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DISCLAIMERS OF WARRANTY, LIMITATION OF LIABILITY, AND LIQUIDATION OF DAMAGES IN SALES TRANSACTIONS

TEISUKE AKAMATSU* and GEORGE H. BONNEVILLE**

I. INTRODUCTION

One of the largest paint manufacturers in the United States recently introduced a new type of exterior house paint that required application procedures somewhat different from traditional methods. Affixed to the top of each can of the new-type paint is a label stating in large red letters:¹

USE THIS UNUSUAL NEW PAINT AS DIRECTED OR PLEASE DON'T USE IT!

In Japan, where a manufacturer often issues an express guarantee, but seldom a limitation of liability for defective products, and almost never a disclaimer,² a Certificate of Guarantee (*hoshōsho*) affixed by a manufacturer to his television equipment states:³

SCOPE OF GUARANTEE

1. WE WILL BE GLAD TO RENDER YOU A FREE REPAIR SERVICE FOR THE TROUBLES OF MACHINE CAUSED BY IMPERFECTNESS IN ITS QUALITY, WITHIN THE PERIOD OF GUARANTEE.

2. WE *MAY NOT* GIVE YOU A FREE REPAIR SERVICE FOR THE TROUBLES, OTHER THAN THOSE MENTIONED ABOVE.

This article will set forth and compare the domestic law of the United States and Japan, in the narrow field of law defined in the title. Many American lawyers may feel that these subjects do not deserve equal dignity with the preceding article on products liability. They are

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¹ "Spred" House Paint, manufactured by The Glidden Company, Cleveland 14, Ohio.

² Japanese manufacturers are more cautious about guarantee problems in export sales, hence more clauses for limitation of liability are employed with respect to products such as cameras, radios, etc., sold in a jurisdiction where the principle of implied warranty is applicable, than they are in the case of products sold only in the domestic market.

³ Mitsubishi TV Hoshōsho (Mitsubishi's TV certificate of guarantee) as of 1967 by Mitsubishi Denki K.K. (Mitsubishi Electric Machine Co., Ltd.)

The period of guaranty is usually a year.

probably right, since no amount of care or study in drafting disclaimers and limitations will protect against suit for personal injuries suffered, say, by a stevedore who steps through a hollow spot in a wrapped bundle of household doors.⁴ Moreover, this topic obviously covers only a small part of the general subject of products liability, a branch of the law undergoing rapid changes in the United States and commanding increasing attention in all its facets from the bar, the business community, the consuming public, and the federal and state governments.

In defense of equal dignity for this topic, it may be noted that businessmen are likely to have considerably more ordinary quality (or performance) complaints than personal injury claims. They expect their lawyers to help minimize their expenses on the former, but hopefully do not expect them to be endowed with any unique ability to foresee that a package of doors must be suitable for use as a walkway or scaffold. Deficiencies in foresight in the latter category can be covered by product liability insurance.⁵

It is recognized that the assigned topic is of continuing concern to only a few business-oriented lawyers in the United States (who would not welcome, at least from these authors, another detailed review of the intricacies of the warranty provisions of the Uniform Commercial Code⁶). Further, it would appear desirable to set forth something of at least passing interest to Japanese lawyers and possibly the business communities of the two countries. Accordingly, this article will examine the differences and similarities in the two domestic legal systems in the field of sales warranties and will include some comment and conjecture from the standpoint of relative efficiency; *i.e.*, which system is more likely to produce socially desirable results at minimum cost?

It seems fair to assume that the United States paint manufacturer did not adopt the red-letter label in reckless disregard of its effect on sales, merely lashing out in blind rage at the lack of "caveat" of the

⁴ See *Simpson Timber Co. v. Parks*, 34 U.S.L. WEEK 2339 (9th Cir. Dec. 3, 1965), 66 COLUM. L. REV. 1190 (1966), 54 GEO. L.J. 1439 (1966), *rev'd on rehearing*, 369 F.2d 324 (9th Cir. 1966). In that case the manufacturer finally prevailed.

⁵ See 4 RICHARDS, INSURANCE 2251, 2254-55 (5th ed. 1952), for product liability coverage clause (Condition B) in typical Comprehensive Public Liability Policy; compare Exclusion 4, *id.* at 2102, 2105.

⁶ All references to the Uniform Commercial Code [hereinafter UCC] are to the UNIFORM COMMERCIAL CODE 1962 OFFICIAL TEXT WITH COMMENTS. UCC article 2 (Article on Sales) covers, and makes many significant changes in, the law of sales. The UCC should not be confused with the Japanese Commercial Code, which covers not only commercial law as understood in the United States, but also other areas of law such as corporations, insurance, and admiralty.

typical United States "emptor." More likely, the manufacturer has concluded that it is more profitable in the long run to lose a few sales to easily-frightened shoppers than to incur the bad publicity and, in some instances, the lost time and expense of mollifying the other type of shopper—the one who seems never to read handling instructions. More to the point of this discussion, however, is the suggestion that the attitudes of American manufacturers are changing and the possibility that this particular manufacturer's lawyer has concluded that disclaimers, limitations, and the like no longer afford any real protection in the United States. Nevertheless, traditional concepts die slowly. The "Directions for Easy Application" on the side of the described container carry the usual warning that the contents are not to be eaten, and the following concluding paragraph:⁷

CAUTION: *Do not expose to freezing temperatures.* When used on surfaces properly prepared and primed according to directions this product will give excellent results; however, it is warranted to conform only to formula or sample and Seller's liability is limited to the purchase price of the product used.

II. EXPRESS GUARANTEE

The Japanese guarantee quoted at the outset, which is more elaborate than the average form encountered in those few areas where express guarantees are used at all, still seems a far cry from the full-blown warranty disclaimer, limitation of liability, and liquidation of maximum amount of damages frequently adopted but seldom emphasized by United States manufacturers. It is important but not difficult to understand the reason for the difference.

There is no theory precisely comparable to the American concept of implied sales warranty in Japanese law. The Japanese guarantee (*hoshō*), in general, is not a creature of statute, and the court decisions treat the guarantee as an agreement or an obligation arising out of agreement. As such, it requires offer and acceptance; that is, mutual consent.⁸ The mere sale of an article does not automatically commit a Japanese seller to a warranty of its merchantability.

In the United States, an express assurance of quality or performance

⁷ See note 1 *supra*.

⁸ The Japanese guarantee is not unlike the warranty concept in old British precedents, *e.g.*, *Chandelor v. Lopus*, Croke, James 1, 4, 79 Eng. Rep. 3 (Ex. 1625). Henderson, *Contract Problems in U.S.-Japanese Joint Ventures*, 39 WASH. L. REV. However, there is no requirement of consideration in Japanese contract law. See 479, 487 (1964).

may be a device to promote sales or simply a springboard from which to jump into disclaimers of warranty and limitations of liability. The differences in objectives may produce two entirely different forms of guarantee, as will be seen from examples cited later, or both objectives may be reflected in a single form. (The legend quoted above from the paint container label seems to have only a slight promotional value, and therefore may not be the best possible example.) Thus the complexity of express guarantees in American society stems from the American legal concept that express and implied warranties are somehow related. The simplicity of Japanese guarantees results from a legal concept that separates contractual or consensual obligations from obligations imposed by society.

Japanese law approaches contractual commitments as to quality and fitness of goods sold simply as a matter of contract performance. Article 415 of the Japanese Civil Code provides:⁹

If an obligor fails to effect performance in accordance with the tenor and purport of the obligation, the obligee may demand compensation for damages; the same shall apply in cases where performance becomes impossible for any cause for which the obligor is responsible.

Thus a breach of a guarantee of quality is covered in the same manner as a breach of warranty of title or a default on a commitment as to time or place of delivery. Remedies, statutes of limitation, and public policy restrictions on the parties' freedom of contract are applied to all types of breaches in essentially the same manner.¹⁰

⁹ This translation and those of the Japanese Civil Code provisions which follow are taken from 2 Eibun hōreisha Law Bulletin Series [hereinafter EHS] No. 2100 (1966).

¹⁰ See JAPANESE CIVIL CODE:

- Art. 1: (1) All private rights shall conform to the public welfare.
 (2) The exercise of rights and performance of duties shall be done in faith and in accordance with the principles of trust.
 (3) No abusing of rights is permissible.
- Art. 90: A juristic act which has for its object such matters as are contrary to public policy or good morals is null and void.
- Art. 95: A declaration of intention shall be null and void, if made under a mistake in regard to any essential elements of the juristic act; however, if there has been gross negligence on the part of the declarant, its nullity cannot be asserted by the declarant himself.
- Art. 167: (1) A claim shall lapse if it is not exercised for ten years.
 (2) A property right other than a claim of ownership shall lapse if it is not exercised for twenty years.
- Art. 416: (1) A demand of compensation for damages shall be for the compensation by the obligor of such damages as would ordinarily arise from the non-performance of an obligation.
 (2) The obligee may recover the damages which have arisen through special circumstances too, if the parties had foreseen or could have foreseen such circumstances.

