." Although there is no provision dedicated solely to define an "electromagnetic record," every provision mentioning an electromagnetic record shares the above definition. (See the provisions mentioned in relation to the principle of functional equivalence below.)

2.3 The Principle of Functional Equivalence (Article 9 of the e-CC)

2.3.1 Form requirements – Comparisons with Article 9(1) and (2) of the e-CC

The principle of functional equivalence is also an unwritten rule, and thought to be derived from the unwritten principle of the freedom to choose the form of the contract.

While the functional equivalence is unwritten as a general rule, one can find various express provisions standing on the functional equivalence in specific contexts. For instance, Article 13(2) of the Japanese Arbitration Act provides that an arbitration clause does not become legally valid unless it is in writing. Paragraph (4) of said Article stipulates, "When an arbitration agreement is made in an electromagnetic record (meaning a record produced by electronic means, magnetic means, or any other means unrecognizable to human perception, which is used in

6 Article 4 of the e-CC provides definitions of (a) "communication," (b) "electronic communication," (c) "data message," (d) "originator" of an electronic communication, (e) "addressee" of an electronic communication, (f) "information system," (g) "automated message system," and (h) "place of business."

information processing by computers) recording the contents thereof, such arbitration agreement is deemed to be made in writing".[7]

Another instance is Article 3-7 of the Code of Civil Procedure. This Article was inserted in 2011 in order to clarify the ways to determine international jurisdiction that had previously been set forth by judicial precedents. Article 3-7(1) stipulates that parties may decide the international jurisdiction by agreement. Paragraph (2) of the Article provides that an agreement on international jurisdiction shall be ineffective "unless it is made in writing." And Paragraph (3) states, "When an agreement provided in Paragraph (1) is made in an electromagnetic record (meaning a record produced by electronic means, magnetic means, or any other means unrecognizable to human perception, which is used in information processing by computers) recording the contents thereof, such agreement is deemed to be made in writing".[8]

As one can observe from the above-mentioned laws, a typical drafting style that was used to address the functional equivalence is to have two separate provisions usually written right next to each other: one provision providing a writing requirement only, and another subsequent provision specifically stating that the "writing" used in the previous provision also includes an electromagnetic record. The same drafting style is employed in various provisions that require writings in specific circumstances (eg Article 466(2) of the Civil Code,[9] Article 11(3) of the Code of Civil Procedure,[10] and Article 26 of the Corporate Code[11]).

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7 This provision was inserted in the Arbitration Act in 2004.

8 With respect to an agreement concerning the domestic jurisdiction, see Code of Civil Procedure Article 11 (below n 10).

9 Article 466 of the Civil Code:

> (1) A guarantor shall have the responsibility to perform the obligation of the principal obligor when the latter fails to perform such obligation.
>
> (2) No contract of guarantee shall be effective unless it is made in writing.
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> (3) If a contract of guarantee is concluded by electromagnetic record (meaning a record produced by electronic means, magnetic means, or any other means unrecognizable to human perception, which is used in information processing by computers) which records the contents thereof, the contract of guarantee is deemed to be made in writing, and the provision of the preceding paragraph shall apply.

In the Civil Code, a contract of suretyship is a rare exception that is considered invalid if it is not made in writing (see also above n 3).

10 Article 11 of the Code of Civil Procedure:

> (1) The parties may determine a court with jurisdiction by an agreement only in the first instance.

The IT Documents Act, which is one of the Three Digital Laws also follows the same drafting pattern. The IT Documents Act is unique in the sense that it does not provide any rules applicable to individuals or companies. The IT Documents Act sets forth a list of fifty different laws all of which are administrative laws requiring the submission of writings, and declares that the listed laws must be amended in the way to recognize electromagnetic records as "writings."[12] Some of the targeted administrative regulations involve regulations concerning transactions. For instance, in an instalment sales contract, a seller is required to produce a writing that clarifies the contents of the contract to a purchaser (Article 4 of the Instalment Sales Act). Since the Instalment Sales Act was one of the listed 50 laws, Article 4-2 was introduced, which stipulates that the writing provided in Article 4 may be produced to a purchaser in an electronic form upon the purchaser's assent. Similar amendments were made to the Home Visit Sales Law and the Travel Agency Act. While the IT Documents Act stands on the principle that any law that requires a written document should also recognize an electronic record as a legitimate writing, there are four exceptions to the principle: (a) in the case where a law requires the preparation of a notarized document (eg the Act on Land and Building Leases, and the Act on Voluntary Guardianship Contract Law); (b) where a contract is expected to be concluded in a face-to-face manner (eg, the Pawnbroker Business Act); (c) where written documents are required by international laws (eg the Act on International Carriage of Goods by Sea); and (d) where conventional written documents, rather

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(2) The agreement set forth in the preceding paragraph shall not become effective unless it is made with respect to an action based on certain legal relationships and made in writing.

(3) If the agreement set forth in paragraph (1) is made by means of an electromagnetic record, the provisions of the preceding paragraph shall be applied by deeming such agreement to have been made in writing.

11 Article 26 of the Companies Act:

(1) In order to incorporate a stock company, incorporator(s) shall prepare articles of incorporation, and all incorporators shall sign or affix the name(s) and seal(s) to it.

(2) Articles of incorporation set forth in the preceding paragraph may be prepared by electromagnetic records (meaning records produced by electronic forms, magnetic forms, or any other forms unrecognizable by human senses, which are for computer data-processing use as prescribed by the applicable Ordinance of the Ministry of Justice). In such cases, actions prescribed by the applicable Ordinance of the Ministry of Justice shall be taken in lieu of the signing or the affixing of the name(s) and seal(s), with respect to the data recorded in such electromagnetic records.

12 Examples of the targeted laws are the Securities and Exchange Act, the Financial Futures Trading Act, the Act on Investment and Investment Corporation, the Financial Instrument and Exchange Act, the Insurance Business Act, the Radio Act, the Tuberculosis Control Law, the Social Welfare Act, the Pharmaceutical Affairs Act, the Fishery Act, the Instalment Sales Act, the Home Visit Sales Law, the Travel Agency Act, the Real Estate Brokerage Act and the like.

than electronic records, are deemed necessary due to the nature of the disputes arising in relation to the documents (eg the Money Lending Business Act). The written documents required in these four instances may not be replaced by electronic forms.

The above-mentioned drafting manner is also maintained in the recent amendment proposals to the Japanese Civil Code.[13] For instance, Article 587-2 is a newly inserted provision which addresses a case where a loan for consumption is formulated in writing. Paragraph (1) of the Article states that where a loan for consumption is concluded in writing, the contract is effective without the actual tender of the loaned objects.[14] And Paragraph (4) of the said Article states that an electromagnetic record containing the contents of a loan for consumption is deemed a writing.[15]

2.3.1.1 Problem of hidden laws

(a) Rules are hidden with no structural guidance to find them

This drafting pattern, together with the lack of a general provision recognizing the functional equivalence, clouds the Japanese law's principal approach to the functional equivalence, because this invites two possible opposing interpretations. One is that the functional equivalence is *not* recognized as a general principle, and therefore an electromagnetic record does not satisfy a writing requirement unless

13 The proposed amendment to the Civil Code was approved by the House of Representatives in April of 2015, and is currently awaiting approval from the House of Councillors as of May 2015. The approval will likely be given during this year's session of the Diet.

14 While a writing is not required to make a valid loan for consumption, the tender of the loaned object is required for validity of the contract under the current Civil Code (Article 587).

15 One notable exception to the typical drafting pattern is Article 548(3) of the proposals to amend the Civil Code. The Article is a newly inserted provision in the proposals to amend the Civil Code to address a standard form contract. The Article states that a party who prepared a standard form contract "must, without delay, disclose the content of the standard form transaction agreement to the other party upon such other party's request made either before reaching agreement or within a reasonable period of time after reaching agreement. However, this obligation shall not apply if the agreement preparer has already issued a written agreement or delivered an electromagnetic record containing the agreement content".

