

Rethinking Contract Practice and Law in Japan

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This article explores “the Japanese advantage” in the enforcement of ex ante contract commitments in comparison with the United States, arguing that ostensible convergence of Japanese and United States contract practice in on-going business relationships is based on very different assumptions and conditions. Writing in the early 1960s Takeyoshi Kawashima in Japan and Stewart Macaulay in the United States described prevailing views and practices related to business agreements. Their respective observations indicated a tendency in both countries to avoid formal, legally enforceable contacts. For over four decades scholars on both sides of the Pacific have tended view these observations as grounds for arguing for a convergence of contract practice. Recent research efforts have attempted to verify empirically such convergence. On closer examination, however, the conclusions reached by Kawashima and Macaulay rest on very different assumptions. For Kawashima the avoidance of formal contact appears to be based on a desire to avoid the enforcement of ex ante commitments by those who perceive that their bargaining leverage will remain intact throughout an on-going business relationship, thus enabling them to adjust unilaterally to changing circumstances. Similarly enforceable ex ante contractual commitments may also be viewed as less advantageous to those who may have the disadvantage in bargaining leverage at the time of the contracting to the extent that they perceive that they may gain greater ex post leverage. Macaulay, on the other hand emphasized the transactions costs of formal contracting and uncertainty of enforcement that reduced the efficacy of ex ante commitments. This article explores the predicates for both positions. It concludes that with respect to the concerns raised by Macaulay, Japan has a comparative advantage. Because of the organization and values of Japanese judges as well as the legal rules related to both excused non-performance as a result of changing circumstances, the legal rules favor greater certainty in the enforcement of ex ante commitments thereby supporting Kawashima’s foundational observations. Similarly, the greater uncertainty of enforcement as well as the flexibility of the legal rules on impracticability as well as contract termination in the United States justifies Macaulay’s conclusions. Japan’s loss of advantage in

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terms of effective formal enforcement of contract rights, it is argued, is counter-balanced by the strength of supportive mechanisms of private ordering.