Therefore, Japanese parties involved in a breach of an express guarantee of quality have no hesitation to pick up the heart of the matter under article 415, which is breach of contract. In the United States, an unexcused shortage in quantity or delay in delivery would be a breach of contract, while nonconformity to sample or description would be a breach of the statutory implied warranty of merchantability.¹¹ Obviously, a buyer may have the same problem (or even a worse problem) in the case of a late delivery or short count as he would have in the case of nonconformity to description, slight falldown in grade, or minor defects in quality. Nevertheless, UCC sections 2-316(2), 2-317(c), and 2-318 carefully circumscribe the parties' right to substitute an express guarantee for implied warranties, while there are no similar restrictions on their right to expressly provide for delay in delivery¹² or variations in the specified quantity. Fortunately, the draftsmen of the UCC merged the two concepts of breach of warranty and breach of contract in the definition of tender of delivery,¹³ in specifying the buyer's rights of rejection of a tender not conforming to the contract,¹⁴ and remedies for damages incurred,¹⁵ falling into the warranty trap only when they provide a special measure of damages for breach of warranty.¹⁶

III. IMPLIED WARRANTY AND KASHI TAMPO

Some Japanese scholars point out that the absence of implied warranties represents an undeveloped aspect in Japanese contractual

Art. 540: (1) If one of the parties has a right of rescission either by contract or by provision of law, the rescission shall be effected by a declaration of intention made to the other party.

(2) The declaration of intention mentioned in the preceding paragraph cannot be revoked.

Art. 541: If one of the parties does not perform his obligation, the other party may fix a reasonable period and demand its performance, and may rescind the contract, if no performance is effected within such period.

Art. 545: ... (3) The exercise of a right of rescission shall not preclude a demand of compensation for damages.

¹¹ In Japan nonconformity to sample is not always considered as a breach of an express guarantee and thus a breach of contract. The Japanese courts have rather consistently applied Civil Code article 570, a nonconsensual device, to sales not conforming to a sample, while Japanese scholars argue that nonconformity to sample in a sale of nonspecific goods should be treated as a breach of contract and that only in a sale of specific goods should article 570 apply. See discussion of *kashi tampo* liability in Part III *infra*, particularly text accompanying notes 41-47, 53.

¹² Actually, UCC §§ 2-615 and 2-616 prescribe certain duties of the seller and rights of the buyer when delivery is delayed due to unforeseen occurrences, but these sections do not affect an agreement providing wide latitude in time of delivery or excusing delays due to occurrences within the contemplation of the parties.

¹³ UCC § 2-503.

¹⁴ UCC § 2-601.

¹⁵ UCC § 2-711.

¹⁶ UCC § 2-714(2). Official Comment 3 of this section appears to be an apology for

theory.¹⁷ A recent trend toward the American system has been noted in connection with export sales, however, where the Japanese Government imposes quality obligations on the seller regardless of the provisions of the contract of sale.¹⁸

However, this does not mean that the Japanese legal system does not provide remedies for a buyer who finds serious defects in goods he has purchased, not foreseen or contemplated at the time the bargain is made. The doctrine of *kashi tampo* is the most important nonconsensual device used in domestic sales transactions to implement or limit the contractual obligations of the immediate parties to a sale of defective goods and to protect the interests of other members of society. *Kashi* readily translates into "defect," and *tampo* is the equivalent of "protection," "coverage," or perhaps "security." *Kashi tampo* liability thus is the concept of liability imposed by law on the seller of a defective article.

Kashi tampo liability is derived from article 570 of the Japanese Civil Code which provides: "If any latent defects exist in the object of a sale, the provisions of Article 566 shall apply mutatis mutandis, except in the case of a compulsory sale by official auction." Article 566 prescribes remedies (rescission and/or damages) for a buyer of goods where title or right of possession is encumbered, on demand made within one year from the time of discovery.¹⁹ Since most American lawyers understand the Latin phrase to mean "as nearly as may be, with necessary changes in point of detail," the only deceptive provision of article 570 is the word "latent."

an unnecessarily fine distinction in measure of damages, but does not indicate any propensity to dispose of warranty as an independent concept.

¹⁷ I BRAUCHER & MICHIDA, *AMERIKA SHŌTORIJIHŌ TO NIPPON MINSHŌHŌ: BAIBAI* (American law on commercial transactions and the Japanese Civil and Commercial Codes: Sales) 252 (1960).

¹⁸ See *Yushutsuhin kensahō* (Export inspection law) (Law No. 97, 1957). See also MICHIDA, *TAIBEI BŌEKI BAIBAIHŌ* (United States foreign trade sales laws) 12 (1962), where it is noted that if caveat emptor is accepted world-wide, there would not be much need for the export inspection system.

¹⁹ JAPANESE CIVIL CODE art. 566:

(1) Where the object of a sale is subject to a superficies, emphyteusis, servitude, right of retention or pledge and the buyer was unaware thereof, he may rescind the contract only if the object of the contract cannot be obtained thereby; in other cases the buyer may demand only compensation for damages.

(2) The provisions of the preceding paragraph shall apply mutatis mutandis in cases where a servitude, which has been represented as existing in favor of the immovable which is the object of sale, does not exist, or where a registered lease exists on such immovable.

(3) In the cases mentioned in the preceding two paragraphs the rescission of the contract or the demand of compensation for damages shall be made within one year from the time when the buyer became aware of the fact.

Suppose *B* agreed to buy from *S*, an importer, all the iron bars which were twenty feet long which *S* had imported and stored in a Yokohama custom house. Both *B* and *S* had their main offices in Kobe, where the contract was made. And suppose it was later found upon delivery that the iron bars had been twisted prior to the day of sale and that some of them were shorter than nineteen feet in length (therefore a *patent* defect in the American concept). The Japanese courts would, in such circumstances, find that the iron bars had a "latent defect" within the meaning of article 570 and grant remedies according to that article. In fact, a Japanese court did hold that such iron bars were encumbered by latent defects, stating that "latent defects" are defects about which the buyer, without negligence (*kashiitsu*) did not know at the time of sales agreement.²⁰ Judging the purpose which article 570 is to accomplish, it seems apparent that, where the buyer is in good faith in not knowing of the existence of the defects and where there is no negligence on the part of the buyer in not knowing of the existence of the defects, the defects are "latent." It is unanimously understood that by "latent," the Japanese Civil Code requires only that there be no negligence on the part of the buyer.²¹ Thus, *kashi tampo* liability in Japan covers situations where the defects would be considered patent, that is, visible, under American concepts, particularly in transactions between businessmen where the buyer ordinarily does not examine the goods at the time that the bargain is made.

To illustrate both the concept of "latent" and the concept of "defect," the Japanese courts have held for *buyers* by reason of latent defects in the following cases:

Unfitness for normal use of sales object: Sale of sewing cottons which turned out to be greatly mildewed;²² sale of binocular prism

²⁰ Sakai Kanzo Shōten v. Okumura Denki Shōkai, 3 Minshū 339 (Gr. Ct. Cass., June 23, 1924). Even before this decision, inferior courts and scholars had required that there be no negligence on the part of the buyer if a defect was to be classified as latent. These authorities had defined the term "latent defects" to mean defects which an ordinary person could not easily discover. Under such definition it was not known whether a defect which was actually visible (thus probably "patent" under American concepts) could ever be classified as "latent." It was in the *Sakai Kanzo* case, *supra*, that the highest court in Japan first declared that visible defects could, indeed, be "latent" defects, provided the buyer was not negligent in not knowing that the defects existed. See Hirata, *Kakureta kashi* (Latent defects), JURISUTO (Bessatsu No. 7) 110 (1966).

²¹ See WAGATSUMA & ARIZUMI, SAIKENHŌ (Law of obligation) 330, in 3 KOMMENTARU (1951).

²² Maruka Katan Ito Gōmeikaisha v. Iida, 27 Minroku 255 (Gr. Ct. Cass., Feb. 10, 1921).

and lens which had irregular concave and convex lenses and other defects;²³ sale of truck where two tires were soon scorched and a radiator and other parts damaged.²⁴

Unfitness for particular use agreed upon: Sale of milch cows which suffered from incurable diseases;²⁵ sale of an ice machine which was understood to have a productivity of four tons of ice a day but actually had that of only two tons a day;²⁶ sale of an electric motor which was supposed to have 130 horsepower but actually had only thirty to seventy horsepower.²⁷

Sale by sample: Sale of lumber which turned out to have gnarls, whereas the sample had no gnarl;²⁸ sale of mine where buyer found, after field investigation, that mineral ores were inferior to samples in terms of silver content;²⁹ sale of milk candy which turned out to be softer and inferior in contents to samples.³⁰

Sales and advertisement: Sales of rice mortar, advertised as having a pounding power of 500 *hyō* of rice (1 *hyō* = 1.99 bushels) and as having free repair service for defects, where the rice mortars actually were much worse than advertised.³¹

Illegality of use: Sale of forged monetary note;³² sale of house which occupied 70% of the land space when the law permitted only 30% occupation in a certain area;³³ sale of sugar which had been smuggled into the country but confiscated after the sale.³⁴

On the other hand, the courts have held for *sellers* in the following cases:

²³ Saitō v. Matsushima, HÖRITSU SHIMBUN (No. 2337) 15 (Tokyo App. Ch., June 23, 1924).

²⁴ Yamada v. Takahara, 8 Minshū 198 (Sup. Ct., 2d P.B., Jan. 22, 1954).