One characteristic of the proposed amendment to the Civil Code is the insertion of the section addressing a standard form contract (from Articles 548-2 to 548-4 of the proposed amendment to the Civil Code). A standard form transaction agreement is defined in Article 548-2(1) as a transaction where "a specified person enters into transactions with unknown numbers of unspecified counterparties, and the entire content or a portion of the content of each transaction is uniform and is reasonable for both parties." The rules on standard form agreements are applicable to both online and off-line contracts insofar as their contracts satisfy the definition of a standard from transaction agreement. The rules are applicable regardless of whether a contract is classified as a consumer contract.

there is an express provision specifically mentioning the permissibility of an electronic record. Another interpretation is that the functional equivalence is indeed recognized as a principle and the provisions mentioning electromagnetic records are simply intended to restate the principle. Without a general provision promulgating the functional equivalence, one who only reads the texts of the above-mentioned laws would naturally take the first interpretation, and assume that if a law remains silent about an electromagnetic form while requiring a writing, that would mean that an electronic form is *not* recognized as a "writing". This assumption is, however, incorrect.

For example, an obligee is required to issue a receipt upon a request of the obligor. Article 486 of the Civil Code provides, "Article 486 of the Civil Code: Any person who made the performance shall be entitled to request the person who received the performance to issue a receipt". This Article is applicable to any situations involving the performance of a certain obligation. Although the Article does not expressly mention whether a "receipt" can be issued in an electronic form unlike the other provisions mentioned above, a "receipt," or a writing, under the Article is interpreted to include an electronic form, and therefore an electronic form is deemed to be a legitimate writing under the Article. A "receipt" in the Article is interpreted to include an electronic form because the functional equivalence can be derived from the freedom to choose the form of the contract. In fact, during the discussions on amending the current Japanese Civil Code, the Legislative Council discussed whether to insert a new provision to clarify that a receipt in electronic form is also a legitimate receipt within the meaning of the Article. However, the Legislative Council eventually decided not to, because, according to them, given the unwritten principle of freedom of contract, it is *obvious* that a receipt may be issued in electronic form insofar as the relevant parties agree to that.

However, functional equivalence is not written anywhere in Japanese law. Suppose a person whose knowledge is limited to the texts of express provisions only. He sees (i) a number of provisions that clearly state electronic forms are recognized as writings, on the one hand, and then, (ii) provisions that require writings without mentioning electronic forms, on the other hand. Without knowing the unwritten rule of functional equivalence, how *obvious* would it actually seem to him that the provisions of the latter category (ii) actually permit electronic forms as writings?

To make the situation worse, there are also (iii) provisions that require writing without mentioning electronic forms and are indeed interpreted to mean that only

paper forms are recognized as writings.[16] Consequently, one can understand whether an electronic form suffices for a writing requirement in a given circumstance only if the relevant laws, the interpretations behind them, and the underlying principles are already known.[17]

(b) The general principle itself becomes clouded

Another problem is that this drafting manner clouds the existence of the principal rules themselves. It is sometimes said that Japanese law recognizes the principles of non-discrimination and functional equivalence as rules corollary to the freedom to choose the form of the contract. However, as was mentioned earlier, the principle of non-discrimination has not been made into an express provision simply because it was deemed unnecessary to enact such a provision insofar as the law recognizes the freedom to choose the form of the contract. The same attitude is taken in relation to the principle of functional equivalence. From this viewpoint, neither the non-discrimination nor the functional equivalence has been elevated to the level of fundamental principles. Rather, they receive only tacit approval under Japanese law.

The implication of tacit approval can become equivocal because there is no express provision for the functional equivalence, or non-discrimination for that matter. Since the above-explained drafting pattern allocates an independent provision for the treatment of each of a conventional writing and an electronic record, it leaves room for providing a different treatment to each of these were it not for the general principle of functional equivalence. Without the general principle, one cannot see which is the principal rule: whether it is the equal treatment to a conventional writing and electronic record, or different treatment for each of them.

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16 For instance, Article 37 of the Real Estate Brokerage Act provides:

> (1) A real estate broker must, without delay, issue a document {containing the contents of the contract} to {his client and/or} the counterparty to an agreement in connection with the sale or exchange of a building lot or building… *omitted*.
>
> (2) A real estate broker must issue a document {containing the contents of the contract}… to {his/her client and/or} the counterparty to an agreement in connection with the lease of a building lot or building… *omitted*."

While the Article remains silent about an electronic form, a "document" under the Article is interpreted to mean only a paper form one, and therefore, an electronic form does not meet the writing requirement of the Article.

17 The proposed amendment to the Japanese Civil Code puts forward the inclusion of an express provision, "Neither the creation of a writing nor any other form is required for the formation of the contract unless provided otherwise in the laws or regulations" (Article 522(2) of the proposed amendment to the Civil Code). Although merely stipulating the principle of freedom to choose the form of the contract does not solve problems of hidden law as outlined in the main text of this paper, at least, the non-discrimination and functional equivalence will be seen as rules derived from an express provision of the Article.

In fact, from the discussions on drafting the IT Document Act, whether the equal treatment is indeed recognized as a principle is not so certain, because the discussions were always context specific. For instance, as was mentioned earlier, in an instalment sales contract, an electronic form to clarify the contents of the contract became a permissible substitute for a written contract after careful consideration of whether a contract in electronic form could upset the purpose of the requirement for the submission of a written contract (eg to let a purchaser easily understand the contents of the contract). Such context specificity in permitting an electronic record could indicate that an electronic record at issue has become permissible not because of the general principle of non-discrimination or functional equivalence, but rather simply because of the effect of the specific provision permitting as such.

2.3.2 Originality requirement – Comparison with Article 9(4) of the e-CC

Article 9(4) of the e-CC states that if a law requires a communication or contract to be made available in its original form, that requirement is satisfied in relation to an electronic communication on the conditions designated in the Article. In contrast, in Japanese law, there are virtually no substantive laws concerning contracts that require a communication or a contract to be made available in its original form since writings are, in principle, not required in transactions. However, there are rules concerning the originality of a document in (a) administrative regulations and (b) laws on evidence.

2.3.2.1 Administrative regulations

Unlike private law, administrative regulations often require various documents to be stored in their original form for regulatory purposes (eg tax payment). As was mentioned earlier, targeting fifty different administrative regulations, the IT Documents Act was intended to enable various documents to be created, stored, and submitted in digital forms (eg ledgers, receipts, inventories of property, minutes of the meetings of boards of directors, and the articles of association of a company). One problem to be noted concerning the IT Documents Act was that the Act amended the targeted regulations in the way that they only acknowledged electronic records that were generated as the originals. For instance, a digital form (eg PDF) that is created by scanning a paper form was not recognized as a legitimate writing under the laws changed by the IT Documents Act, because in this case, the paper form record is the original document and the PDF is deemed as a copy of the original. However, more often than not, documents (eg receipts) were originally created in paper form, later transformed into electronic forms, and digitally stored. In response to this reality, the Act on Utilization of Telecommunications Technology in Document Preservation, etc. Conducted by Private Business Operators, etc. (hereinafter, e-Documents Act) was enacted in 2004 to make digital files created by

scanning paper documents satisfy the writing requirements in administrative laws. Much like the IT Documents Act, the e-Documents Act is also essentially a law to amend other laws. The number of the laws intended to be changed by the e-Documents Act was no less than 251. Currently, most documents that are subject to administrative regulations can be created, stored, and presented in digital forms.[18]

2.3.2.2 Rules on evidence

A document is required to be the original as admissible evidence. Article 143 of the Rules of Civil Procedure provides that a document, to be admissible evidence, must be "the original, an authenticated copy, or a certified transcript of the document." However, an unauthenticated copy of an original document (eg a photocopy of an original document) is also admissible for submission to a court (a) if the other party does not oppose the submission of a copy of an original, and (b) does not contest the existence of the original. Even though the other party contests the authenticity of the original, a copy of the original may still be deemed to be admissible evidence insofar as both (a) and (b) are satisfied.[19] This rule is not written but rather is acknowledged as long-established practice in court.