²⁵ Suga v. Sugiyama, HÖRITSU SHIMBUN (No. 184) 5 (Tokyo Dist. Ct. date unknown). See also Motomura v. Tanaka, HÖRITSU SHIMBUN (No. 2940) 14 (Nagasaki App. Ch., Nov. 28, 1928). These ill milch cow cases could also have been classified under the preceding heading.

²⁶ Judgment of Oct. 30, 1913, 2 HÖRITSU GAKUSETSU HANREI HYÖRON ZENSHŪ (Complete collection of legal theories and precedents) [hereinafter cited HYÖRON] 366 (Tokyo App. Ch.).

²⁷ Nakano Tekkō Jikkensho v. Horie, 27 Minroku 2160 (Gr. Ct. Cass., Dec. 15, 1921).

²⁸ Tagami v. Satō, 5 Minshū 433 (Gr. Ct. Cass., May 24, 1926). Actually, the buyer in this case did not recover, but the latent defects theory was determined to be applicable. The case, after remand, is discussed in text accompanying note 53 *infra*.

²⁹ Suga v. Yamaguchi, HÖRITSU SHIMBUN (No. 3211) 11 (Gr. Ct. Cass., Dec. 8, 1930).

³⁰ Kuzuhara Kōgyō v. Saitamaken Gakkō Kyūshoku Kyōdo Kumiai, 4 Kakyū minshū 1111 (Urawa Dist. Ct., Aug. 8, 1953).

³¹ Ikemoto v. Ōzeki, 12 Minshū 71 (Gr. Ct. Cass., Jan. 14, 1933).

³² Yakushō Shōgi K.K. v. Niino, 15 Kakyū minshū 2044 (Osaka Dist. Ct., Aug. 26, 1964).

³³ Maruyama Takehana, 15 Kakyū minshū 2959 (Tokyo Dist. Ct., Dec. 17, 1964).

³⁴ Yamaguchi v. Kuroda, 1 Kakyū minshū 162 (Fukuoka Dist. Ct., Feb. 8, 1950).

No "latent defects": Sale of gas mantle, color of which became paled after the sale;³⁵ sale of antiques which in fact were not;³⁶ sale of plate glasses, a number of which turned out to be broken when checked at the time of delivery;³⁷ sale of lumber, only five percent of which had defects;³⁸ performance of a barge building contract, where the tonnage was less than that agreed upon by five percent.³⁹

It should be noted that essentially the same *kashi tampo* liability applies not only to sales of goods but to sales of land and even sales of services.⁴⁰ This eliminates at least one problem encountered in the United States in attempting to predict or determine the obligations of a party who, for instance, agrees to "furnish all labor, supervision, materials, tools, and equipment" necessary to provide a complete carpet installation, or perhaps agrees to sell the same carpet, "installed, complete." Perhaps it is the lack of any basic reason for special rules applicable to the sale of goods, as well as dissatisfaction with the operation of these rules in particular cases, that explains the recent rapid development in other branches of products liability law in the United States.

Having established what is a latent defect under article 570, there is another problem to be resolved before concluding that relief is available under the doctrine of *kashi tampo* liability. The majority opinion of Japanese scholars⁴¹ is that article 570 applies only to the sale of specific goods and not to the sale of nonspecific goods. This

³⁵ *Futaya v. Yamashita*, HÖRITSU SHIMBUN (No. 619) 15 (Tokyo Dist. Ct., Nov. 6, 1909). Here, the court found no defects, much less latent defects.

³⁶ *Konishi v. Miyagi*, 6 HYÖRON 292 (Tokyo Wd. Ct., Feb. 6, 1917). The court recognized that by general custom the buyer is expected to have a good eye for antiques.

³⁷ *Kumatoridani v. Sudo*, 17 HYÖRON 63 (Tokyo App. Ch., Sept. 29, 1927). In denying "latent" defects, the court reasoned that the broken glass could have been easily discovered.

³⁸ *Nomura Mokuzai K.K. v. Watanabe*, 12 HYÖRON 504 (Tokyo Dist. Ct., March 5, 1923).

³⁹ *Sakata v. Nagata*, HÖRITSU SHIMBUN (No. 2364) 21 (Tokyo App. Ch., Dec. 25, 1924).

⁴⁰ Although there are special provisions concerning contracts primarily involving work or services (Civil Code articles 632-42), *kashi tampo* liability will apply in cases where there are defects in the completed project. There has been quite a controversy, however, whether *kashi tampo* liability for sales (article 570) or for work contracts (articles 632-42) should apply when transfer of title to goods is inseparable from the rendering of the services. The majority of scholars and judicial decisions make a distinction based on the purpose of the contract. If the purpose is to accomplish the work, they apply articles 634-39. If the purpose is to transfer title after the work is completed, they apply article 570. See *Hoshino v. Akiyoshi*, HÖRITSU SHIMBUN (No. 518) 13 (Tokyo Dist. Ct., Dec. 26, 1908); *SUEHIRO, SAIKEN KAKURON* (particulars of obligation law) 692 (1918); *Honda, Kainushi no sekkei sashizu to kashi tampo*, JURISUTO (Bessatsu No. 7) 126 (1966).

⁴¹ See, e.g., *WAGATSUMA & ARIIZUMI, op. cit. supra* note 21, at 329.

majority opinion argues that if there is a defect in the goods delivered in the case of a sale of nonspecific goods, for example a water pump, the buyer can demand that the seller substitute a perfect pump. This demand is proper because the seller has failed "to effect performance in accordance with the tenor and purport of the obligation"⁴² and because there *has not yet* been a performance. In such a case the majority view states that the buyer is protected by the remedies against such nonperformance provided in articles 541⁴³ and 545;⁴⁴ therefore, the buyer need not resort to the remedies provided in article 570, *i.e.*, rescind the contract and/or claim for damages. Thus, the majority opinion of scholars concludes that the application of article 570 logically should be limited to the sale of specific goods, *e.g.*, a particular pump in the hands of the seller. The majority view also explains the function of article 570 from a different view: In the case of a simple sale of a specific water pump, when the pump is delivered, the seller has performed his obligation "in accordance with the tenor and purport of the obligation." This is because the seller had no alternative to the delivery of the subject of the sales contract, *i.e.*, that particular pump. Once the delivery of that pump has been made, the performance is perfect. Even if the pump had defects, the buyer could not demand the substitution of a perfect pump, simply because the contract was directed to the sale of that specific pump. Because the seller has fully performed, the buyer cannot rely on the remedies of article 415. And, according to this view, article 570 is provided specifically for such situations.

There are, however, various minority opinions of Japanese scholars, slightly inconsistent in detail, which assert that the applicability of article 570 should not be restricted to the sale of specific goods. On the other hand, some scholars place importance on the distinction between fungible and nonfungible goods, rather than the distinction between specific and nonspecific goods. Thus, they do not advocate the application of article 570 to the sale of a newly published book, even though it is specified by the customer.⁴⁵ Others apply article

⁴² JAPANESE CIVIL CODE art. 415, quoted in text accompanying note 9 *supra*.

⁴³ Quoted in note 10 *supra*.

⁴⁴ *Ibid.*

⁴⁵ See Hoshino, *Kashi tambo no kenkyū* (A study of *kashi tambo*), HIKAKUHŪ KENKYŪ (No. 23) (1962). This symposium shows recent trends of scholarly opinions and also presents very interesting comparative aspects of *kashi tambo* liability. For the development of the majority and minority theories see YUNOKI, URINUSHI KASHI TAMPO SEKININ NO KENKYU (Seller's *kashi tambo* liability) 158-82 (1962). Some of the unique views can be found in OBO, SAIKEN SŌRON (General theory of law of obligations)

570 only to specified goods that are nonfungible in the sense of being unique, like George Washington's diary.⁴⁶ This, of course, is the sort of dilemma that results from confusing principles of contract and public policy. Fortunately, the Japanese courts with few exceptions⁴⁷ have had only a little difficulty in reaching sound conclusions.

The following illustrative case discussion has been extended beyond what would be necessary to show the conclusions of the courts, in an effort to reflect the flavor of Japanese judicial decisions, particularly the mixture of deference to opinions of scholars and concern for practical results in everyday life.

In *Kamifuji Pump Mfg. Co. v. Akazawa*⁴⁸ the Court rejected the majority scholars' view that article 570 should not apply to nonspecific goods. In that case *B* purchased from *S* a turbine pump operated with a gasoline engine. A defect in the engine's ignition system caused the pump to function improperly. *B* requested *S* to either replace it or repair it. Acting upon this request, *S* undertook to repair it, but the result was unsatisfactory. *B* then returned the pump and sought to rescind the contract under article 570 and to recover his purchase price. Relying on the majority scholars' view, *S* asserted in defense that nonspecific goods were involved so article 570 should not apply. The Court, however, rejected *S*'s contention. The Court acknowledged that a buyer has the right under article 415 to refuse to accept defective nonspecific goods, because in furnishing defective goods the seller has not perfectly performed his obligation. The Court added, however, that delivery of defective goods is distinguishable from delivery of goods entirely different in specie from those called for in the contract; hence, it should not be hastily concluded that delivery of defective goods cannot be performance of the contract. Rather, the Court concluded that so long as the buyer *accepts* the delivery of defective goods, such delivery should be construed as performance, though imperfect.⁴⁹ Of course, if the buyer accepts delivery with knowledge

103, in 20 HŪRITSUGAKU ZENSŪ (1959); Kitagawa, *Kashi tampo ni tsuite* (On *kashi tampo*) (pts. 1-2), 67 HŌGAKU RONSŌ (No. 6) 66, 68 *id.* (No. 3) 53 (1960).