In relation to a copy of an electronic record, Article 231 of the Code of Civil Procedure states that evidentiary rules on writings are applicable to "drawings, photographs, audiotapes, videotapes and **any other objects prepared for the purpose of indicating information, other than documents**". Since the bold portion is interpreted to include digital data stored in CD-ROM, or any other digital

18 There is one noteworthy difference between the IT Documents Act and the e-Documents Act. Since the IT Documents Act was a law to amend other laws, the purpose of the IT Documents Act was accomplished once the targeted fifty laws were amended. (In fact, the texts of the IT Documents Act are no longer officially available because there is no point of the Act remaining in existence anymore.) In contrast, the e-Documents Act states the general principle that a business operator may create, store, and present documents in digital form when laws require him to create, store, and present documents, even though the laws only refer to "writings" (Articles 3 (as for the creation of forms), 4 (as for the storage of forms), and 5 (with respect to presenting forms)). These Articles, at least on their face, establish the principle of functional equivalence in the contexts of administrative regulations. Consequently, the e-Documents Act remains as law even after the targeted 251 laws were changed.

However, Articles 3 to 5 of the said Act also expressly state that the Articles are applicable "only to the laws that are designated by competent ministerial ordinance." And the ministerial ordinance lists 251 different laws, much like the IT Documents Act, along with specific regulations concerning manners to create, store, and present electronic records (eg, degree of resolution, whether information can be generated in monochrome, whether an e-signature is required). Considering the fact that the regulated manners to create, store, and present electronic records are significantly different depending on the regulations, the functional equivalence promulgated in the e-Documents Act does not seem to have practical effect to be the principal.

19 The other party may argue the authenticity of the original, and that would affect the weight of the submitted copy as evidence.

storage systems, evidentiary rules on writings, including the above-mentioned established practice, are applicable to a copy of an electronic record. In fact, the submission of a copy of an electronic record has been an established practice. Since evidentiary rules on electronic records are derived through the interpretation of an express provision, which is Article 231 of the Code of Civil Procedure, in combination with the application of an unwritten precedent, which concern rules on submitting a copy of the original, these rules are also unwritten.

2.4 Rules on Contracting (Articles 10 to 12 of the e-CC) – They are also Hidden

2.4.1 General Rules on Contracting in Japanese Law

As for rules on contracting, the Japanese Civil Code currently does not have a general express provision addressing contract formation, although there are provisions concerning offer and acceptance (Articles 521 to 532 of the Civil Code). Putting it differently, the Japanese Civil Code allocates a section for contract formation and provides rules concerning offer and acceptance that are similar to, for instance, those one can see in Articles 15 to 19, and 21(1) of the United Nations Convention International Sales of Goods (hereinafter, CISG).[20] However, a general provision on contract formation, like Article 23 of the CISG,[21] does not exist in the current Japanese Civil Code. The general rule that a contract is formed when an acceptance of an offer becomes effective is acknowledged as an unwritten rule.

In relation to rules on offer and acceptance, the Japanese Civil Code establishes the arrival rule as the principle concerning a notice to a person at a distance. Article 97 of the Civil Code provides that a notice to a party at a distance "shall become effective at the time of the arrival of the notice" to the party. The arrival rule is applicable to any kinds of notices, including an offer to enter into a contract. The exception is an acceptance to enter into a contract. Article 526(1) of the Civil Code stipulates, "A contract between persons at a distance shall be formed upon dispatch of the notice of acceptance".

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20 Eg Article 15 of the CISG: (1) An offer becomes effective when it reaches the offeree. (2) An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.

For comparisons Article 521 of the Japanese Civil Code: (1) An offer which specifies a period for acceptance may not be revoked. (2) If an offeror does not receive notice of acceptance of the offer set forth in the preceding paragraph within the period referred to in the same paragraph, the offer shall cease to be effective.

21 Article 23 of the CISG: A contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this Convention.

2.4.1.1 The e-Consumer Contract Act – Creating an exception to the exception

However, with respect to a notice of acceptance sent electronically, the e-Consumer Contract Act, which is one of the Digital Three Laws, is intended to create an exception to the exception: Article 4 of that Act states, "Article 526(1)…of the Civil Code shall not apply to the case where an electronic acceptance notice is dispatched for a contract made between persons at a distance". The Article is applicable insofar as a notice of acceptance is sent through an electronic medium (eg fax, email, and website) whether or not the contract at issue is classified as a consumer contract. Since Article 526(1), which provides the dispatch rule, is not applicable to a notice of acceptance if it is sent electronically, the principle, which is the arrival rule stated in Article 97, is applicable to an electronically sent acceptance. One reason for creating the exception for an electronic acceptance lies in the nature of electronic communication: The law does not have to assure a person who has electronically dispatched an acceptance to a contract that the contract be concluded, because the acceptance reaches the offeror as soon as the communication is sent, and therefore, the dispatch rule does not have the practical necessity to remain as the rule. Another more fundamental reason is that the dispatch rule itself had long been criticized under Japanese law, because (i) there is virtually no risk that one's acceptance of a contract fails to reach the offeror under the modern developed mail delivery service, and therefore, there is no strong practical necessity to uphold the dispatch rule for any form of one's acceptance to a contract. Also, (ii) unlike Anglo-American law, under Japanese law an offeror is bound by his offer for a reasonable period of time after the offer was made, even when he has not specified the time for the offeree to send him a reply (Article 524 of the Civil Code); therefore, there is not much need to protect the expectation of a person who has dispatched the acceptance that the contract is concluded by adhering to the dispatch rule.[22] Furthermore, the shift to the arrival rule was intended to be in line with international trends. Given the borderless nature of e-commerce, the conformity of Japanese law with the international trends was thought to be necessary.[23]

A problem underlying Japanese laws on contracting through electronic communications is also that the rules are hidden. Suppose you do not have prior knowledge of Japanese civil law and wish to know Japanese rules on contracting

22 Takashi Uchida *Minpo [Civil Law] II* (4th ed, Tokyo Daigaku Shuppankai 2008) 41; Yutaka Yamamoto "Denshikeiyaku to Minpohori [Electronic Contract and Civil Law Doctrines]" (2009) 31 Hogakukyoshitsu 97.

23 Takashi Uchida "IT Jidai no Torihiki to Minjihosei [Trade and Civil Legislation in the Age of Information Technology]" (2001) 118 (4) Journal of Jurisprudence Association 486.

through electronic communications. Since you are told that the Digital Three Laws are the major e-commerce laws in Japan (which is true), you look into the e-Consumer Contract Act and read Article 4, only to find that Article 526(1) of the Civil Code is *not* applicable. Even if you see Article 526(1) while assuming that the possible policy to take is either the dispatch rule or arrival rule, you could merely guess that the arrival rule would be the applicable rule. You could not be sure, because the e-Consumer Contract Act does not tell you what rule is actually applicable, or where you can find it (the applicable rule is in Article 97 of the Civil Code).

2.4.2 Specific rules on contracting in Japanese law – in comparisons with Articles 10, 11, and 12 of the e-CC

While Articles 10 to 12 of the e-CC clarify specific rules on contracting, all the rules of Japanese law corresponding to these Articles are also in the form of interpretations of the terms "offer," "acceptance," "dispatch," and "arrival," and are therefore, unwritten.

2.4.2.1 Time and place of dispatch and receipt of electronic communications (Article 10 (1), (2) and (4) of the e-CC)

Article 10(1) of the e-CC clarifies the time of dispatch of an electronic communication.[24] In Japanese law, the same rule outlined in Article 10(1) of the e-CC is recognized as an interpretation of the concept of "dispatch."

With respect to the time of receipt of an electronic communication, Paragraph (2) of Article 10 of the e-CC provides rules on the time of receipt (a) where the communication is delivered to a designated electronic address, and (b) where the communication is delivered at another electronic address of the addressee.[25] In contrast, under Japanese law, the concept of "receipt" is generally interpreted to

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24 Article 10(1) of the e-CC:

> The time of dispatch of an electronic communication is the time when it leaves an information system under the control of the originator or of the party who sent it on behalf of the originator or, if the electronic communication has not left an information system under the control of the originator or of the party who sent it on behalf of the originator, the time when the electronic communication is received.

25 Article 10(2) of the e-CC:

> The time of receipt of an electronic communication is the time when it becomes capable of being retrieved by the addressee at an electronic address designated by the addressee. The time of receipt of an electronic communication at another electronic address of the addressee is the time when it becomes capable of being retrieved by the addressee at that address and the addressee becomes aware that the electronic communication has been sent to that address. An electronic communication is presumed to be capable of being retrieved by the addressee when it reaches the addressee's electronic address.

mean that a notice is considered to have been received by the addressee when the notice has become capable of being noticed by the addressee, that is, when it has been placed within the sphere controllable by the addressee.[26] While this interpretation was originally developed in relation to paper-based communications, electronic communications are thought to be fundamentally the same as paper-based communications, and therefore both forms of communication are to be subjected to the same rules. Accordingly, the above interpretation of the concept of "receipt" is also applicable to an electronic communication.

Based on this approach, as for case (a), Japanese law recognizes the same rules: The time of receipt of an electronic communication is the time when it becomes capable of being retrieved by the addressee. In relation to case (b), the rules in Japanese law are slightly different. Even in the case where no specific address is designated, if an electronic notice is sent to an address that is reasonably believed to be the address that the addressee uses for the type of the transaction at issue, the case is considered the same as case (a). Therefore, the notice is deemed to have been received at the time it becomes capable of being retrieved by the addressee. In the situation where no designated address of an addressee is given, and an electronic notice is sent to an address other than the address that is reasonably thought to be used by the addressee for the type of transaction at issue, the rules are the same as those in Article (2) of the e-CC: The time of receipt of the notice is the time when it becomes capable of being retrieved by the addressee at that address, and the addressee becomes aware that the notice has been sent to the address. Rules contained in Paragraph (4) of Article 10 of the e-CC are also generally supported as interpretations of the phrase, arrival of a notice.

In relation to the third sentence of Paragraph (2) of Article 10 of the e-CC,[27] while this portion of the Article allows an addressee to rebut the presumption that they became capable of retrieving a notice at issue by showing that the notice has been blocked by their computer software (eg spam filter program), a school of thought in Japanese law argues that the risk of a computer software filtering out notices should be borne by the addressee who has installed the software, and therefore, a notice should be considered as capable of being retrieved by the addressee even when the addressee did not notice it due to a spam filter program installed in their computer.[28]

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26 The Supreme Court of Japan, 1st Petty Bench, 20 April 1961, *Minshu* vol 15, no 4, 774; the Supreme Court of Japan, 3rd Petty Bench, 17 December 1968, *Minshu* vol 22, no 13, 2998.

27 See e-CC (above n 25) s 10 (2).

28 Yamamoto (above n 22) 99.

All these rules of Japanese law explained above are not made into express provisions, but rather are recognized as unwritten rules, as they are derived through established interpretations of the concepts of "dispatch" and "receipt" within the meaning of the unwritten general rule that a contract is formulated when offer and acceptance becomes effective.[29] Japan chose not to enact rules on contracting through electronic communications at the time of the enactment of the Three Digital Laws, because the established interpretations of the terms that have been developed for paper-based communications were thought to be also applicable to electronic communications. Therefore, the lawmakers did not see the necessity to enact rules specifically for electronic communications.

2.4.2.2 Determination of one's place of business as the place the notice is sent to and received at (Articles 10(3), 6, and 4 of the e-CC)

As for Paragraph (3) of Article 10 of the e-CC,[30] Japanese law also recognizes the same rule that an electronic communication is deemed to be dispatched or received at the place where the originator has its place of business. In Japanese law, the ways to determine one's place of business are, however, slightly different.

The Japanese Commercial Code uses the phrase "business office," instead of place of business. Although no express provision defines a business office, the prevailing interpretation of "business office" states that a person's business office is a place where that person carries out their business dealings in a continuous and stable manner at the place, and in such an organized and independent manner that orders and directions to conduct business are determined at that place. Since certain business dealings have to be carried out at the said business office, a place like a warehouse is not considered a business office. Moreover, since a business office has to have a degree of autonomy in deciding the ways of operating the business, an office that carries out what has been decided by its headquarters is not considered a business office. Compared with Article 4(h) of the e-CC that defines the phrase, a "place of business," the definition of "business office" requires a place to have a certain autonomy, while the definition of a place of business under Article 4 (h) of e-CC does not expressly refer to the autonomy requirement.[31] However, in a case

29 Nobuhiro Nakayama (ed) Denshishotorihiki oyobi Johozaitorihikito ni Kansuru Junsoku to Kaisetsu [The Interpretive Guidelines on Electronic Commerce and Information Property Trading and Its Explanation] (Bessatsu NBL 118 2007); Yamamoto (above n 22) 98.

30 Article 10(3) of the e-CC: An electronic communication is deemed to be dispatched at the place where the originator has its place of business and is deemed to be received at the place where the addressee has its place of business, as determined in accordance with article 6.

31 Article 4(h) of the e-CC: "Place of business" means any place where a party maintains a non-transitory establishment to pursue an economic activity other than the temporary provision of goods or services out of a specific location.

where the CISG is applicable, Japanese courts would be likely to follow the definition provided in Article 4(h) of the e-CC as well, because this is in line with the prevailing interpretation of a place of business under the CISG.[32] In addition, considering that the definition of a place of business given by courts that applied CISG refers to the autonomy requirement,[33] the two concepts should be deemed almost identical.

As for determining the location of one's business office under Japanese law, no presumption clause exists similar to that stated in Paragraph (1) of Article 6 of the e-CC.[34] Rather, the location of one's business office is determined objectively based on the definition of a business office, although the exact criteria can be slightly different, depending on the purpose of the determination (eg to determine the jurisdiction, or to determine the place of performance).

2.4.2.3 Definition of an invitation to make an offer (Article 11 of the e-CC)

The definition of an invitation to make an offer expressed in Article 11 of the e-CC is shared by Japanese law, although it is not made into an express provision for the same reason that the rules on the time of dispatch and receipt of electronic communications are not written as express provisions. In Japanese law, whether one's statement of will to make a contract is considered an offer or merely an invitation to make an offer is determined based on the reasonable interpretation of the statement.[35] The same is applicable to one's statement of will in the form of an electronic communication, and therefore, a "proposal to conclude a contract made through one or more electronic communications which is not addressed to one or more specific parties, but is generally accessible to parties making use of information systems, including proposals that make use of interactive applications for the placement of orders through such information systems" (Article 11 of the e-CC) is also deemed to be an invitation to make an offer under Japanese law. For instance, there is a District Court case where an online computer shop mistakenly put up a brand-new computer for sale at the price of 2,787 JPY (approximately 27.5 USD) on its shopping website. Although a customer sent a purchase order for three

32 United Nations, *UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods* (New York, United Nations 2012) 4-5 <http://www.uncitral.org/pdf/english/clout/CISG-digest-2012-e.pdf>.

33 Ibid.

34 Article 6 (1) of the e-CC: For the purposes of this Convention, a party's place of business is presumed to be the location indicated by that party, unless another party demonstrates that the party making the indication does not have a place of business at that location.

35 Tomohei Taniguch and Kiyoshi Igarashi (ed) *Shinpan Chushaku Minpo (13) [Commentaries on Civil Law New Edition (*13*)]* (Yuhikaku, 1996) (Shinichi Toda) 437.

computers, that was turned down by the online shop owner. The Tokyo District Court rejected the customer's argument that they had already entered into a sales contract for three computers at the time it had placed the purchase order. The Court reasoned that an online shop's act of putting up a sales object and its price on his online shopping website should be interpreted as an invitation to make an offer, and therefore, it was the customer who had made the offer that had been later turned down by the shop.[36]

2.4.3 Problem of Hidden Laws

As was mentioned, all the rules of Japanese law outlined above concerning contracting through electronic communications are not made into express provisions. Then, what do we actually have in the form of written laws concerning contract formation through electronic communications in Japanese law? The answer is, "virtually none". It is true that Article 4 of the e-Consumer Contract Act can be counted as one provision. However, as was explained, this Article is intended only to create an exception to the exception stated in Article 526(1) of the Civil Code (ie the dispatch rule for acceptance), so that a notice of acceptance electronically sent is subjected to the arrival rule (Article 97 of the Civil Code). The specific rules on contracting, such as those contained Articles 10 to 12 of the e-CC, are all unwritten, as they are derived through interpretation of the concepts of offer, acceptance, dispatch and receipt within the meaning of, again, unwritten rule that a contract is formulated when offer and acceptance become effective.