⁴⁶ YUNOKI, *op. cit. supra* note 45, at 167-73.

⁴⁷ In a recent Supreme Court case, the purchaser of a forged painting was denied damages under Civil Code article 415. *Nakayama v. Fujii*, HANREI JIHŌ (No. 320) 14 (Sup. Ct., Sept. 25, 1962). The case caused quite a stir among Japanese jurists since it purported to follow the majority theory. See YUNOKI, *op. cit. supra* note 45, at 296, 321.

⁴⁸ 4 Minshū 217 (Gr. Ct. Cass., March 13, 1925).

⁴⁹ The same type of reasoning was followed in *Tōyō Kanzume v. Ōishi*, 6 Minshū 249 (Gr. Ct. Cass., April 15, 1927), although in that case the buyer was denied recovery under a *kashi tampo* theory because he failed to comply with the inspection requirement under article 526 of the Commercial Code.

that the goods are defective and fails to make demand for perfect performance under articles 415 and 541, it may very well be construed that he is not entitled to claim *kashi tampo* liability under article 570. But, if the buyer accepts delivery *without* knowledge of latent defects in the goods, he should be entitled to claim *kashi tampo* liability. The Court also noted that there are no words restricting the application of article 570 only to the sale of specific goods.

In further support of its interpretation of article 570 the Court stated that when the seller and buyer, after concluding a sales contract for nonspecific goods, mutually agree and select specific goods for delivery, the situation is analogous to a sales contract for specific goods from the first instance, since in both cases the goods are specified before delivery. The Court concluded that there was no reason to distinguish between the two situations insofar as the buyer's right to rely on *kashi tampo* liability is concerned.

Aside from the theoretical reasoning stated above, however, the main or final goal which the Court sought to accomplish in applying article 570 to the sale of nonspecific goods seems to be found in the following. The Court assumed for the moment that the seller's delivery of defective goods was nonperformance. This being true, the buyer would have the right under articles 415 and 541 to demand delivery of perfect goods, and the seller would have the right to demand return of the goods already delivered. These respective rights of the parties would last, under the applicable statute of limitations, for five,⁵⁰ ten, or possibly even twenty years.⁵¹ Therefore, if the above presumptions were true, the parties would be placed in a very uncertain position for a long period of time. On the other hand, if article 570 were held to apply, the parties' position is made certain after a lapse of a much shorter period. This is because article 566(3)⁵² limits the exercise of rights under article 570 to a period of one year after discovery of the defect (which normally would occur quite soon after delivery).

⁵⁰ JAPANESE COMMERCIAL CODE art. 522 [This translation and those of the Japanese Commercial Code provisions which follow are taken from 2 EHS No. 2200 (1963)]:

Except as otherwise provided for in this Code, a claim which has arisen out of a commercial transaction shall be extinguished by prescription if it is not exercised within five years. However, if a shorter period for prescription is provided for by other laws or ordinances, such provisions shall apply.

⁵¹ JAPANESE CIVIL CODE art. 167: "(1) A claim shall lapse if it is not exercised for ten years. (2) A property right other than a claim of ownership shall lapse if it is not exercised for twenty years."

⁵² Quoted in note 19 *supra*. It might also be noted that in the case of a commercial transaction, the buyer's remedies are limited to *six months* after discovery of the defect. JAPANESE COMMERCIAL CODE art. 526.

The preference for the shorter limitation period is further illustrated by *Satō v. Tagami*,⁵³ which decided that *kashi tampo* liability is applicable to sales by sample. *B* had purchased some fir planks from *S*, after *S* had displayed samples of the lumber. After a series of legal proceedings, *S* won a judgment against *B* for the balance of the purchase price. *B* then sought relief by asserting that the planks delivered by *S* did not conform to the sample. *B* argued that the sample was essentially an express warranty of quality, and that in delivering nonconforming lumber *S* had not performed under Civil Code article 415. From the character of the relief sought by *B*, the Court concluded that *B*'s claim was based, not on breach of contract under article 415, but rather on *kashi tampo* under article 570. The Court was not sure whether specific or nonspecific goods were involved; however, in the course of discussing *kashi tampo* liability the Court stated that regardless of whether the goods were specific or nonspecific, in the case of a sale by sample the seller is deemed to have warranted that the goods delivered will conform to the sample. If the goods delivered are inferior to the sample, or if defects are found, even if the degree of inferiority be so insignificant that it may not be considered a defect by general standards, article 570 should be applied. The Court explained that a "defect" means a quality which does not conform to a certain standard, and the purpose of a sample is to set a certain standard by which the quality of the goods sold are to be judged. Therefore, if the quality of the delivered goods is inferior to the sample, the goods will be regarded as "defective goods" in the sense of article 570.

The Court also determined that *B* had accepted the goods, so regardless of whether specific or nonspecific goods were involved there was no room for *B* to argue nonperformance. Reaching the conclusion that article 415 was not applicable, but that article 570 was, the Court denied *B*'s claim for relief, because the limitation period for bringing claims under article 570 had expired.

The reasoning of these cases has been followed almost uniformly in later cases.⁵⁴ The reasoning generally is as follows: "If the buyer *accepts* the goods delivered, there is a performance, although imperfect.

⁵³ 7 Minshū 1071 (Gr. Ct. Cass., Dec. 12, 1928).

⁵⁴ See, e.g., *Ikemoto v. Ōzeki*, 12 Minshū 71 (Gr. Ct. Cass., Jan. 14, 1933); *C. H. Rafoief v. Gotō*, 10 Minshū 252 (Gr. Ct. Cass., May 13, 1931); *Mishima Seishi v. Shimizu Seishi*, HŌRITSU SHIMBUN (No. 3265) 9 (Gr. Ct. Cass., April 2, 1931); *Kanouchi v. Asanuma*, HŌRITSU SHIMBUN (No. 3236) 13 (Gr. Ct. Cass., Feb. 10, 1931); *Ikemoto v. Matsui*, 13 Kōsai minshū 513 (Osaka High Ct., Aug. 9, 1960).

Having performed, the seller is not liable for nonperformance under Civil Code article 415. Rather, the buyer should rely on *kashi tampo* liability under article 570." Unfortunately, these cases do not clarify just what is sufficient "acceptance" to constitute performance. In fact, one might hastily conclude that mere delivery constitutes acceptance, thus rendering article 415 a nullity insofar as a remedy for defective goods is concerned. This matter was cleared up somewhat, however, in *Yamada Elec. Co. v. Voice of Shiogama*.⁵⁵ In that case *B* purchased from *S* a set of broadcasting equipment to be used in carrying on *B*'s business of broadcasting street advertisements. The equipment functioned improperly, having a poor tonal quality and often becoming inoperative. The efforts of *B*'s own engineer to repair the equipment were unsatisfactory. *B* asked *S* to take the equipment back for complete repairs or else replace it. *S* did not comply. *B* was forced to rent broadcasting equipment from a third party in order to continue his business. *S* brought suit against *B* for the purchase price. *B* then sought to rescind the contract under article 415, alleging nonperformance. *S* of course asserted that *B* had accepted the goods and therefore could not rescind under article 415, there having been performance on *S*'s part. The Court, however, stated that it could not follow the view that, if the buyer in a sales contract for nonspecific goods once accepts the goods delivered, he can no longer claim for a perfect performance. The Court stated that the buyer has a right, even after accepting delivery, to claim for perfect performance, except in the case where the buyer acknowledged the goods as satisfying the performance obligation with knowledge of the existence of the defect and with the intent to claim only *kashi tampo* liability. Applying this general principle to the facts, the Court found that *B* had not acknowledged the delivery of the equipment as being performance with knowledge of the existence of latent defects. Therefore, *B* was allowed to rescind the contract on the basis of *S*'s imperfect performance.

This decision seems to have cleared up some of the vagueness surrounding the meaning of "acceptance," as used in prior decisions, by distinguishing an *acknowledgement of performance* from a mere *acceptance*. This line of reasoning, had it been followed earlier, might have led to different results in the cases previously discussed. However, there is a factual distinction which should be pointed out before

⁵⁵ 15 Minshū 2852 (Sup. Ct., Dec. 15, 1961). For its meaning as precedent see review by Hoshino in 80 HōGAKU KYŌKAI ZASSHI (No. 5) 708 (1964).

any sweeping conclusions are hastily reached. In the *Yamada Electric* case, the action was brought within one year of the sale; thus, the Court was not forced to choose between a longer or shorter statute of limitations, as was the case in the previous decisions.

IV. IMPACT ON BUSINESS PRACTICES

Although there are these uncertainties in Japanese procedure after a defect is discovered, it should be re-emphasized that they are largely matters for lawyers to consider after the fact. Other than exercising some care in inspecting purchases on their arrival, the business community can go about its ordinary affairs in complete indifference.

By comparison, a businessman in the United States may offer or demand a guarantee of quantity, price, or time of shipment with little difficulty in predicting the meaning and consequences. However, if he guarantees quality or performance, or even if he fails to mention quality or performance, his lawyer tells him that he is in the mysterious field of warranty. Unfortunately, and despite some clarifications accomplished by the UCC, the lawyer also is not quite sure of the rules of the warranty game or even the names and numbers of all the players.