For your information, the proposed amendment to the Japanese Civil Code proposes to discard the dispatch rule for acceptance by the repeal of Article 526(1), and puts forward the insertion of a new provision stating: "A contract is formulated when a party manifests the intention to enter into a contract, showing the contents of the contract, and the other party manifests the acceptance" (Article 522(1) of the proposed amendment to the Civil Code). Consequently, you will likely not be able to refer to Article 4 of the e-Consumer Contract Act in a few years once the amendment is made to the Civil Code, because Article 4 of the e-Consumer Contract Act – the exception to the dispatch rule – will lose its meaning on the repeal of Article 526(1) of the current Civil Code. As a consequence, when the Japanese Civil Code is amended, all the rules concerning contracting through e-communications outlined in the above will be derived through interpretations of the amended version of Article 522(1), and therefore, be hidden in the form of unwritten rules.

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36 The Tokyo District Court, 2 September 2005, *Hanreijihou* no 1922, 105.

III WHAT RULES ARE ACTUALLY MADE INTO EXPRESS PROVISIONS THAT CAN BE CALLED E-COMMERCE LAWS?

3.1 Rules on e-signatures

When comparing the e-CC and Japanese law, one can see that only the rules corresponding to Article 9(3) of the e-CC are actually made into express provisions in Japanese law.

Article 2 of the Japanese e-Signature Act provides the definition of an e-signature as follows: "(1) The term 'electronic signature' as used in this Act means a measure taken with respect to information that can be recorded in an electromagnetic record (a record that is prepared by an electronic form, a magnetic form or any other form not perceivable by human senses that is used for information processing by computers; hereinafter the same shall apply in this Act) and which falls under both of the following requirements: (i) A measure to indicate that such information was created by the person who has taken such measure; and (ii) A measure to confirm whether such information has been altered".[37] With respect to (i), the purpose of using a measure must be to make manifest that the contained digital information has been created by the person using the measure. Therefore, if the digital information is encrypted solely for the purpose of concealing it, such encryption would not be considered an electronic signature. Requirement (ii) is imposed in order to ascertain the scope of the information certified by the relevant e-signature.

The definition of an e-signature does not focus on a certain type of technology, such as a digital signature (ie an electronic signature based on PKI technology). The definition does not accompany an additional condition concerning the degree of security of the encryption or the difficulty of the alteration of the contained digital information either. Accordingly, any type of encryption is considered an e-signature under the Act insofar as it satisfies (i) and (ii). This manner of defining an e-signature is, in theory, intended to conform to the principle of technology neutrality. However, in practice, among the technologies currently available, the type of e-signature that can actually satisfy both criteria is limited to e-signatures based on PKI technology due to the addition of requirement (ii).

Concerning the evidentiary rules on seals and signatures, the Japanese Code of Civil Procedure provides that one has to prove that a document was authentically created in order for it to be admissible in court (Article 228(1)). As was stated earlier,

37 The Japanese e-Signature Act covers mainly three themes: (a) definition and evidentiary rules of e-signature, (b) procedure for an e-signature certification business provider to acquire accreditation for her certification businesses from the government, and (c) the national government's obligation to deepen public understanding of the e-signature and certification business through public education and information activities.

the evidentiary rules concerning documents are equally applicable to digital information (Article 231).

In relation to a paper document, "a private document, if it is signed or sealed by the principal or his/her agent, shall be presumed to be authentically created." (Article 228(3)) Technically speaking, in order for this Article to be applicable, a party who intends to submit a document has to prove both (a) that the seal placed on the document belongs to the person claimed to have placed the seal, and (b) that that person was the one placing the seal on the document. However, according to the established judicial precedent, if the impression of a seal on a document matches the one of the seal belonging to a person claimed to have placed the seal on the document (which means (a) is proven), it is presumed that the document is sealed by that person (which means (b) is presumed to be satisfied).[38] In consequence, once (a) is proven, Article 228(3) is presumed to be applicable, and therefore, the document is presumed to be authentically created unless the other party proves that the seal was placed on the document by someone else.

E-signatures are subjected to the same rules. Article 3 of the e-Signature Act provide, "Any electromagnetic record that is made in order to express information (except for that prepared by a public official in the course of duty) shall be presumed to be established authentically if the electronic signature (limited to that which can be performed only by the principal through appropriate management of codes and properties necessary to perform this) is performed by the principal with respect to information recorded in such electromagnetic record". In order for the Article to be applied (and therefore, an electronic record is presumed to have been authentically created), one has to prove both (a) that the used electronic signature belongs to the person who is claimed to have made the e-signature, and (b) that that person was the one placing the e-signature on the electronic record at issue. If (a) is proven, (b) is presumed to be satisfied. Consequently, if (a) is proven, Article 228(3) is presumed to be applicable unless otherwise proven by the other party.

If an e-signature at issue was created at a certification business operator accredited by the government, proving requirement (a) is relatively easier than the case of an e-signature created at a non-accredited certification business operator, because an accredited certification business operator may issue a private key to a person only after their identity is verified.[39] However, even in a case of an

38 The Supreme Court of Japan, 3rd Petty bench, 12 May 1964, *Minshu* vol 18, no 4, 597.

39 The accreditation may not be given to a certification business operator unless their method of confirming the identity of a user of their e-signature satisfies the criteria set forth in the relevant ordinance (Article 6(1) (ii) of the e-Signature Act). And Article 5 of the Ordinance for Enforcement of the e-Signature Act provides that a user's identity has to be verified through a public certificate, such as a certificate of his residence, a record of his family register, and the like.

e-signature generated by a non-accredited certification business operator, proving requirement (a) would be equally easy insofar as the business operator implements a strict identification method to verify the identity of its users.

IV REASONS AND PROBLEMS OF HIDDEN LAWS

4.1 Reasons for Hidden Laws

As seen above, the Three Digital Laws, (i) the e-Consumer Contract Act, (ii) the e-Signature Act, and (iii) the IT Documents Act, provide rules on e-commerce only in a fragmentary manner: (i) the e-Consumer Contract Act only addresses a rule on contracting, (ii) the e-Signature Act only covers the definition and rules on an e-signature, and (iii) the IT Document Act itself was intended to amend 50 different laws that required the submissions of paper documents. The rest of the rules contained in the e-CC are not created as part of Japanese e-commerce law, but rather are derived either from existing laws other than the Three Digital Laws, or through interpretation of existing laws. (See also the Appendix.)

This piecemeal approach to create e-commerce law was employed mainly for two reasons. First, online contracting was thought to be regulated under the same rules that govern offline contracting unless there are compelling reasons not to. This idea itself should be apposite to designing laws on e-commerce because the process of entering into and performing a contract is not always exclusively either online or offline. More often than not, contractual parties frequently go back and forth between online and offline channels during the negotiations and performance of a contract whenever they see fit to do so. Accordingly, rules to govern online and offline contracting should be the same as far as practicable.

By asking whether it was indeed necessary to create a new law in order to respond to each one of the issues emerging from the rapid changes of digitalization, the drafting committees of the Three Digital Laws focused on (a) designing new laws – the Three Digital Laws – to deal with issues that arose specifically in e-commerce and could not be dealt with by the then existing laws, while (b) clarifying interpretations of the then existing laws to deal with the issues that could be addressed without creating new laws, at the same time. The Three Digital Laws were created after careful identification of the issues that were unique only to e-commerce and could not be solved by existing laws, and the Three Digital Laws were intended to address only such issues.[40] For instance, all the rules on offer and acceptance are derived from interpretation of the existing terms "dispatch," "receipts" and other related concepts, simply because that was possible. The exception is the arrival rule

40 Inagaki, *et al* (above n 4) 4.

for acceptance. It could not be derived from the then existing law, because it clearly provides the dispatch rule for acceptance. That is why only a provision stipulating the arrival rule for acceptance was created in the e-Consumer Contract Act.

Second, the Three Digital Laws were created not to respond to practical needs of traders and business sectors, but rather to prepare legal infrastructure for future potential needs. Considering that the market got by without the need for amending the then existing laws, it is somewhat understandable why the lawmakers did not venture into creating a whole new set of rules for e-commerce. For instance, the lawmakers chose not to establish rules concerning the principle of non-discrimination or functional equivalence because business sectors prospered without establishing those principles insofar as they had the then existing rule, that is, the freedom to choose the form of the contract.[41]

Consequently, laws on e-commerce were created not as a uniform set of rules but rather piece-by-piece, and then, each of the rules was grafted on to the existing contract law like little twigs being grafted onto a large tree trunk. This drafting manner is more time and cost effective than creating the whole set of laws from scratch. It is also reasonable considering that treating online and offline contracting in the same manner is fundamentally consistent with the principles of non-discrimination and functional equivalence. However, it has consequently made Japanese e-commerce law complex and difficult to grasp because the rules on e-commerce are scattered in various kinds of laws with no structure within them.

4.2 Problems of hidden laws

Complexity within e-commerce law is a problem because it makes the laws difficult to grasp, which can be a hindrance to the growth of e-commerce. The difficulty of comprehending e-commerce law can be particularly grave for small- and medium-sized enterprises (hereinafter, SMEs), which usually do not have in-house lawyers or other legal experts to resort to, but they are the major players in e-commerce. In fact, listening surveys on SMEs conducted by the Japanese Ministry of Economy, Trade and Industry (METI) in 2010 showed that one of the major causes for hesitation to engage in cross-border e-commerce was that SMEs were not familiar with the applicable laws.[42] It is true that a large number of SMEs in Japan indeed has engaged in cross-border e-commerce despite the complexity of Japanese

41 Uchida (above n 23) 511-512, points to the tendency of the Japanese Cabinet Legislation Bureau to attach great importance to maintaining consistency with the existing laws as a reason why the Three Digital Laws did not become as novel and thoroughgoing as they could have been.

42 "Report on Legal Issues Concerning Cross-border E-commerce" 5 (2010) <www.meti.go.jp/policy/it_policy/ec/cbec/cbec_images/crossborderec_houkokusho.pdf>

e-commerce law. However, the same survey also revealed that many SMEs were actually engaging in cross-border e-commerce without understanding applicable laws. Such SMEs simply turned a blind eye either intentionally or carelessly to the risk of not knowing applicable laws. The survey showed SMEs' responses to the risk of not knowing applicable laws: Some stated that they chose to ignore the risk because they could not afford support from lawyers or other legal experts. Some others nonchalantly stated, "We would look into laws if something happens".

Complexity within e-commerce law can also diminish the effects of Japan's undertaking to harmonize its law, because harmonizing its domestic law with international standards would not remove legal obstacles as intended unless the harmonization is effectively made known to traders. Japan made the Three Digital Laws with the ambition of making the domestic law and legal infrastructure attractive to both domestic and foreign traders through harmonizing the nation's law with international standards so Japan could become one of the leading countries in online commerce.[43] The policy shift from the dispatch rule to the arrival rule for the acceptance made in an electronic form is representative of the nation's attempt at the harmonization of domestic e-commerce law with international standards. Given the ambition, it would be an irony if Japanese e-commerce law has remained incomprehensible to traders. It is, therefore, vital not only to set forth laws necessary for e-commerce, but also to make them easily comprehensible in order to advance cross-border e-commerce.

V SOLUTIONS TO THE PROBLEMS OF HIDDEN LAWS

What we need to do is give a structure to Japanese e-commerce law, so that one can easily navigate through the laws to find what one is looking for.

5.1 How about adopting the e-CC?

One possible, and perhaps simple, solution would be adopting the e-CC and replacing the relevant existing laws with it. This solution is most certainly the ideal, because it would enable Japan not only to have a structured uniform set of e-commerce law but also to take one step closer to the attainment of international harmonization of e-commerce law. However, this solution could cause problems as well because existing Japanese laws on e-commerce are not completely in line with those in the e-CC.

5.1.1 Laws on error (Article 14 of the e-CC)

One significant difference between Japanese laws on e-commerce and the e-CC lies in rules on error in electronic communications. Article 14 of the e-CC provides

43 Inagaki, *et al* (above n 4) 34.

that a person who made an input error in an electronic communication exchanged with the automated message system of another party is entitled to withdraw the mistaken portion of the communication (a) if the mistaken party notifies the other party of the error as soon as possible after having learned of the mistake, and (b) if the mistaken party has not received any material benefit from the goods or services received from the other party.

In contrast, while Japanese law has a provision similar to Article 14 of the e-CC, the provision is applicable only to a certain type of an electronic consumer contract, and neither condition (a) nor (b) is required in the provision. Article 3 of the e-Consumer Contract Act deals with a case where a consumer made an input error "in the course of making an offer or accepting the offer" in an "electronic consumer contract," which is defined in Article 2 of the Act as a contract "that is made between a consumer and a business entity by electromagnetic method through a visual browser of a computer in cases where the consumer manifests his/her intention to make an offer or to accept the offer by transmitting his/her intention through his/her computer in accordance with the procedures prepared on this visual browser by the business entity or its designee".[44] In such a case, Article 3 of the Act states that the consumer is entitled to void the contract due to his/her input error, but the consumer is not entitled to void the contract if "the business entity… confirms the consumer's intention to make an offer or to accept the offer by electromagnetic means on the visual browser, or where the consumer manifests expressly his/her intention to the business entity that there is no need for such confirmation measures".

Since Article 3 of the Act is applicable only to an electronic consumer contract, error in electronic communications in a Business-to-Business (BtoB) contract is addressed not by the Act, but rather by the general law of mistake which is Article 95 of the Civil Code. Article 95 of the Civil Code provides that a contract becomes void if there is a mistake in any significant element of the contract, and the mistaken party did not make the mistake in gross negligence. Accordingly, in the case of an input error in BtoB electronic communications, the non-gross negligence requirement has to be satisfied in order for a mistaken party to void the resultant contract. Given the nature of an input error, it would be difficult for a mistaken party to prove that the input error was not made through gross negligence.

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44 Since Article 3 of the e-Consumer Contract Act is applicable only to an electronic contract made by a consumer following "the procedures prepared on this visual browser" prepared by a business entity or its designee, the Article is not applicable to a case where a consumer concludes a contract through an email exchange (eg where a consumer mistyped the quantity of a sales object in the purchase order in the form of an email).

The e-Consumer Contract Act provides a special rule of mistake applicable only to a consumer's input error, because without such a special rule, a mistaken consumer would have to resort to Article 95 of the Civil Code. As a result, the consumer would have to prove that the input error was not made through gross negligence. Article 3 of the e-Consumer Contract Act is intended to lift the burden imposed upon a mistaken consumer by the non-gross negligence requirement. Considering that an input error is a type of mistake that a person, whether classified as a consumer or not in a given context, is prone to make, it would be reasonable to create a similar special rule concerning an input error made by a business operator, as in the e-CC. In fact, some scholars of Japanese law argue that the rule stated in Article 3 of the e-Consumer Contract Act should not be limited to an electronic consumer contract.[45] However, Japanese law chose to see the rule on an input error as part of consumer protection only. The reasoning is as follows: On the one hand, a typical example of an electronic BtoB contract is concluded through electronic data interchange (EDI) strategy. Since data (eg a purchase order) is sent and processed solely by computers under the EDI strategy, a possible input error is not manually made, but rather is made due to errors in the system. Since such an error could be caused by systemic problems of the EDI, the relevant business operators could and should insert provisions concerning the manners of dealing with such input errors in their arrangement. Therefore a party to a BtoB electronic contract usually would not have to resort to law concerning an input error.[46] On the other hand, a consumer does not have a chance to negotiate over the manner to deal with a future possible input error with a business operator. Therefore, the law should give protection to a mistaken consumer, but not necessarily to a mistaken party in an electronic BtoB contract.

This approach was strengthened by the social phenomena that the number of consumer issues involving consumers' input errors increased around the time when the e-Consumer Contract Act was enacted.[47] Eventually, the e-Consumer Contract Act was created only to provide a mistaken consumer with a means to void the resultant contract as an *ex post facto* remedial measure. Meanwhile, at the same time,

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45 Takato Natsui "Denshishohishakeiyaku Oyobi Denshishodakutsuchi Ni Kansuru Minpotokureiho To Sono Mondaiten [The Act on Special Provisions to the Civil Code Concerning Electronic Consumer Contracts and Electronic Acceptance Notice, and Accompanying Issues" Hanreitaimuzu no 1072, 65 (2001).