For example, if the before-mentioned can of paint was first sold to a retail store and resold to a housewife who hired a painter to apply it on her married son's house, with unsatisfactory results, what can any lawyer tell any party involved except "settle it"? Recall the quoted language appearing on the side of the can. Does the manufacturer expressly warrant excellent results, and to whom, his immediate buyer only? Does the retailer become liable on the same language and to the same extent, and to whom, the housewife only, or to her workman? Does the donee (married son) have rights although he is not a member of the buyer's household, in view of Official Comment 3 of UCC section 2-318, expressing a position of "neutrality" on this point? If the passage in question were conspicuous, would there be an effective disclaimer of warranty of fitness under UCC section 2-316, *i.e.*, are the words "warranted to conform only" the equivalent of "there are no warranties that extend beyond"? Can the retailer claim the benefit of any disclaimer on the manufacturer's label? Is the limitation of "seller's liability . . . to the purchase price of the product used" the same as "limiting the buyer's remedies to repayment of the price" under UCC section 2-719, and is the stated remedy "expressly agreed to be exclusive," as required by the same section if it is to bar

other remedies of the buyer? Again, who is the seller? Who is the buyer, and which buyer's purchase price is the manufacturer talking about? The difficulty of drafting a clear and concise statement that covers these points may explain why surprisingly few comprehensive disclaimer and limitation clauses meeting the literal requirements of the UCC are found in actual use in the United States, or even in the form books.⁵⁶

Of course, not all of these questions would be eliminated by abandoning the American concept that express and implied warranty are like matters and may be treated alike. On the other hand, what is unique about a sale of goods that requires specialized rules that are not applicable, or at least not generally recognized, in a sale of land, a sale of services, or a lease of goods? Again, perhaps the artificialities and inadequacies of the warranty concept are the real reason for the recent new developments in the area of strict liability in tort⁵⁷ and the still newer theory of "enterprise liability."⁵⁸

In another article in this issue,⁵⁹ it is suggested that Japanese

⁵⁶ See CARROLL & WHITESIDE, FORMS FOR COMMERCIAL TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE ¶ 103.16, at 56-59 (1963); A.B.A. SECTION OF CORPORATION, BANKING & BUSINESS LAW, UNIFORM COMMERCIAL CODE HANDBOOK 84 (1964). Note that these forms contain no direct reference to disclaimers of warranty, and if any language is intended to operate as a disclaimer, it is not made conspicuous as required by UCC § 2-316 and as defined in UCC § 1-201(10). Because of the infinite variety of products being sold and circumstances under which they are sold, no "Standard" warranty could be devised that is suitable for all situations. The following is offered as a starting point for the draftsman whose client wishes a form to cover simple and innocuous commodities, is willing to live with the implied warranty of merchantability, and does not wish to sacrifice any more sales appeal than necessary to obtain protection against extravagant claims for indirect damages:

GENERAL GUARANTY AND LIMITATIONS. ——— products are guaranteed to be of merchantable quality and to conform to specifications and tolerances incorporated in this agreement. Should any ——— product be found not to meet the foregoing guaranty, we will furnish a replacement product conforming to this guaranty, or, at our election, make a fair allowance therefor. However, written notice of any claim under this guaranty must be given within 30 days after delivery and you must afford us a reasonable opportunity to inspect the products in unaltered condition and evaluate the claim in accordance with procedures customary in the industry.

There are no warranties which extend beyond the foregoing, and our sole responsibility thereunder is as stated. We shall not be liable for consequential, indirect or incidental damages, or for any amount in excess of the price for the shipment involved, under the foregoing guaranty or any other part of this agreement.

⁵⁷ See, e.g., RESTATEMENT (SECOND), TORTS § 402A. (Tent. Draft No. 10, 1964).

⁵⁸ See *Santor v. A & M Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965), holding a manufacturer directly liable to a remote consumer for reduction in market value of a residence due to a defect in manufacture of a carpet materially affecting its appearance. The court expressly recognized that the result could not be justified on theories of warranty or strict liability in tort, but based its decision on "enterprise liability."

⁵⁹ Niibori & Cosway, *Products Liability in Sales Transactions*, 42 WASH. L. REV. 483 (1967).

businessmen have had comparatively favorable experience with product liability claims, as witnessed by the dearth of reported cases on the subject, at least partly due to (a) historical consumer distrust of legal remedies, and (b) the prevailing attitude that recourse to legal procedures to resolve a dispute constitutes a loss of "face." Perhaps "face" has an American equivalent in "product reputation," but it is difficult to find any similarity in consumer attitudes in the respective countries. The United States consumer not only possesses but exercises a vast array of legal, political, and economic weapons whenever he feels aggrieved. Perhaps the occidental consumer's equivalent of "face" is "standing up for my rights." On his side, he has an Assistant Secretary in the federal administration, several powerful consumer associations, frequently the organized power of the labor movement, the great bulk of legal periodical literature, the solicitude of the draftsmen of the *Second Restatement of Torts* and of UCC article 2, the votes in the legislative bodies, and ultimately the sympathies of the jury.

To date, most American manufacturers have been content to rely upon marketing techniques developed in a halcyon era when courts disregarded "sales puffing," literally enforced written sales agreements (including disclaimers and limitations), and insulated the manufacturer from all those who were not in privity of contract with him. Meanwhile, the law in the United States has progressed "far down the road from the place where the MacPherson Buick lost its wheel."⁶⁰ However, there is increasing concern among businessmen as well as lawyers as to whether disclaimers and limitations offer a seller adequate protection. Similarly, there is increasing recognition of the manufacturer's need to communicate directly with the consumer, sometimes as bluntly as in the case of the red-letter label on the can of paint. On the other hand, retailers, who probably have a greater exposure to warranty claims than do manufacturers, make little or no effort to disclaim warranty or limit liability. For example, one of the largest United States retailers has only this to say in its mail order catalogue:⁶¹

⁶⁰ See *Manufacturer of Defective Tractor Liable for Farmer's Commercial Loss*, 34 U.S.L. WEEK 1116 (1966).

⁶¹ SEARS, ROEBUCK & CO., EVERYTHING FOR SPRING AND SUMMER 662 (1966), as distributed from Seattle, Washington. Compare *Joseph v. Sears, Roebuck & Co.*, 224 S.C. 105, 77 S.E.2d 583 (1953), 40 A.L.R.2d 742, a suit for personal injuries and property damage suffered by a purchaser of a pressure cooker from Sears due to explosion of the cooker. Plaintiff testified that she relied on an oral representation by the saleslady that in view of the safety devices, "no explosion was possible." The defense was based primarily on the following guarantee, contained in an instruction booklet that accompanied each pressure cooker, 77 S.E.2d at 593:

SEARS GUARANTEE

Your satisfaction is guaranteed or your money back.

We guarantee that every article in this catalog is accurately described and illustrated.

If for any reason whatever you are not satisfied with any article purchased from us, we want you to return it to us at our expense.

We will exchange it for exactly what you want, or will return your money, including any transportation charges you have paid.

SEARS, ROEBUCK AND CO.

Certainly there is nothing in UCC section 2-607(5) to permit a retailer-buyer to "vouch in" his supplier in a warranty claim brought by a customer of the retailer, if the supplier has disclaimed warranty and the retailer has not. Nor do other provisions of UCC article 2 grant any certain recourse to the retailer, despite Official Comment 5 to section 2-607, stating that article 2 extends rights for "injuries" to various beneficiaries other than immediate purchasers. Are American manufacturers and American retailers both out of step with the law, or is the written law out of step with the law in actual operation? If the American concept of warranty arising out of a sale, subject to disclaimer and limitation by express agreement in the contract of sale, is still a viable concept in consumer goods transactions, why do manufacturers put their disclaimers and limitations on the product labels

Guarantee

This Cooker was thoroughly tested under pressure before it left the factory. We guarantee each Cooker sold by us to be free from defects in material and workmanship when used according to our directions; our obligation under this guarantee is limited to making good at our factory any defective part or parts thereof which shall, within three months after delivery of such Cooker to the original purchaser, be returned to us.

This guarantee shall not apply to any Cooker which shall have been repaired or altered outside of our factory in any way so as to affect its stability or reliability, nor which has been subject to misuse, negligence or accidents. We do not authorize any person or representative to make any other guarantee or to assume for us any liability in connection with the sale of the Cooker other than those contained herein. Any agreements outside of or contradictory to the foregoing shall be void and of no effect.

Sears Roebuck and Co.

In upholding a verdict for plaintiff, the majority opinion states, 77 S.E.2d at 589: The "guarantee" contained in this booklet purports to limit appellant's liability for defects. Respondent denied that any such booklet was given to her or called to her attention. The Court charged the jury that any such warranty or limitation of liability "would have had to have been called to the attention of the purchaser at the time of the purchase and the purchase would have had to have been made with the knowledge of that for it to have been sold upon a written warranty." This instruction was substantially in accord with the rule stated in *Stevenson v. B. B. Kirkland Seed Co.*, 176 S.C. 345, 180 S.E. 197, and *Reliance Varnish Co. v. Mullins Lumber Co.*, 213 S.C. 84, 48 S.E.2d 653. There is no merit in this exception.

and why do retailers disregard the concept entirely? In short, is the "developed" concept of warranty in the United States actually superior to the Japanese concept of contract performance or breach, coupled with their concept of almost completely independent liabilities imposed by law?