46 Takashi Uchida "Denshishotorihiki To Ho (2) [Electronic Commercial Transactions and Law" NBL no 601, 20 (1996).

47 Futoshi Kawano "Summaries of the Act on Special Provisions to the Civil Code Concerning Electronic Consumer Contracts and Electronic Acceptance Notice, and Accompanying Issues" NBL no 718, 29 (2001).

the administrative law named the Act on Specified Commercial Transactions was created in 2000 with a provision that directs online shop operators to prepare ways to enable consumers to confirm the contents of the contracts on the visual browsers before they place the purchase orders as a preventative measure against consumer input errors (Article 14 of the said Act, and Article 16(1)(i) and (ii) of the Order for Enforcement of the said Act).

Another difference in the treatment of an input error made in a BtoB contract between Japanese law and the e-CC is that Article 95 of the Civil Code does not mention condition (a) or (b) as outlined in Article 14(1) of the e-CC. Therefore, according to Article 95 of the Civil Code, a mistaken party would not be barred from voiding the contract merely because they failed to promptly inform the other party of the mistake. In relation to condition (b), even though a rendered service is access to certain information (eg software downloaded through a website in a software licence contract) and therefore the original state cannot be restored once the access to the information is given to the mistaken party, that does not necessarily bar the mistaken party from asserting the voidance of the relevant contract on account of mistake.

If Japan adopts the e-CC, the two additional conditions (a) and (b) of Article 14 of the e-CC would be imposed upon a mistaken party only where a mistake involves an input error (not any other types of mistakes), *and* where the mistake occurs between an individual and the automated message system in a BtoB contract (but not a BtoB contract where both sides of the parties are individual persons, or a BtoC contract between an individual and the automated message system). It would be difficult to logically explain why only this case is singled out and subjected to such different rules.

These differences in the rules on mistake can be a discouraging factor for Japan to adopt the e-CC. Furthermore, since Japan has already furnished rules that correspond to almost all of those contained in the e-CC, there is, regrettably but also understandably, not much call for adopting the e-CC in Japan. Considering these, persuading Japan to accede the e-CC does not seem auspicious, at least at this moment.

5.2 Alternative Solution: Restructuring the Existing Rules

As an alternative solution, the author proposes that the "hidden" Japanese rules on e-commerce be used in accordance with the structure of the e-CC, and the new arrangement be used as a comprehensive guide to Japanese e-commerce law. The new arrangement would provide visibility within Japanese e-commerce law, not simply because rules on e-commerce are re-organized as a uniform set of rules, but also because the new arrangement would be in conformity with the framework of the e-CC. If a country's laws are organized in the way the relevant UN Convention (or

theUNCITRAL Model Law, for that matter) is, it would enable one to easily navigate the laws to find the rule being sought, because the framework of the UN Convention (or UNCITRAL Model Law) is indeed a framework that is shared and referred to worldwide. In this sense, not only the contents, but also the framework of the UN Convention (or the UNCITRAL Model Law) itself can and should serve as an international standard. This viewpoint is particularly important for a country like Japan which has been attempting to harmonize its law with international standards within the existing structure of the law of the country rather than creating a new uniform set of rules, because the result tends to be that domestic laws become complex and "hidden" to the eyes of both domestic and foreign traders, as the current state of Japanese e-commerce law exhibits.

It is true that advocating for Japan to adopt the e-CC would be simpler than the approach proposed in this paper, and adopting the e-CC is probably even the optimal approach. However, one can also say that restructuring Japanese e-commerce law in the manner explained in this proposal would be a more realistic approach for Japan to participate in the process of international harmonization of e-commerce law although it may not be the optimal approach.

Nonetheless, the author does not altogether dismiss the possibility of Japan adopting the e-CC. Japan enacted the Three Digital Laws in order to create a legal infrastructure that is attractive to both domestic and foreign players in e-commerce. To attain this purpose, discrepancies in laws between countries should be eliminated through international harmonization of the laws. The policy shift from the dispatch rule to the arrival rule concerning the notice of acceptance was indeed Japan's attempt to attain international harmonization of the law. We should keep pushing the nation toward this direction. The proposed arrangement of Japanese e-commerce law will help facilitate discussions in Japan concerning the adoption of the e-CC, because the proposed arrangement, especially with accompanying comparative notes as for the e-CC, will highlight the similarities and differences between Japanese e-commerce law and the e-CC. Revealing similarities will help alleviate the anxiety related to legal unpredictability that often arises in business communities and serves as an obstacle when the introduction of a new law is discussed. With respect to the differences, they will be offered as concrete points of discussion for considering the adoption of the e-CC. Moreover, the rearranged structure of Japanese e-commerce law will also continue to enlighten people in Japan as to the importance of participating in the international harmonization process.

APPENDIX

United Nations Convention on the Use of Electronic Communications in International Contracts (the e-CC)	Japanese law
CHAPTER I. SPHERE OF APPLICATION ***Article 1. Scope of application*** ***Article 2. Exclusions*** ***Article 3. Party autonomy***	**N/A**
CHAPTER II. GENERAL PROVISIONS ***Article 4. Definitions*** For the purposes of this Convention: *(a)* "Communication" means any statement, declaration, demand, notice or request, including an offer and the acceptance of an offer, that the parties are required to make or choose to make in connection with the formation or performance of a contract; *(b)* "Electronic communication" means any communication that the parties make by means of data messages; *(c)* "Data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange, electronic mail, telegram, telex or telecopy; *(d)* "Originator" of an electronic communication means a party by whom, or on whose behalf, the electronic communication has been sent or generated prior to storage, if any, but it does not include a party acting as an intermediary with respect to that electronic communication; *(e)* "Addressee" of an electronic communication means a party who is intended by the originator to receive the electronic communication, but does not include a party acting as an intermediary with respect to that electronic communication; *(f)* "Information system" means a system for generating, sending, receiving, storing or otherwise processing data messages; *(g)* "Automated message system" means a computer program or an electronic or other automated means used to initiate an action or respond to data messages or performances in whole or in part, without review or intervention by a natural person each time an action is initiated or a response is generated by the system;	No definitions are provided in express provisions. However, the meanings of the concepts are, in essence, the same. The definition of an "electromagnetic record" is defined as a "record produced by electronic means, magnetic means, or any other means unrecognizable to human perception, which is used in information processing by computers." (*See* I. B. The principle of technology neutrality.)
(h) "Place of business" means any place where a party maintains a non-transitory establishment to pursue an economic activity other than the temporary provision of goods or services out of a specific location.	In the case where the CISG is applicable, the definition provided in Article 4(h) of the e-CC would likely be followed. In the other instances, the Japanese Commercial Code uses the phrase, a "business office." (*See* I. D. 2. b) Determination of one's place of business as the place the notice is sent to and received at.)

Article 5. Interpretation	**N/A**
Article 6. Location of the parties 1. For the purposes of this Convention, a party's place of business is presumed to be the location indicated by that party, unless another party demonstrates that the party making the indication does not have a place of business at that location.	There is no general presumption clause as for the location of one's business office. A business office is determined objectively through asking whether a place at issue satisfies the definition of a business office. (*See* I. D. 2. b) Determination of one's place of business as the place the notice is sent to and received at.)
2. If a party has not indicated a place of business and has more than one place of business, then the place of business for the purposes of this Convention is that which has the closest relationship to the relevant contract, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract.	Article 10(a) of the CISG In the instances where the CISG is not applicable, there is no similar provision in Japanese law.
3. If a natural person does not have a place of business, reference is to be made to the person's habitual residence.	Article 10(b) of the CISG Article 516 of the Commercial Code: When the place where an obligation arising from a commercial transaction is to be performed cannot be specified owing to the nature of the transaction or the manifestation of the intention of the parties, the delivery of a specified thing shall be performed at the place where such thing exits at the time of the transaction, and any other obligation shall be performed at the current business office of the obligee (*if the obligee has no business office, at his/her domicile*).
4. A location is not a place of business merely because that is: (a) where equipment and technology supporting an information system used by a party in connection with the formation of a contract are located; or (b) where the information system may be accessed by other parties.	There is no express provision. However, according to the established definition of a business office, neither (a) nor (b) would be considered a business place, because neither of them suffices the autonomy requirement. (*See* I. D. 2. b) Determination of one's place of business as the place the notice is sent to and received at.)
5. The sole fact that a party makes use of a domain name or electronic mail address connected to a specific country does not create a presumption that its place of business is located in that country.	There is no express provision. However, the same rule is generally recognized as an unwritten rule.
Article 7. Information requirements Nothing in this Convention affects the application of any rule of law that may require the parties to disclose their identities, places of business or other information, or relieves a party from the legal consequences of making inaccurate, incomplete or false statements in that regard.	**N/A**