In the proposed Uniform Law on the International Sale of Goods,⁶² the seller's obligations as to quality are treated as a matter of performance in conformity to the contract specifications, similar to his obligations as to quantity and date and place of delivery.⁶³

Although the proposed Uniform Law does recognize loss of profit as an element of damages in some circumstances,⁶⁴ there is no reference to physical injury to the person or damage to property of the buyer resulting from the delivery of goods not in conformity to the contract, and article 8 of the Uniform Law rather crisply provides: "The present Law shall govern only the obligations of the seller and the buyer arising from a contract of sale."

These provisions undoubtedly reflect the influence of the civil law system, particularly the French codes and French legal concepts.⁶⁵ Since Japan's Civil Code is patterned somewhat after the French system, it is not surprising that the fundamental Japanese approach to quality problems in the sale of goods is quite similar to that taken by the proposed Uniform Law on the International Sale of Goods. American lawyers may instinctively prefer the American approach,

⁶² Some of the history of this proposed law may be found in Honnold, *The 1964 Hague Conventions and the Uniform Laws on the International Sale of Goods*, 13 AM. J. COMP. L. 451 (1964). For the text of the proposed law see *id.* at 456.

⁶³ UNIFORM LAW ON THE INTERNATIONAL SALE OF GOODS [hereinafter UNIFORM LAW] art. 33:

1. The seller shall not have fulfilled his obligation to deliver the goods where he has handed over:

(a) part only of the goods sold or a larger or a smaller quantity of the goods than he contracted to sell;

(b) goods which are not those to which the contract relates or goods of a different kind;

(c) goods which lack the qualities of a sample or model which the seller has handed over or sent to the buyer, unless the seller has submitted it without any express or implied undertaking that the goods would conform therewith;

(d) goods which do not possess the qualities necessary for their ordinary or commercial use;

(e) goods which do not possess the qualities for some particular purpose expressly or impliedly contemplated by the contract;

(f) in general, goods which do not possess the qualities and characteristics expressly or impliedly contemplated by the contract.

2. No difference in quantity, lack of part of the goods or absence of any quality or characteristic shall be taken into consideration where it is not material.

⁶⁴ See UNIFORM LAW arts. 82, 86.

⁶⁵ See Nadelmann, *The Uniform Law on the International Sale of Goods: A Conflict of Laws Imbroglia*, 74 YALE L.J. 449, 460 (1965).

that implied warranty is a matter quite unrelated to contract performance. However, they certainly should attach some weight to the considered judgment of twenty-eight nations of the world (including nineteen nations of Western Europe and four from the Middle East⁶⁶) that have been buying and selling goods since long before the first white settler warranted a blanket to an American Indian. As one leading authority observed in defending the Uniform Law on International Sale of Goods, "Any national law (even the law of sales) contains rules which grew out of a long tradition but which have little rational basis."⁶⁷

V. DISCLAIMER OF WARRANTY

Since disclaimer of implied warranty in the United States is the seller's attempt to protect himself against a purported contractual obligation actually imposed by society, and since the *kashi tampo* concept is not similarly based on a consensual theory, it would be surprising to find that Japanese law recognizes the right of the parties to agree on a modification, waiver, or release of the normal obligations arising under article 570 of the Civil Code. Yet, article 572 of the Civil Code provides just that surprise by implication, stating:

Even where the seller has made a special stipulation that he is not liable in respect of the warranties mentioned in the preceding twelve Articles, he cannot be relieved of the liability in respect of any fact of which he was aware and nevertheless failed to disclose or in respect of any right which he himself created in favor of, or assigned to, a third person.

This, of course, places limits upon, and only indirectly recognizes, the right to enter into stipulations against the obligations imposed by articles 560 to 571 (warranties against encumbrances on the title, loss or damage to the goods, shortage, and latent defects). Equally surprising, no reported court decision has considered article 572 or any aspect of a stipulation not to warrant, even though the Civil Code provision has been in existence since 1896. In addition to the general paucity of case reports⁶⁸ and the before-mentioned attitudes of the

⁶⁶ See Honnold, *supra* note 62, at 452.

⁶⁷ Tunc, *The Uniform Law on the International Sale of Goods: A Reply to Professor Nadelmann*, 74 *YALE L.J.* 1409, 1411 (1965).

⁶⁸ Less than 10% of the Supreme Court cases and less than 0.8% of the lower court cases are selected for publication. See Sono & Shattuck, *Personal Property as Collateral in Japan and the United States*, 39 *WASH. L. REV.* 570, 571 n.6 (1964).

Japanese people, the only other explanation seems to be the beautiful simplicity of article 572 itself.

By contrast, UCC sections 2-314 and 2-315 permit the monsters of implied warranty to continue their former place in American law, while sections 2-316 and 2-317(c) allow the parties to keep the monsters on a short tether by permitting disclaimers. This necessitates some additional complex provisions in the same sections to prevent abuse of the disclaimer technique. Finally section 2-318 outlaws the disclaimer of warranty to persons other than the buyer in certain instances relating to consumer goods.⁶⁹

VI. RELEASE OF WARRANTY RIGHTS

SPECIAL RULES APPLICABLE TO JAPANESE BUSINESSMEN

Of course, the UCC has a few special rules applicable when one or both parties to a transaction are not only businessmen, but chargeable with special knowledge or skill regarding the practices or goods involved.⁷⁰ However, the UCC and its forerunners in America provide in general one set of rules applicable to any sale, negotiable instrument, security interest, or other included transaction, regardless of the business or nonbusiness status of the parties. The Japanese Commercial Code applies broadly to any commercial transactions, regardless of the business status of the parties,⁷¹ adopting the civil law approach.⁷²

⁶⁹ UCC § 2-318:

A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

For a recent criticism of this section see Comment, 42 WASH. L. REV. 253 (1966). See also UCC § 2-719(3), declaring a limitation against consequential damages for injuries to the person in the case of consumer goods to be prima facie unconscionable.

⁷⁰ See UCC § 2-104.

⁷¹ JAPANESE COMMERCIAL CODE art. 4:

(1) The term "trader" as used in this Code shall mean a person who engages in commercial transactions as a business on his own behalf.

(2) A person who engages in the sale of goods as a business with a shop or a similar equipment or a person who carries on mining business shall be deemed to be a trader even if he does not engage in commercial transactions as a business. The same shall apply to a company of the nature mentioned in Article 52 paragraph 2.

Art 52:

(1) The term "company" as used in this Code shall mean an association incorporated for the purpose of engaging in commercial transactions as a business.
(2) An association which has for its object the acquisition of gain and is incorporated in accordance with the provisions of this Book shall be deemed to be a company even if it does not engage in commercial transactions as a business.

The interrelationship between the Japanese Commercial and Civil Codes, and between both codes and commercial custom, is set forth in article 1 of the Commercial Code, as follows: "Where there is no provision in this Code as to a commercial matter, the commercial customary law shall apply; and if there is no such law, the Civil Code shall apply." With this background, it is easy to see the tremendous importance of article 526 of the Commercial Code, which reads as follows:

- (1) In the case of a sale between traders, the buyer shall, upon taking delivery of the subject-matter, examine it without delay, and if he discovers any defects therein or any deficiency in quantity he shall immediately despatch notice thereof to the seller; otherwise he has no right to rescind the contract, to demand a reduction in the price or to claim damages. The same shall apply where within six months the buyer discovers in the subject-matter of the sale a defect which was not immediately discoverable.

Art. 501:

The transactions mentioned below are commercial transactions:

- (1) Transactions the object of which is either the acquisition for value of movables, immovables or valuable instruments with the intention of disposing of them at a profit, or the disposal of objects so acquired;
- (2) Contracts for the supply of movables or valuable instruments which are to be acquired from others, and transactions the object of which is to acquire them for value in order to carry out such contracts;
- (3) Transactions on Exchanges;
- (4) Transactions relating to bill and other commercial papers.

Art. 502:

The transactions mentioned below, if effected as a business, are commercial transactions, except such transactions as are effected by persons who manufacture articles or render services solely for the purpose of earning wages:

- (1) Transactions the object of which is the acquisition for value or the hire of movables or immovables with the intention of letting them, or the letting of objects so acquired or hired;
- (2) Transactions relating to the manufacture or working up of articles for other persons;
- (3) Transactions relating to the supply of electricity or gas;
- (4) Transactions relating to carriage;
- (5) Contracts for the execution of works or for the supply of labor;
- (6) Transactions relating to publishing, printing, or the taking of photographs;
- (7) Transactions relating to the operation of establishments the object of which is to receive visitors;
- (8) Money changing and other banking transactions;
- (9) Insurance;
- (10) Acceptance of deposits;
- (11) Transactions relating to brokerage or commission agency;
- (12) Acceptance of agency for commercial transactions.

Art. 503:

- (1) Transactions effected by a trader for the purpose of his business are commercial transactions.
- (2) The transactions of a trader shall be presumed to be effected for the purpose of his business.

Art. 523:

The provisions relating to commercial transactions shall apply *mutatis mutandis* to transactions effected by the companies mentioned in Article 52 paragraph 2.

- (2) The provisions of the preceding paragraph shall not apply where there has been bad faith on the part of the seller.

In a case where the buyer, without checking the quantity of lumber with that stated in the invoice, accepted the delivery with no objection but sent a notice of shortage in number to the seller about ten days later, the Court held against the buyer.⁷³ The buyer was denied damages in a case where he sent a notice of defects in a dynamo to the seller twenty days after discovery of the defects and two months after the delivery.⁷⁴ The Court also held against the buyer in a case where the buyer sent to the seller a mere notice of existence of defects in a ship, without describing the kinds and scope of the defects.⁷⁵ It would seem from these cases that Japanese sellers, except those in bad faith, are better protected than are American sellers; this may explain why they do not resort to a stipulation not to warrant (disclaimer) as often as American sellers do.

Thus, where UCC section 2-314 imposes the implied warranty of merchantability on a seller who is a "merchant" with respect to the goods involved, article 526 of the Japanese Commercial Code imposes on *any* business-motivated buyer the obligation to inspect the goods without delay and give notice of any defects immediately. A careful reading of UCC sections 2-601 through 2-608 indicates that there is no similar duty imposed on the American buyer, although he may be held to have accepted (waived his right to reject) the goods by failing to make an effective rejection after he has had a reasonable opportunity to inspect the goods.⁷⁶ Acceptance of the goods, however, does not operate to bar other remedies for breach of warranty of merchantability until a reasonable time after the buyer "discovers or should have discovered" a breach.⁷⁷ In the absence of an affirmative duty to inspect immediately, it seems clear that a buyer "should have discovered" a defect only when he does discover a defect or becomes so dissatisfied that an inspection and discovery is the next logical step. True, the Official Comments to UCC section 2-602 state that

⁷³ See KOHLIK, *DIGEST OF COMMERCIAL LAWS OF THE WORLD* (1966). Only volume one of this work is available at the time this is written, but examination of part one of the digest of laws of each nation covered in this volume indicates that a commercial code similar to that of Japan is in effect in a substantial majority of nations.

⁷⁴ Judgment of June 14, 1941, 8 HANKETSU ZENSUŪ (No. 22) 7 (Gr. Ct. Cass.).

⁷⁵ Kitai v. Yoshida, 2 Kakyū minshū 100 (Osaka Dist. Ct., Jan. 30, 1951).

⁷⁶ Awanokuni Kyōdō Kisen K.K. v. Nitta, 1 Minshū 155 (Gr. Ct. Cass., April 1, 1921).

⁷⁷ UCC § 2-606(b).

⁷⁸ UCC § 2-607(3)(a).

the provisions relating to inspection must be read in connection with the buyer's reasonable time to give notice, and suggest that provisions of the express contract or UCC section 2-309 dealing with indefinite time for action may provide additional certainty on the matter. However, the fact remains that an American buyer has no duty to inspect in order to preserve his right to claim damages for breach of warranty.

By comparison to the German and French systems, some Japanese scholars say that Commercial Code article 526 should not apply just to sales between traders, but rather to all sales, on the ground that the buyer's profession has nothing to do with the obligation to inspect. It of course has a bearing on what might reasonably be expected to be discovered by the buyer's inspection.⁷⁸ Be that as it may, the breadth of application of the Japanese Commercial Code and the protection offered to sellers against damage claims out of all proportion to the selling price of the product, seem to satisfy the Japanese business community to the extent that it does not employ express contractual disclaimers and limitations. Certainly one of the principal concerns of the American seller is the desire to limit his liability for defects discoverable on receipt of shipment to the value of the goods at the time of receipt. In some industries, this may take the form of standard published claims procedures, perhaps rising to the level of trade custom or perhaps incorporated by reference in individual contracts of sale. For example, the "Terms and Conditions of Quotation and Sale" covering lumber produced in the Western United States provides:⁷⁹

The complainant buyer shall unload the car and file complaint with the seller within 10 days after unloading. The seller shall acknowledge the complaint within 10 days after receipt of such complaint. The disputed material must be held intact for not exceeding 30 days after filing of the complaint. Otherwise material may be presumed to be accepted as invoiced. When a request for reinspection is filed directly with the Western Wood Products Association by the complainant buyer, such reinspection shall be made only after confirmation is received from the shipper that the complaint was filed within the 10-day period.

The above provisions shall not apply to wrapped units. In such cases, reinspection for grade will be permitted if complaint is filed within 90 days after receipt of shipment. The reinspection shall be made only on grade characteristics which are not altered by time. Such characteristics may be knots, knot size and placement, skips, manufacture, pitch and like characteristics.

⁷⁸ See YUNOKI, *op. cit. supra* note 45, at 399.

⁷⁹ Western Wood Products Association, 700 Yeon Building, Portland, Oregon 97204.

In other cases, a standard guarantee is published by a trade association for use by members who wish to adopt it. For example, the "Standard Door Guarantee" covering wooden doors states:⁸⁰

In the case of a defect reasonably discoverable by inspection of each door upon receipt of shipment from the manufacturer, notice must be given within thirty days thereafter and before the door is hung or treated in any manner.

Most often, however, each individual seller fashions some written provision requiring inspection by the buyer, or limiting liability to those elements of damage that would occur even if inspection had taken place, or both.⁸¹

With respect to warranties against defects not reasonably discoverable by inspection upon arrival, UCC section 2-725 offers some comfort in providing the seller a four-year statute of limitations running from the time of tender of delivery, subject to reduction to not less than one year by agreement of the parties. However, where a warranty explicitly extends to future performance of the goods, the statute of limitations does not start to run until the breach of warranty is, or should have been, discovered. Thus it offers cold comfort to the increasing number of sellers whose products are guaranteed for one year, five years, or a lifetime. At best, UCC section 2-725 could not be as comforting to sellers as article 526 of the Japanese Commercial Code, which literally and apparently in fact cuts off all rights to claim damages for defects, not immediately discoverable, at the end of six months after delivery to the buyer.

VII. LIMITATION OF LIABILITY AND LIQUIDATION OF DAMAGES

Here there are some difficulties with terminology that must be resolved at the outset. UCC section 2-718 refers to liquidation or limitation of damages, and section 2-719 refers to contractual modification or limitation of remedies. In practice in the United States, one seldom sees a sales contract calling for liquidated damages, say, of \$100 per day of delay in arrival of a shipment, although such clauses are not unusual in construction service contracts. What is frequently encountered in sales transactions is a statement of the seller's obligation to repair, replace, or refund the price of defective goods, expressly provided to be exclusive and in substitution for the remedies

⁸⁰ National Woodwork Mfrs. Ass'n, 400 West Madison Street, Chicago, Illinois 60606.

⁸¹ See note 56 *supra*.

otherwise provided by the UCC for the buyer of defective goods. Such a provision may be embellished with an express negation of liability for indirect or consequential damages, and an overriding provision that damages for breach of warranty or any other breach by seller may in no event exceed the contract price. Looking only at section 2-719, all of the foregoing provisions appear to be covered by the examples expressly set forth in the section. The only serious problem is in determining whether ensuing circumstances "cause an exclusive or limited remedy to fail of its essential purposes,"⁸² in which case the general remedy provisions of the sales article apply. The Official Comment states that this result ensues when the buyer is deprived of the substantial value of his bargain, but the Comment does not speculate on what the seller's essential purpose may be in adopting such a limiting clause. However, a provision adopting the contract price as a maximum measure of damages probably will have to run the gauntlet of section 2-718 as well. Thus, it must be reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy.

In Japan, it also appears that limitation of liability and liquidation of damages are merged into a single concept. Japanese Civil Code article 420 reads:

- (1) The parties may determine in advance the amount of compensation for damages payable in the event of the nonperformance of an obligation; in such case the Court cannot increase or reduce the amount.
- (2) The determination in advance of the amount of compensation for damages shall not prejudice the obligee's right to demand performance or rescission.
- (3) A penalty is presumed to be a determination in advance of the amount of compensation for damages.

Although the provisions refer only to the event of nonperformance of obligation, they should apply analogously to *kashi tampo* liability, namely, the damages due to the defects in the objects of sale.

The scholars describe at least three types of what they call "determination in advance of the amount of compensation for damages" (*baishō gaku no yotei*)⁸³, which Americans would term liquidated damages and penalty.

The distinction is important especially concerning the demands of

⁸² UCC § 2-719(2).

⁸³ WAGATSUMA, SAIKEN SŌRON (General theory of claim) 134-35, in 4 MIMPŪ KŪGI (1960)

original performances and rescission as mentioned in Civil Code article 420(2). (1) *Predetermination of compensation for damages in case of delay of performance.* For example, in the sale of goods the seller agrees to pay ¥1,000 per day from the due date until the flawless goods are delivered to the buyer if the original goods had defects. (2) *Predetermination of compensation for damages for substitution of the original performance.* For example, in the twenty-month installment sale of a specific \$50,000 house, where the price is continuously increasing and the title is reserved by the seller until the final payment, the seller agrees in advance to pay \$60,000 (estimated agreed price after twenty months) if defects, such as softness of ground causing settlement which will make the object of the sale unattainable, are found before the transfer of the title. (3) *Predetermination of compensation for damages, a stipulation as in terrorem and also as liquidation.* For example, in the sale of specific goods the parties agree in advance that the seller pays half of the price in case defects are found which will make the object of the sales contract unattainable. Or, in the sale of nonspecific goods, the seller agrees in advance to pay half of the price if the seller fails to deliver the goods without defects on due date. These are done partly *in terrorem* for securing the delivery of flawless objects.