CHAPTER III. USE OF ELECTRONIC COMMUNICATIONS IN INTERNATIONAL CONTRACTS	
Article 8. Legal recognition of electronic communications 1. A communication or a contract shall not be denied validity or enforceability on the sole ground that it is in the form of an electronic communication. 2. Nothing in this Convention requires a party to use or accept electronic communications, but a party's agreement to do so may be inferred from the party's conduct.	There is no express provision. However, the same rules can be derived as an unwritten rule from one's freedom to choose the form of the contract. (*See* I. A. The principle of non-discrimination)
Article 9. Form requirements 1. Nothing in this Convention requires a communication or a contract to be made or evidenced in any particular form.	There is no express provision. However, the same rule can be derived as an unwritten rule from one's freedom to choose the form of the contract. (*See* I. C. The principle of functional equivalence)
2. Where the law requires that a communication or a contract should be in writing, or provides consequences for the absence of a writing, that requirement is met by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference.	There is no express provision. However, the same rule can be recognized as an unwritten rule. (*See* I. C. The principle of functional equivalence)
3. Where the law requires that a communication or a contract should be signed by a party, or provides consequences for the absence of a signature, that requirement is met in relation to an electronic communication if: *(a)* A method is used to identify the party and to indicate that party's intention in respect of the information contained in the electronic communication; and *(b)* The method used is either: (i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or (ii) Proven in fact to have fulfilled the functions described in subparagraph *(a)* above, by itself or together with further evidence.	Article 2 of E-signature Act: (1) The term "Electronic Signature" as used in this Act means a measure taken with respect to information that can be recorded in an electromagnetic record (a record that is prepared by an electronic form, a magnetic form or any other form not perceivable by human senses that is used for information processing by computers; hereinafter the same shall apply in this Act) and which falls under both of the following requirements: (i) A measure to indicate that such information was created by the person who has taken such measure; and (ii) A measure to confirm whether such information has been altered. (*See* II. A. Rules on e-signatures)
4. Where the law requires that a communication or a contract should be made available or retained in its original form, or provides consequences for the absence of an original, that requirement is met in relation to an electronic communication if: *(a)* There exists a reliable assurance as to the integrity of the information it contains from the time when it was first generated in its final form, as an electronic communication or otherwise; and *(b)* Where it is required that the information it contains be made avail- able, that information is capable of being displayed to the person to whom it is to be made available. 5. For the purposes of paragraph 4 *(a)*: *(a)* The criteria for assessing integrity shall be whether the information has	There is virtually no substantive law that requires a communication or a contract to be made available in its original form. With respect to evidentiary rules, according to the established practice in court, an unauthenticated copy of an original document (eg, a photocopy of an original document) is admitted as evidence (a) if the other party does not oppose the submission of a copy of the original document, and (b) the other party does not contest the authenticity of the creation of the original document. The same rule is applicable to a copy of an electronic record. (*See* I. C. 2. a)

remained complete and unaltered, apart from the addition of any endorsement and any change that arises in the normal course of communication, storage and display; and *(b)* The standard of reliability required shall be assessed in the light of the purpose for which the information was generated and in the light of all the relevant circumstances.	Rules on evidence.) As for administrative regulations, similar rules can be found in the IT Documents Act and the Act on Utilization of Telecommunications Technology in Document Preservation, etc. Conducted by Private Business Operators, etc. (*See* I. C. 2. a) Rules on evidence.)
Article 10. Time and place of dispatch and receipt of electronic communications	
1. The time of dispatch of an electronic communication is the time when it leaves an information system under the control of the originator or of the party who sent it on behalf of the originator or, if the electronic communication has not left an information system under the control of the originator or of the party who sent it on behalf of the originator, the time when the electronic communication is received.	There is no express provision defining the term "dispatch." However, the concept "dispatch" is interpreted in the same way in the case of e-communication. (*See* I. D. 2. a) Time and place of dispatch and receipt of electronic communications.)
2. The time of receipt of an electronic communication is the time when it becomes capable of being retrieved by the addressee at an electronic address designated by the addressee. The time of receipt of an electronic communication at another electronic address of the addressee is the time when it becomes capable of being retrieved by the addressee at that address and the addressee becomes aware that the electronic communication has been sent to that address. An electronic communication is presumed to be capable of being retrieved by the addressee when it reaches the addressee's electronic address.	There is no express provision. However, similar rules are recognized through interpreting the term "receipt." (*See* I. D. 2. a) Time and place of dispatch and receipt of electronic communications.)
3. An electronic communication is deemed to be dispatched at the place where the originator has its place of business and is deemed to be received at the place where the addressee has its place of business, as determined in accordance with article 6. 4. Paragraph 2 of this article applies notwithstanding that the place where the information system supporting an electronic address is located may be different from the place where the electronic communication is deemed to be received under paragraph 3 of this article.	There is no express provision. However, the same rule is recognized in the form of interpreting the general rule that a contract is formulated when an offer and acceptance become effective.
Article 11. Invitations to make offers A proposal to conclude a contract made through one or more electronic communications which is not addressed to one or more specific parties, but is generally accessible to parties making use of information systems, including proposals that make use of interactive applications for the placement of orders through such information systems, is to be considered as an invitation to make offers, unless it clearly indicates the intention of the party making the proposal to be bound in case of acceptance.	There is no express provision defining an invitation to make offers. However, the idea of an invitation to make offers is acknowledged. (*See* I. D. 2. c) Definition of an invitation to make an offer.)
Article 12. Use of automated message systems for contract formation A contract formed by the interaction of an automated	There is no express provision. However, a message automatically sent message is not

message system and a natural person, or by the interaction of automated message systems, shall not be denied validity or enforceability on the sole ground that no natural person reviewed or intervened in each of the individual actions carried out by the automated message systems or the resulting contract.	denied its validity insofar as it is recognized as an expression of will of a person who operates the relevant system. This rule is recognized in the form of an interpretation of the freedom to choose the form of the contract. (*See* I A. The principle of non-discrimination.)
Article 13. Availability of contract terms Nothing in this Convention affects the application of any rule of law that may require a party that negotiates some or all of the terms of a contract through the exchange of electronic communications to make available to the other party those electronic communications which contain the contractual terms in a particular manner, or relieves a party from the legal consequences of its failure to do so.	**N/A**
Article 14. Error in electronic communications 1. Where a natural person makes an input error in an electronic communication exchanged with the automated message system of another party and the automated message system does not provide the person with an opportunity to correct the error, that person, or the party on whose behalf that person was acting, has the right to withdraw the portion of the electronic communication in which the input error was made if: *(a)* The person, or the party on whose behalf that person was acting, notifies the other party of the error as soon as possible after having learned of the error and indicates that he or she made an error in the electronic communication; and *(b)* The person, or the party on whose behalf that person was acting, has not used or received any material benefit or value from the goods or services, if any, received from the other party. 2. Nothing in this article affects the application of any rule of law that may govern the consequences of any error other than as provided for in paragraph 1.	A similar rule exists in Article 3 of the e-Consumer Contract Act, but is applicable only to an electronic consumer contract. As for an input error in a BtoB contract, Article 95 of the Civil Code is applicable. (As for differences between Article 14 of the e-CC and Article 95 of the Japanese Civil Code, *see* IV. A. 1. Laws on error.)
CHAPTER IV. FINAL PROVISIONS ***Articles 15 to 25***	**N/A**

* The parts where the e-CC and Japanese law are partitioned by wavy lines indicate divergences between the two laws.