However, since the first type is of penalty nature, it cannot be the basis for calculating the compensation for damage in case of nonperformance or of rescission of the contract, or in case there are found defects in the object of sale so serious that no goods of the type would fulfill the object of the contract.

The second type is liquidated damages in the narrower sense. If the obligee (the buyer) claims this compensation, he can no longer claim the original performance (delivery of land) in spite of article 420(2) (or at least the Civil Code provision should be interpreted along this line).

The third type is a mixture of penalty and liquidated damages. Once the seller fails to deliver the flawless goods on due date, the buyer may immediately demand the predetermined compensation and he does not need to rescind the sale. However, if the buyer chooses to rescind, the predetermined compensation should then be the basis for calculating the damages.⁸⁴

⁸⁴ Akiyoshi v. Nishino, 27 Minroku 1548 (Gr. Ct. Cass., Sept. 24, 1921) (because the parties predetermined the compensation in case of nonperformance, it was interpreted that the parties intended to prevent and settle all disputes as to damages).

At any rate, if the fact of nonperformance or of defects in the objects of the sale are proved, the obligee is entitled to the determined compensation without proving the occurrence of damage or the amount thereof. The obligor may not be excused even though he proves there is actually no damage, or that it is less than the predetermined compensation. Also the obligee may not claim an increase of the predetermined compensation by proving that the amount of damage is actually greater than the predetermined compensation.

Article 420 of the Civil Code premises that the compensation for damages is determined in money. Then article 421 provides: "The provisions of the preceding Article shall apply *mutatis mutandis* in cases where the parties have agreed beforehand that something other than money shall be applied for compensation for damages."

For example, the seller of a milch cow agrees to pay to the buyer a gallon of milk a day in case of delay of delivery. However, the agreed compensation must be at least estimable in money, and if the amount of the predetermined compensation cannot be estimated in money, the stipulation of such determination is null and void.

The determination in advance of the amount of compensation for damages has been a part of the freedom of contract in the modern law of Japan. However, recent legislation tends to apply public policy limits. For example, the Interest Rate Restriction Law⁸⁵ places a maximum standard for interest on loans and invalidates the amount of the compensation for damages determined in advance, or penalty (*iyakukin*), to double the amount of the maximum interest. Likewise, the scholars talk of the application of public policy and good morals⁸⁶ and the principle of faith and trust⁸⁷ to the determination in advance of the amount of compensation in general.

Although no Japanese decisions are found in the case of sales of defective goods, there are numerous court decisions which employed the public policy device for the predetermination of damages under article 420. In the installment sale of an automobile where the buyer agreed in advance to return the automobile and furthermore to pay to the seller the whole price as the compensation for damage in case of failure of payment, such agreement of predetermination was held null and void because of violation of public policy and good morals.⁸⁸

⁸⁵ *Risoku seigenhō* (Law No. 10, May 15, 1954) arts. 1, 4.

⁸⁶ JAPANESE CIVIL CODE art. 90, quoted in note 10 *supra*.

⁸⁷ JAPANESE CIVIL CODE art. 1, quoted in note 10 *supra*.

⁸⁸ *Fukushima Toyota Jidōsha K.K. v. Watanabe*, 10 *Kakyū minshū* 2450 (Fukushima Dist. Ct., Nov. 18, 1959).

Also in the installment sale of an automobile, the court invalidated a stipulation in advance that in case of failure of payment the buyer will pay to the seller the paid-in amount as the rent and the balance of the price as the penalty and also return the automobile.⁸⁹

However, a stipulation of the predetermination for the buyer to pay the whole price in case of failure of payment was held not against public policy where the stipulation was interpreted to secure the damage in case of the buyer's failure to return an automobile after the rescission of its sale.⁹⁰

A stipulation for damages due to delay in payment of a note in the amount of 0.33 yen per day per 100 yen of the note was held against public policy or good morals as mentioned in article 90 of the Civil Code.⁹¹

VIII. CONCLUSION

First, it should be stated that remarks critical of the American law, and any inference of criticism of American practices, should be attributed solely to the American co-author. His Japanese counterpart displays great respect for the achievements of the law in the United States in protecting buyers, particularly consumers or common people, from serious impositions at the hands of their vendors. Certainly in many respects the UCC and American law in general are much more in step with the practices and the objectives of the society in which it operates than is the case with the law in Japan. However, if there is any possibility that there are fundamental flaws in the prevailing concepts of implied warranty in the United States, it should prove worthwhile for Japan to bear this in mind in guiding the further development of its law on the subject. Similarly, there should at least be an awareness in the United States that other, much older, societies have regulated relations between buyers and sellers without enacting a special code for sale of goods transactions and certainly without going through the agonies of privity, disclaimers, and fictitious contractual obligations.

Next, an article of this nature is almost certain to emphasize the differences rather than the similarities in the two legal systems. Neither space nor time permitted mention of the many points of

⁸⁹ Hirokawa v. Tochigi Toyopet K.K., 14 Kakyū minshū 2395 (Maebashi Dist. Ct., Dec. 2, 1963).

⁹⁰ Judgment of March 30, 1964, HANREI TAIMUZU (No. 162) 176 (Tokyo High Ct.).

⁹¹ Yamamura v. Kanzaki, 23 Minshū 147 (Gr. Ct. Cass., March 14, 1944). Note, however, that the case was decided before enactment of the Interest Rate Restriction Law, note 85 *supra*.

similarity noted by the authors, but they are remarkable. An American reader of the Japanese statutes and the rulings in the cases is reassured by repeated encounters with familiar concepts of merchantability, fitness, trade custom, extension of guarantee beneficiaries through advertising, consumer credit protection, and the like. Similarly, a Japanese reader will feel quite at home (and may even have a false sense of security) with the UCC.

The chief difficulty has been that there has been no need, little authority, and not too much discussion in Japan concerning the purely defensive concepts to which this article is confined. On the other hand, the subject is both complicated and subject to wide criticism in the United States. Thus, in an effort to create something worthwhile in both nations, it seemed important to emphasize business practices and trends in the two societies, with particular emphasis on the uncertainties existing in the United States.

Without taking a position of the degree of care that should be required of a producer and seller, and certainly without arguing for a caveat emptor doctrine as strict as now prevails in Japan, it nevertheless seems apparent that the extremely competitive United States business community cannot be expected to formulate its contractual obligations and discharge its social obligations without clearer guidelines than exist at present. The businessman is entitled to more specific guidance as to what he can and cannot do by contract with his immediate customer; what he must and must not do in testing, quality control, advertising, and instructions and warnings affixed to his products or their packaging. If there are to be differences between ordinary commodity sales and special end-use product sales, defectively designed products and occasionally improperly manufactured products, commercial losses and physical losses, business people and nonbusiness consumers, and sales for resale and sales for use, it seems unfair to expect the producer or seller to realize this in time to take appropriate action. The courts and legal writers seem to look at the problems after the fact and primarily from the standpoint of what happened to the buyer or user.⁹² If the objective of American law is only to do justice in each particular case, it might as well appoint commissions, as is sometimes done in Japan,⁹³ to make awards or

⁹² And in at least one case, a non-user. See *Piercefield v. Remington Arms Co.*, 375 Mich. 85, 133 N.W.2d 129 (1965), 41 WASH. L. REV. 161 (1966).

⁹³ See Niibori & Cosway, *Products Liability in Sales Transactions*, 42 WASH. L. REV. 483, 485 (1967).

recommendations having no value as precedent in other cases. On the other hand, if at least one objective is to set forth rules for the guidance of future conduct and the settlement of future claims without litigation in every case, American law still has a long journey ahead on that road where Mr. MacPherson's Buick lost its wheel⁹⁴ and Mrs. Henningsen's Plymouth went out of control.⁹⁵

American society should make up its mind as to the extent of responsibility to be imposed on manufacturers and sellers, and the extent they should have freedom to vary that responsibility by contract or other express communication. Society undoubtedly has established an obligation running beyond the immediate buyer, and wants to see warnings, handling instructions, and clearly expressed descriptions of contents communicated to the ultimate user. Producers and sellers are moving in that direction, largely due to economic and political pressure, but are moving slowly because the new theories of law offer little assurance of protection to the businessman who tries to conform. Also, the old theories still offer the producer some hope of making more sales at higher prices, by heavy promotion to the consumer and cautious drafting of his immediate contract of sale.

The only certainties today are that there will continue to be occasional defects in manufactured articles, occasional abuse of perfect articles by consumers, and occasional cases where only the consumer knows what really happened. Until remote sellers have some assurance that they can control the risks of their relationship with consumers—*i.e.*, that claims by users will be limited to conditions within the manufacturer's control and users will be chargeable with matters of common knowledge and with specific communications from the supplier—producers and sellers will remain reluctant to say or do anything that will add to their costs and discourage the use of their products in the marketplace.

If the legal profession is to lead the business communities of both nations toward a more efficient performance of their obligations, there are concepts in each domestic legal system that can be profitably borrowed from the other. There also may be pitfalls in each system worth avoiding in the other. It is hoped that this article will provide a basis for further work toward these ends.

⁹⁴ See *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

⁹⁵ See *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

